

No. _____ Term _____

IN THE
SUPREME COURT OF THE UNITED STATES

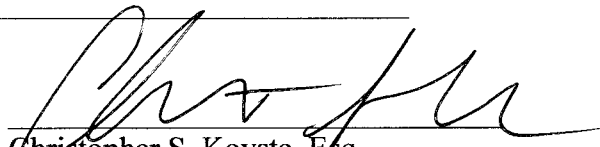
JAMES EDWARD COOKE,
Petitioner,

v.

STATE OF DELAWARE
Respondent.

On Petition for a Writ of Certiorari
to the Delaware Supreme Court

PETITION FOR WRIT OF CERTIORARI



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Dated: May 22, 2018

QUESTIONS PRESENTED

Did the Delaware courts' creation from the bench of a mandatory life without parole sentence violate Mr. Cooke's due process and Eighth Amendment rights?

Does the creation of a mandatory life without parole sentence, thereby depriving Mr. Cooke of appellate review of his sentence as required by state law, violate the Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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IN THE
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JAMES EDWARD COOKE,
Petitioner,

v.

STATE OF DELAWARE
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE**

Petitioner James E. Cooke respectfully petitions for a writ of certiorari to review the judgement of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court was filed on February 21, 2018 and is reported as *Cooke v. State* No. 309, 2017, 2018 WL 1020106, at *1 (Del. Feb. 21, 2018). The opinion appears at A1-4.

JURISDICTION

The opinion and judgment of the Delaware Supreme Court was filed on February 21, 2018. This petition is filed within 90 days of the Delaware Supreme Court's decision in compliance with United States Supreme Court Rule 13. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the Eighth Amendment to the United States Constitution, which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

U.S. CONST. amend. VIII.

and Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

nor shall any State deprive any person of life, liberty, or property, without due process of law

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

Mr. Cooke is serving a mandatory life sentence without the possibility of parole. That mandatory sentence was not drafted and passed into law by the legislature. Instead, the Delaware Supreme Court created this mandatory sentence from the bench via summary opinions. Mr. Cooke, though, was originally subjected to a capital trial. As a consequence of the heightened procedures attached to a capital case, Mr. Cooke was tried by an unrepresentative, inherently prosecution-favoring jury, and ultimately waived his right to counsel.

Mr. Cooke was in fact tried twice. On the first occasion, in March, 2007, his attorneys – against his wishes – conceded his guilt and pursued a guilty but mentally ill defense. *Cooke v. State*, 977 A.2d 803, 812 (Del. 2009). Following his conviction, the Delaware Supreme Court found that counsel’s concession of their client’s guilt without his consent constituted ineffective assistance of counsel, reversed the conviction and remanded the case for a new trial. *Id.* at 850.

Mr. Cooke was re-indicted on April 25, 2011, and re-arraigned on July 29, 2011. He was tried again beginning on February 20 through May of 2012. However, because the court held that the evidentiary rulings from the first, vacated, trial were “the law of the case” for the second trial, that second trial merely re-presented the same evidence from the State and the same (lack of) evidence from the defense. *Compare Cooke*, 977 A.2d at 810–12 (describing the facts of the case) *with Cooke v. State*, 97 A.3d 513, 518–22 (Del. 2014) (same). Unsurprisingly, the jury again found Petitioner guilty of Murder in the First Degree. *Id.* at 523. On September 17, 2012, the Superior Court of Delaware sentenced Petitioner to death once again. *Id.*

After Petitioner exhausted the appeal of his second death sentence, he timely filed a state post-conviction motion pursuant to Del. Super. Ct. Crim. R. 61 (hereinafter “Rule 61”). While that Rule 61 motion was pending, this Court issued its opinion in *Hurst v. Florida*, 136 S. Ct.

616 (2016). Because Delaware’s death penalty statute – 11 *Del. C.* § 4209 – mirrored the Florida statute struck down by *Hurst*, the Delaware Supreme Court held that Delaware’s capital sentencing scheme was similarly unconstitutional. *Rauf v. State*, 145 A.3d 430, 432 (Del. 2016) (“Delaware’s current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*.”). Critically, the court concluded that, because the jury’s role as explained in § 4209 was so complicated, and so intertwined with the other aspects of the statute, that the unconstitutional language was “not severable” from the rest of the statute. *Rauf*, 145 A.3d at 434. The same year, the court held that *Rauf* had retroactive effect. *Powell v. State*, 153 A.3d 69, 76 (Del. 2016).

In light of *Hurst*, *Rauf*, and *Powell*, while his Rule 61 post-conviction petition was pending, Petitioner filed a separate *Motion to Vacate* his death sentence. A7-22. That *Motion* was granted on May 16, 2017. A5. However, over Petitioner’s objection, having vacated the death sentence the Superior Court simply imposed a sentence of life without parole. A5-6. The court held that in *Powell* and all subsequent cases applying *Rauf*, the Delaware Supreme Court did indeed sever the unconstitutional language from the statute, leaving behind fragments of a statute that by default imposed a mandatory life without parole sentence. A5-6, A24-28, A45-47. On appeal, the Delaware Supreme Court summarily affirmed the new sentence, stating “[w]e rejected this argument in *Norcross v. State*. Thus, the argument is without merit.” *Cooke v. State*, No. 309, 2017, 2018 WL 1020106, at *1 (Del. Feb. 21, 2018); A1-4.

Crucially, in neither Mr. Cooke’s appeal, nor any of the cases upon which the Superior Court relied, did the Delaware Supreme Court explain the reasoning why its prior holding, that the offending part of § 4209 was not severable, was no longer good law. Instead, the court simply affirmed the lower court’s sentence. As a consequence, Mr. Cooke is now serving a life

without parole sentence that was created and mandated by the Delaware Supreme Court. And, the court's mandate was announced not in a long, reasoned, opinion carefully addressing the nature and effect of *Rauf* on the legislature's sentencing statutes, but in a passing remark in an otherwise summary opinion.

But, because Mr. Cooke was originally tried capitally, he was designated high security by the Department of Corrections, depriving him of effective communication with counsel, and was tried before a jury that had been "death qualified". The lack of effective communication with counsel ultimately resulted in Mr. Cooke's decision to proceed pro se, while the death qualifying process resulted in a jury that was biased in favor of the prosecution.

REASONS FOR GRANTING THE PETITION

A. The Delaware Courts have Created a Mandatory Life Without Parole Sentence, Exceeding its own Constitutional Role and Violating Mr. Cooke's Due Process Rights.

1. Where state law creates a specific legal process, denial of that process violates due process.

Outside the prescriptions contained within the Bill of Rights, made applicable to the states by the Fourteenth Amendment, the Constitution does not demand the states employ any particular procedures in enacting and implementing criminal law. For example, the Constitution does not require states to afford criminal defendants a right to appeal, does not require defendants to be sentenced by juries, and does not demand that a prisoner be committed to a mental health facility in the event he does not possess the mental capacity to understand his sentence. Nevertheless, this Court has made clear in all such cases that, where state law *does* create such process the affected persons possess a property interest in that process, and deprivation of that interest violates due process. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (when a state creates a right to direct appeal, denial of the tools to pursue that right violates due

process); *Hicks v. Oklahoma*, 447 U.S. 343, 345 (1980) (where state law requires jury-sentencing, denial of that right violates due process); *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (where state law mandates mental health treatment for a prisoner incapable of comprehending his sentence, failure to provide such treatment violates due process).

Similarly, the Constitution does not require the states to have a tripartite system of government wherein the legislature creates the law, the executive implements the law and the judiciary decides the law. *Whalen v. United States*, 445 U.S. 684, 689 n. 4 (1980); *Mayor v. Educational Equality League*, 415 U.S. 605, 615 n. 13 (1974). However, the precepts of due process surely dictates that, once state law creates such an organization of government it cannot disregard those separations on a whim. To do so would, generally, violate its citizens' interest in a state governed by the rule of law and, more specifically, violate any citizens' particular interests subsequently impacted by such breakdown of the law.

Here, for example, Delaware's constitution clearly separates governmental powers between its three branches of government. The Delaware Courts possess "The judicial power of this State..." DE Const. Art. IV, § 1. That power is the power to "interpret the law and apply its remedies and penalties in particular cases." *Evans v. State*, 872 A.2d 539, 548 (Del. 2005). It does not include the power to *create* criminal sentences, as that power is reserved solely to the legislature. DE Const. Art II, § 1; *Rice v. Foster*, 4 Del. 479, 479 (1847) (explaining that the General Assembly is prohibited from delegating law-making powers to any body.) With this separation of powers defining the roles of the respective branches of government, Delaware citizens know that any law criminalizing their behavior has been passed by a majority of the legislature, which itself consists of individual representatives duly elected by their constituents. They know that neither the executive nor the courts can create criminal law without those

procedures in place. Delaware citizens, such as Mr. Cooke, therefore possess a property interest in the separation of powers created by Delaware law. *Evitts*, 469 U.S. at 393.

Mr. Cooke was deprived of that property interest when the Delaware Superior Court manufactured, and the Delaware Supreme Court affirmed, a mandatory life sentence, improperly extending the courts' role into that reserved to the Delaware General Assembly. By bypassing the legislature and manufacturing a mandatory sentence from the bench, the Delaware courts have deprived Mr. Cooke of his federal due process rights.

2. **By creating a mandatory life without parole sentence simply to avoid the complications caused by *Rauf*, the Delaware Courts overstepped their constitutional role and imposed an illegal sentence in violation of Mr. Cooke's due process rights.**

In *Rauf* the Delaware Supreme Court correctly held that, “[b]ecause the respective roles of the judge and jury are so complicated under § 4209, we are unable to discern a method by which to parse the statute so as to preserve it.” *Rauf*, 145 A.3d at 434. Concurring and writing for himself and two colleagues, the Chief Justice explained, “[t]he multiple infirmities in the Delaware death penalty statute, as a result of the United States Supreme Court's decision in *Hurst*, must be addressed by the General Assembly. *Id.* at 487 (Strine, C.J., concurring). Tellingly, even the dissent – which disagreed that *Hurst* invalidated § 4209 – agreed that “11 *Del. C. § 4209* is not severable.” *Id.* at 507 (Vaughn, J., dissenting).

The reason for the Court's unanimous conclusion is clear from review of the statute. Comprising over 3,500 words § 4209 explains in great detail the processes by which the jury would choose between life and death, how its recommendation would be made to and received by the judge, and how the judge would decide whether to override or accept that recommendation. Crucially, the statute clearly mandates that, following conviction for first degree murder, the Superior Court “shall” conduct a hearing to determine punishment, and that

hearing “shall” be before the same jury that convicted him. 11 *Del. C.* § 4209(b)(1), (2)¹. This mandatory language permeated the entire statute, directing that the court “shall” permit evidence of aggravating and mitigating factors, § 4209(c)(1), “shall” permit argument by both sides, § 4209(c)(2), and the court “shall” instruct the jury on the process for determining and considering aggravating and mitigating factors, § 4209(c)(3).

While “shall,” on some occasions, may impart a less-than mandatory standard, *e.g.* *Bartley v. Davis*, 519 A.2d 662, 667 (Del. 1986), because the *Rauf* court found the unconstitutional portions of § 4209 to be unseverable, the court could only have concluded that “shall” as contained throughout § 4209 imparted mandatory directions upon the courts. That is, that following a first degree murder conviction, the court must hold a hearing before the convicting jury, must allow evidence and argument from the parties, must direct the jury to determine the existence of aggravators and mitigators, the jury must provide a recommendation to the judge, and the judge must decide whether or not to follow that recommendation. By finding that the jury’s role was unconstitutional pursuant to *Hurst*, the court necessarily removed an integral part of that mandatory process, without which the entire statute would make no sense. Thus, that integral process could not be severed from that entire mandatory process, and so the statute must fall as a whole. *Rauf*, 145 A.3d at 434

The Superior Courts tasked with applying that holding, however, ran into a problem. The courts were ready to grant motions to vacate death sentences pursuant to *Rauf*, but faced the problem of what to do next. Other Delaware statutes made clear that a conviction of first degree

¹ § 4209(c)(2) applies where the defendant waived his jury right at trial, and requires sentencing before a jury unless the parties agree to waive jury sentencing.

murder, unlike every other offense in the Delaware code, necessitated sentencing under § 4209.² 11 *Del. C.* § 636(b)(1). But, the Delaware Supreme Court had found § 4209 to be unconstitutional. *Rauf*, *ibid.* The courts were therefore caught between two illegal sentence possibilities. Instead of recognizing that this dilemma required the intervention of the legislature, the Superior Court instead concluded that the inseverable language of § 4209 was actually severable, and created and imposed a mandatory life sentence. *State v. Swan*, 178 A.3d 455, 458 (Del. Super. Ct. 2017).

The Delaware Supreme Court has since affirmed the Superior court's venture into legislation without discussion. *Norcross v. State*, 177 A.3d 1226 (Del. 2018), as corrected (Jan. 11, 2018), as corrected (Jan. 18, 2018) ("The judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned by the Superior Court in its Memorandum Opinion dated February 10, 2017 rejecting the same contentions made by the appellant's co-defendant, Ralph Swan.")

The Supreme Court did not explain why its reasoning in *Rauf* was no longer accurate, and has not explained as much in any of the other cases raising this issue. Consequently, when Mr. Cooke's case reached the Superior Court, that court simply imposed its self-created mandatory life sentence, citing its prior practice as support. A5-6. The Delaware Supreme Court simply affirmed, again without discussion. *Cooke*, No. 309, 2017, 2018 WL 1020106, at *1 ("Cooke first argues that this Court declared 11 *Del. C.* § 4209 unconstitutional in its entirety, and thus the court should have sentenced him under 11 *Del. C.* § 4205. We rejected this argument in *Norcross v. State*. Thus, the argument is without merit."). Consequently, Mr. Cooke is now serving a life without parole sentence that was created and made mandatory not by the Delaware

² All other offenses are sentenced under 11 *Del. C.* § 4205.

General Assembly, but by the Delaware courts in an effort to avoid dealing with the practical consequences of *Hurst* and *Rauf*.

Delaware law mandates that the legislature shall have sole law-making powers, and the courts' powers shall be only to interpret those laws. DE Const. Art. II, § 1; DE Const. Art. IV, § 1; *Evans*, 872 A.2d at 548; *Rice*, 4 Del. At 479 (explaining that the General Assembly is prohibited from delegating law-making powers to any body). Criminal defendants, such as Mr. Cooke, have a property interest in that procedure, whereby the laws used to prosecute and sentence them are created only by the legislature and not *ad hoc* by the courts. *Evitts*, 469 U.S. at 393. By creating a mandatory life sentence for first degree murder, the Delaware courts have deprived Mr. Cooke of that interest, thereby violating his Fourteenth Amendment due process rights. *Id.*

B. A Sentence of Life Without Parole that Cannot Undergo Meaningful Review Violates the Eighth Amendment's Prohibition Against the Imposition of Cruel and Unusual Punishment and the Fourteenth Amendment's Due Process Guarantee.

1. Life without parole is a grave penalty akin to death.

This Court has already spoken to the gravity of a sentence of life in prison without the possibility of parole, recognizing that, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida*, 560 U.S. 48, 69 (2010). After all, "imprisoning an offender until he dies alters the remainder of his life." *Miller v. Alabama*, 567 U.S. 400, 474–75 (2012). A sentence of life without parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham*, 560 U.S. at 60.

Members of this Court have opined that the penological goals for death are effectively

met in cases of adults who spend decades awaiting execution on death row, and that life without parole is akin to death. For example, in *Lackey v. Texas*, where the defendant had spent 17 years on death row, in his memorandum respecting the denial of certiorari Justice Stevens posited that “after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.” *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995). Consequently, “the additional deterrent effect from an actual execution now, on the one hand, compared to 17 years on death row followed by the prisoner’s continued incarceration for life, on the other, seems minimal.” *Id.* at 1046.

Justice Breyer expressed a similar sentiment in a dissent from denial of certiorari in *Knight v. Florida*, stating that “the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.” *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) (citing *Lackey*, 514 U.S. at 1046).

Most recently, in her Statement respecting denial of certiorari, Justice Sotomayor noted a “‘correspondence’ between capital punishment and life sentences” that may require applying the same procedural safeguards to life without parole sentences as are applied to death sentences. *Campbell v. Ohio*, 138 S. Ct. 1059, 1060 (2018).

In short, while “death is different,” it is increasingly recognized that life without parole is the equivalent of death, and deserves the same level of procedural safeguards.

2. The Delaware courts have created a mandatory life without parole sentence that avoids meaningful appellate review, in violation of the Eighth Amendments.

“We are duty, [sic] bound to insure that every safeguard is observed when a defendant’s life is at stake.” *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (statement of Stevens, J.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)). The most basic of such safeguard is appellate review. But, by creating a mandatory life without parole sentence, the Delaware courts

have deprived the sentencing court of any discretion over sentence, meaning that the sentence will never be subject to appellate review.

In *Campbell*, this Court denied the defendant's petition for writ of certiorari that challenged an Ohio statute that deprives life sentences of appellate review. *Campbell*, 138 S. Ct. 1059. However, Justice Sotomayor, in a concurring opinion, presented her concerns about the constitutionality of the Ohio court's appellate procedure. *Id.* Under the relevant provision of the Ohio Code, sentences imposed for murder and aggravated murder are "not subject to review." Ohio Rev. Code Ann. § 2953.08(D)(3). Such deprivation of appellate review, Justice Sotomayor opined, potentially violates the Eighth Amendment. *Campbell*, 138 S. Ct. 1059. By accident, the Delaware courts have similarly deprived Mr. Cooke of appellate review of his life without parole sentence.

"Delaware law is well established that appellate review of sentences is extremely limited. 'Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.'" *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (citing *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989)). "In Delaware, a sentencing court has broad discretion to consider 'information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.'" *Id.* (citation omitted). Thus, Delaware law limits appellate review of sentences to the question of whether they are within the statutory range, and whether the sentencing court abused its discretion in considering the broad evidence that can affect sentence. But, by creating a mandatory life without parole sentence, the Delaware courts have deprived Mr. Cooke of that appellate review. Thus, by accident the Delaware courts have created a situation whereby a mandatory life sentence cannot receive meaningful appellate review.

When the Delaware Supreme Court affirmed Mr. Cooke's life sentence, the Court effectively created an unreviewable mandatory life without parole sentence that has no opportunity for meaningful appellate review. Yet, due to the Delaware Court's circumvention of the legislative process, Mr. Cooke now faces a mandatory life sentence without any meaningful appellate review. He will not have the opportunity to appeal the merits of his sentence because the remnants of § 4209 created by the court mandates life without parole after conviction of first-degree murder. In creating such a mandatory sentencing, the courts – without legislative authority – has denied Mr. Cooke “every safeguard” necessary for a sentence akin to death, in violation of the Eight Amendment. *See Thompson*, 556 U.S. at 1116.

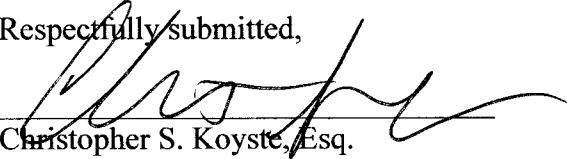
3. The Delaware courts' creation of a mandatory life sentence denied Mr. Cooke of appellate review of his sentence as provided by state law, in violation of his due process rights.

As detailed above, while there is no constitutional right to appeal, where a state creates such a right it cannot then interfere with that appeal without violating the appellant's due process rights. *Evitts*, 469 U.S. at 393 (when a state creates a right to direct appeal, denial of the tools to pursue that right violates due process). Delaware law creates a right to appellate review of a sentence. *Mayes, ibid.* By creating a life without parole sentence that is mandatory, however, the Delaware courts have effectively prevented any appellate review of Mr. Cooke's sentence. Thus, by creating a mandatory life sentence, the Delaware courts have denied Mr. Cooke the meaningful appellate review that Delaware law provides for, violating his due process rights. *Evitts*, 469 U.S. at 393.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Delaware Supreme Court should be granted.

Respectfully submitted,



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Dated: May 22, 2018