

**INSIDE:** Capital Case Complexities ♦ Trial By Jury or By Judge? ♦ The Role of Race in Sentencing ♦ And More

# Delaware Lawyer

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## EDITORS' NOTE

Charles J. Durante & Amy C. Huffman

Our law is ever evolving to reflect changing societal values and interests. The law surrounding capital punishment is no exception. Our state and federal courts have long grappled with the standard set forth in our Eighth Amendment prohibiting the infliction of “cruel and unusual” punishment.

Indeed, the United States Supreme Court has recognized that those words are “not precise” and “their scope is not static.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). Rather, the Courts are to draw the meaning of the Eighth Amendment from “the evolving standards of decency that mark the progress of a maturing society.” *Id.*

In 2002, that sentiment caused the United States Supreme Court to declare it a violation of the Eighth Amendment’s ban on cruel and unusual punishment to execute death row inmates with intellectual disabilities. Similarly, in 2005, the Court in *Roper v. Simmons* abolished the death penalty for juveniles who were under the age of 18 when the crime was committed.

The United States Supreme Court has also reviewed capital punishment jurisprudence under the Sixth Amendment and held unconstitutional state sentencing schemes that permitted a judge rather than a jury to find the facts necessary to sentence a defendant to death.

And, as this issue of *Delaware Lawyer* goes to print, the Supreme Court of Delaware will be reviewing the constitutionality of our own capital punishment sentencing scheme in light

of the *Hurst v. Florida* decision decided earlier this year under the Sixth Amendment.

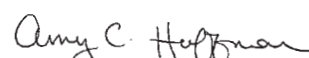
Our first contributor, Judge Paul Wallace, offers an insightful review of the unique issues posed by capital cases from the perspective of both a Delaware prosecutor and judge. For those wishing to better understand the questions currently before the Delaware Supreme Court, Professor Judith Ritter’s article provides a scholarly analysis of *Hurst*’s potential impact on Delaware’s capital sentencing scheme. The Access to Justice article discusses efforts by members of Delaware’s bar to gain a better understanding of how and why race affects the imposition of the death penalty. Finally, Judge William Witham provides a look back into Delaware’s history in an article detailing the unusual events surrounding Harry Butler’s execution in Sussex County in 1926.

*Of Counsel* features the Delaware attorney whose many accolades include creating a Public Defender’s office that was a model for our nation — Lawrence M. Sullivan.

As always, the *Delaware Lawyer*’s Board of Editors is grateful to all of our authors who gave of their time and resources.



Charles J. Durante



Amy C. Huffman



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- Publication of the *Delaware Lawyer* magazine
- Liberty Day — Constitutional lessons for every fifth grader in the Delaware Public Schools
- Sponsorship of the Mural Project by foster children in the New Castle County and Kent County Family Court
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- Funding the Senior Lawyer Oral History Project to compile personal recollections of Delaware legal history

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**Judith L. Ritter**

is the founding director of the Criminal Defense Clinic at Widener University Delaware Law School. She

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Professor Ritter speaks and writes on a number of criminal procedure issues including: confrontation clause; federal habeas corpus; and jury instructions. She frequently provides *pro bono* representation to individuals serving life sentences or sentenced to death. Professor Ritter graduated *summa cum laude* from the State University of New York at Buffalo and *cum laude* from the Georgetown University Law Center.



**Hon. Paul R. Wallace**

was appointed to the Superior Court of Delaware, beginning his term in January 2013. He previously

served as the Delaware Department of Justice's Chief of Appeals from 2008 until his judicial appointment. In that role, he was the State's principal courtroom advocate before the Delaware

Supreme Court and the federal appellate courts. Prior to taking up a full-time appellate practice, Judge Wallace served as Chief Prosecutor for New Castle County and, for close to two decades, as a trial prosecutor handling criminal matters at every level — state and federal, trial and appellate. In 2012, he was awarded the National Appellate Advocacy Award by the Association of Government Attorneys in Capital Litigation.



**Lori W. Will**

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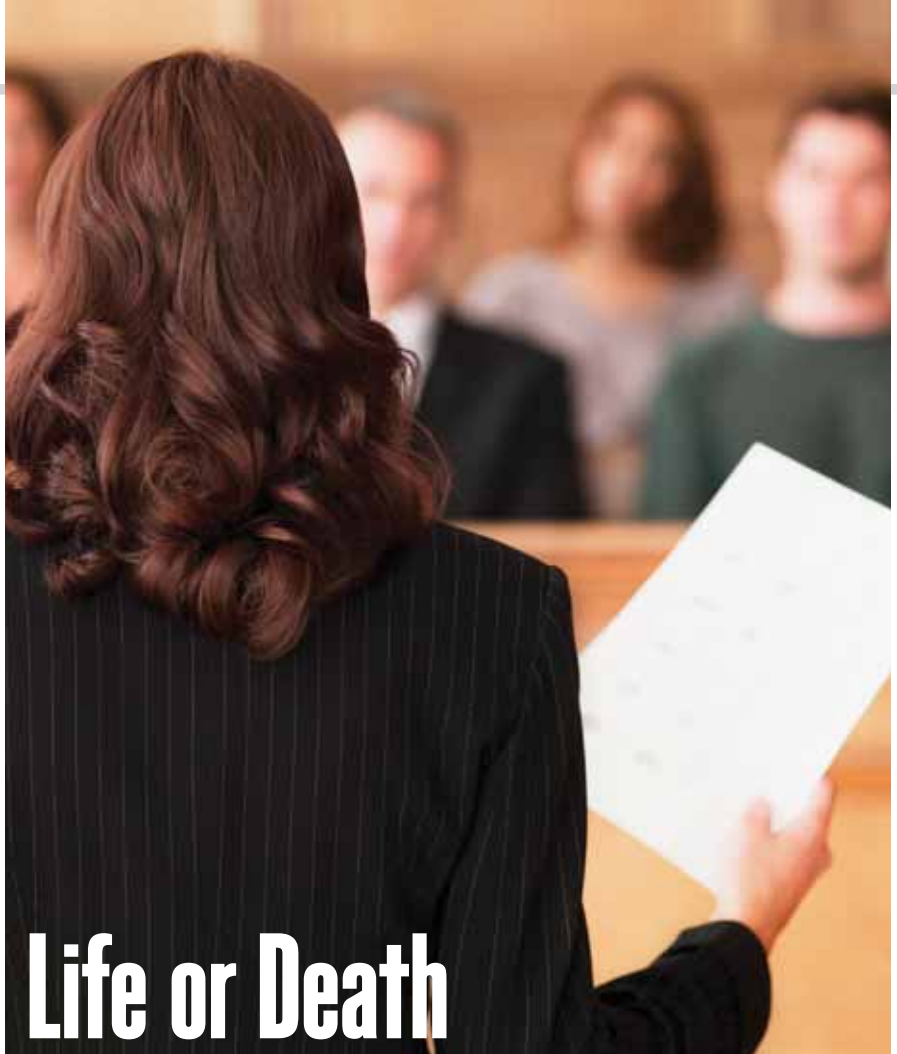
Flom LLP. She represents corporate entities and their directors and officers in complex commercial, corporate and federal securities litigation. Before entering private practice, Ms. Will served as a law clerk to then-Vice Chancellor Leo E. Strine, Jr., on the Delaware Court of Chancery. She is the Secretary and Vice President of the board of directors of the Delaware Children's Museum and serves as a Reporter for the Delaware Supreme Court's Access to Justice Commission Committee on Fairness in the Criminal Justice System. She graduated *summa cum laude* with a B.A. in History and Government & Law from Lafayette College, and received her J.D. from the University of Pennsylvania Law School.



**Hon. William L. Witham, Jr.**

has been a Superior Court judge since 1999. He graduated from University of Delaware in 1970

and received his J.D. from the University of Maryland in 1973. He practiced law with Prickett, Jones, Elliott & Kristol in Dover, Delaware. Judge Witham graduated from the United States Army War College in 1998 and is a retired army colonel. In 2011, he oversaw the implementation of the State of Delaware's Veteran Treatment Court, the only statewide court of its kind in the United States.



# Litigating Life or Death

The two-phase structure of capital cases — determination of guilt and then sentencing — puts unique burdens on both defense attorneys and prosecutors.

*“... It is the sentence of the Court that you shall be kept in the custody of the Department of Correction until Friday, the 20th day of April, 2012, and on that date, between the hours of 12:01 a.m. and 3:00 a.m., shall be taken to some convenient place of private execution within the prison enclosure of the James T. Vaughn Correctional Center and in the presence of no more than 10 witnesses summoned for that purpose . . . be injected intravenously with a substance or substances in a lethal quantity sufficient to cause death until you are dead.”*

Imagine for a moment that you are the attorney standing beside one receiving that judgment; or, that you are the attorney at the other table who advocated for it. Not that anyone engaged in capital litigation would think otherwise, but those words in a Delaware courtroom comprise no hollow pronouncement.<sup>1</sup>

The dire consequence of this judgment, of course, intensifies the litigation practices of those undertaking it. A capital case is the most highly charged, emotional, vexing and complicated criminal litigation there is. And while the litigation of almost any death penalty case is now a decades-long process,

the focus here will be on some of the unique aspects of the shortest period — from charging to sentencing judgment.

“Short” is a relative term. It is not at all unusual for a civil case to linger years on the trial court docket before resolution. A delay in excess of a year between a criminal defendant’s arrest and incarceration and the start of his trial is itself usually sufficient to at least necessitate a Court’s consideration of a speedy trial claim.<sup>2</sup> But prosecutors and defense counsel regularly spend well over a year preparing for death penalty trials.

We know why: the complexity of a two-phase criminal proceeding involving more lawyers, more experts, and



intricate forensic evidence; the knowledge that every successful conviction is subjected to layers of state and federal review; and, most importantly, the irremediable cost of getting it wrong.

And so, over the last four decades, courts and commentators have articulated new standards for what prosecutors and defense counsel must do for a resulting death sentence to be constitutional. Because counsel for both sides face what are effectively two different trials — one determining whether the accused is guilty of capital murder and the second whether he should be sentenced to death — meeting those standards forces prosecution and defense counsel to undertake broad investigation and preparation peculiar to capital cases.

### **Responsibilities of the Capital Prosecutor**

“The prosecutor has more control over life, liberty, and reputation than any other person in America.”<sup>3</sup> In no circumstance is that truer than in a capital case. There is no more critical judgment by a prosecutor than her decision to seek a death sentence. But although the consequences of this discretionary decision are like no other, courts grant the same wide berth to the State’s charging call in a capital case as with any other criminal matter.

The State has never been required to adopt any set of screening procedures or charging policies to guide these determinations. Instead, the Attorney General, through his or her deputies, can make the capital charging decision in the same manner as all other charging decisions. Given the consequences, however, exacting internal screening procedures and formalized case review proceedings — steps wholly singular to capital cases — have long been the norm in Delaware.<sup>4</sup>

The scrutiny of the State’s capital litigation practices only increases once proceedings commence. This is, in part, due to the unique role of a prosecutor in our system of justice, a role that has greater gravity when the potential verdict is death. “A prosecutor has the

**“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.”**

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responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. . . .”<sup>5</sup>

The United States Supreme Court has noted:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.<sup>6</sup>

Our own high court further explained long ago that “[a] prosecuting attorney represents all the people, *including the defendant who is being tried*. It is his duty to see that the State’s case is presented with earnestness and vigor, but it is equally his duty to see that justice be done.”<sup>7</sup>

The restraints on a prosecutor’s trial behavior are far greater than those of

other advocates. For instance, where a prosecuting attorney has knowledge of the truthfulness and veracity of a witness and where the purpose of his cross-examination would normally be to undermine the credibility of the witness, he is bound not to.<sup>8</sup> As well, miscues in a deputy attorney general’s arguments during capital proceedings are far more likely to require reversal than in any other case.

Recently, prosecutorial missteps in the investigation and trial of capital cases have led to multiple reversals for Delaware death row inmates. From discovery mistakes to one prosecutor’s unquestionable misconduct during questioning and argument, there is little tolerance for transgressing the strict standards for State’s counsel’s litigation behavior.

### **Expectations for Capital Defense Counsel**

Capital trials differ from all others — they are bifurcated so that if the defendant is convicted of capital murder, there is a separate penalty hearing during which both the State and defense introduce additional evidence about the crime and the background of the killer. And so:

[For a lawyer], taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one’s personal responsibility for the outcome.<sup>9</sup>

To meet this challenge, the American Bar Association has promulgated detailed guidelines for attorneys representing capital defendants.<sup>10</sup> These guidelines are exacting and wide-ranging, calling on capital defense counsel to undertake responsibilities, make judgment calls, and offer advice foreign to the norms to which she might be accustomed. The only realistic and

obtainable goal during capital representation may be the mere avoidance of the execution chamber, even though natural death in prison is the alternative.

Defense counsel in a capital case has an ethical duty to explore the possibility of an agreed-upon resolution that results in less than a death sentence.<sup>11</sup> This obligation is as important as all of counsel's other legal and ethical duties to represent a defendant facing death. Counsel would, in fact, be inept if she failed to explore a plea in a capital case, even when a capital client insists that he would rather be executed than spend the rest of his life in prison. In such a circumstance, it is not unusual for a capital defense attorney to seek the assistance of other experienced capital counsel to facilitate plea discussions with her client who is reluctant to discuss a plea.

This is because capital defense counsel cannot focus solely on obtaining a

**Capital defense counsel cannot focus solely on obtaining a plea agreement for life (or less); to do so might endanger the fragile relationship between trial counsel and capital client.**

plea agreement for life (or less); to do so might endanger the fragile relationship between trial counsel and capital client. But zealous advocacy and exploration of a reasonable plea disposition of a

capital case are not mutually exclusive.

Indeed counsel must seek potential plea resolution, and must concurrently investigate both the guilt and penalty phases of the trial, file all appropriate motions, and zealously advocate during any pretrial proceedings. For it may be defense counsel's efforts in preparing and advocating a full and effective legal defense that forces the prosecutor to decide that the case should be resolved short of a trial.

We all know that there are situations where the capital defendant will demand a trial and will not want to even discuss a plea. To properly prepare for and present a guilt phase defense, counsel must independently investigate the circumstances of the murder and all evidence — testimonial, physical and forensic — that the State may seek to offer.

Capital counsel simply cannot assume the accuracy of any information

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his client might relay. Nor can he avoid casting a wary eye on the information the prosecutor chooses or is compelled to disclose. As recent Delaware experience has demonstrated, even when the potential sentence is death, and even with experienced and well-intentioned counsel on both sides, critical mistakes can be made during the investigative and discovery phases of a capital case.

In turn, the capital defense lawyer's obligation includes finding, interviewing and scrutinizing the backgrounds of potential prosecution witnesses, as well as searching for potential witnesses who might challenge the State's version of events. So too, capital defense counsel must subject all physical and forensic evidence to rigorous independent scrutiny.

While developing a proper factual defense, capital counsel must also investigate possible affirmative and mental health defenses. These may include

**The complexity, profile, expense, risks, resource and emotional drain of capital murder proceedings pose challenges for capital litigators on both sides of the case.**

self-defense, insanity or lesser-offense liability. This, of course, is a delicate balancing act with a client who seeks total absolution. And, if an innocence-based defense strategy is not available,

there is always the difficulty of coordinating a defense to guilt and a case for life in the inevitable penalty proceeding.

Defense trial counsel in a death penalty case, therefore, must — among other things — prepare for and present a hearing far different than any other legal proceeding. A capital mitigation investigation requires an examination of the defendant's complete background: medical records from birth, school records and social history documents. Counsel and her mitigation specialists usually speak with generations of the defendant's family about his upbringing in a search for any information that might explain the murder or make him more sympathetic in the jurors' eyes.

### Conclusion

The complexity, profile, expense, risks, resource and emotional drain of capital murder proceedings pose challenges for capital litigators on both

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sides of the case. The prosecutor must be scrupulous in comporting his or her investigative, charging and trial practices to ensure just results that are within the bounds of applicable law and consistent with community needs. Meanwhile, defense counsel literally has a life depending on his or her skill and best judgment.

These pressures are always there for criminal practitioners but are heightened in a death penalty case — from investigation, through pretrial litigation, to all aspects of the dual trial itself. Fortunately, Delaware capital counsel adeptly shoulder these burdens, striving always to insure the integrity of any capital case judgment; whether that judgment be life or death. ♦

#### NOTES

1. Delaware has the third highest execution rate, behind only Oklahoma and Texas. See *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-execution-rates> (last visited Mar. 11, 2016).
2. “Although it is not codified in Delaware law, the Superior Court speedy trial guidelines set the standard that 90% of criminal trials should be held, or the cases otherwise disposed of, within 120 days of indictment, 98% within 180 days, and *all* cases within one year.” *Dabney v. State*, 953 A.2d 159, 165 (Del. 2008) (emphasis in original).
3. Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc’y 18, 18 (1940) and 31 J. Crim. L. & Criminology 3, 6 (1940).
4. Delaware’s capital litigation practitioners well know that the State Department of Justice’s death penalty case selection protocols have evolved greatly but are not publicly published. Not so for the federal system. See U.S. Dep’t of Justice, United States Attorneys’ Manual, § 9-10.000, et. seq. (2014).
5. Delaware Lawyers’ Rules of Professional Conduct, Rule 3.8, Commentary; *In re Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992) (“Recognizing a [prosecutor’s] role as a shepherd of justice . . .”).
6. *Berger v. United States*, 295 U.S. 78, 88 (1935).
7. *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960) (emphasis in original). See also American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard for Prosecution Function 3-1.2(c)(1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); National District Attorneys Association, *National Prosecution Standards*, § 1.1 (2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”).
8. Compare American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard for Prosecution Function 3-5.7(b)(1993) (“A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.”), with *id.*, Standard for Defense Function 4-7.6(b) Commentary (noting the “professional obligation of defense counsel to impeach truthful witnesses”).
9. COMM. ON CIVIL RIGHTS, ASS’N OF THE BAR OF THE CITY OF N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS’N OF THE BAR OF CITY OF N.Y. 848, 854 (1989).
10. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. Feb. 2003), reprinted in full in 31 HOFSTRA L. REV. 913 (2003).
11. *Id.* at Guideline 10.9.1 (“The Duty to Seek an Agreed-Upon Disposition”).

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# Time to Rethink Delaware's Death Penalty?

A recent Supreme Court ruling has prompted questions about the constitutionality of Delaware's procedures in capital cases.

Last October, I took a few of my Delaware Law School students to hear oral arguments in the United States Supreme Court. There were two cases on the docket that morning. One involved life without parole sentences for juveniles convicted of homicide. Our in-house Criminal Defense Clinic represents someone who has been serving such a sentence and the case argued that morning would be key in our client's bid for re-sentencing.

The oral argument in the other case on the docket, *Hurst v. Florida*, was striking in that it appeared to my students and me that the Justices were all leaning heavily towards striking down Florida's capital penalty phase procedures. On January 12, 2016 that is precisely what the Court did.<sup>1</sup>

## **The *Hurst* Case, Florida, Alabama and Delaware**

In Florida, Delaware and most death penalty jurisdictions, during the penalty phase of a capital trial, the prosecution must prove that the defendant is eligible for the death penalty by establishing the existence of one or more aggravating factors, usually listed in the governing statute. A finding of eligibility thus entails a factual determination

regarding specifics of the crime or the defendant.

When recently reviewed by the Supreme Court, Florida's death penalty statute required the jury to advise the trial judge about whether a defendant was eligible and whether or not to impose a death sentence. The judge, however, made the final decision, which need not have been consistent with the jury's recommendation.



In *Hurst v. Florida*, the Supreme Court ruled that Florida's capital sentencing process violated the Sixth Amendment right to a trial by jury because Hurst should have had a jury decide whether facts were sufficiently proven to make him eligible for the death penalty.

Most death penalty jurisdictions are likely unaffected by *Hurst* because they already place the sentencing determination entirely in the hands of a jury.<sup>2</sup> However, *Hurst* has had an effect in Alabama because its capital trial procedures are virtually the same as they were in Florida.<sup>3</sup>

*Hurst* has the potential to upset the status quo in Delaware as well. In fact, on February 1, 2016, the President Judge of Delaware's Superior Court issued an Administrative Directive staying all capital trials pending the Delaware Supreme Court's consideration of certified questions related to *Hurst*'s impact in Delaware.<sup>4</sup> Before examining the issues raised for Delaware by *Hurst*, a brief description of the legal backdrop for *Hurst* is warranted.

### Looking Back to Changes Wrought in 2000

The United States Supreme Court decided *Apprendi v. New Jersey* in 2000 and ruled that any question of fact that could subject a criminal defendant to a greater sentence than the statutory maximum needed to be proven to a jury beyond a reasonable doubt.<sup>5</sup>

The Court reasoned that facts exposing a defendant to more severe penalties were not merely sentencing factors, but rather "elements" and thus subject to the same constitutionally required processes as all other elements of crimes.

*Apprendi* engendered a sizeable number of cases raising issues about the extent of its application. Most relevant to this article is *Ring v. Arizona* in which the Supreme Court found that Arizona's death penalty statute violated *Apprendi* because it called for the judge, as opposed to a jury, to make the factual findings that would expose the defendant to a death rather than a

## Delaware gives the trial judge far more authority in choosing whether to impose death than the capital case statutes in most death penalty states.

life sentence.<sup>6</sup>

The near-unanimous majority in *Hurst* was unable and unwilling to distinguish Florida's statute from that in Arizona, which is why during Hurst's oral argument the Justices seemed clearly poised to rule against the State of Florida. It was the outcome required by *Ring*.

### Why Is This Important for Delaware?

The comparative roles of the jury and judge in Delaware's death penalty statute<sup>7</sup> differ from those in the Florida statute struck down in *Hurst*. Nevertheless, Delaware gives the trial judge far more authority in choosing whether to impose death than the capital case statutes in most death penalty states. It was quite prudent of the Delaware Superior Court to put off pending capital trials until it receives advice from the State's Supreme Court on whether the Delaware law can survive *Hurst*.

The primary difference between the Delaware and Florida statutes is that under Delaware law, a jury must find unanimously and beyond a reasonable doubt that at least one aggravating factor has been proven. If they do not so find, a death sentence may not be imposed.

In pre-*Hurst* Florida law on the other hand, a judge alone could make this finding, one which is necessary for death eligibility. This is a significant difference since at least the first step in the fact-finding that exposes a defendant

to the possibility of a death sentence in Delaware is assigned to the jury, as required by *Apprendi* and *Ring*.

A more questionable aspect of Delaware's process concerns the steps following the jury's finding of death eligibility. While one aggravating factor is sufficient for eligibility, before a sentence of death may be imposed there must be a finding that any aggravating circumstances outweigh any mitigating circumstances. This is sometimes referred to as the "selection" or "weighing" phase of the sentencing process.

In Delaware, the final decision for this rests with the judge. While the jury considers this question, its view is not binding on the judge. Most importantly, when the judge performs the weighing task, he or she may find and place on the scale additional aggravating circumstances not found by the jury.

It could be argued that this is not problematic because only one factor is needed to make a defendant death eligible and *Ring* only requires that the eligibility determination be made by a jury. Nevertheless, in her majority opinion in *Hurst*, Justice Sotomayor said that a capital punishment statute may not, "allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty."<sup>8</sup>

Thus, in the wake of *Hurst*, Superior Court Judge Paul Wallace, who is presiding over the first-degree murder case against Benjamin Rauf, certified and the Delaware Supreme Court accepted, five questions of law for disposition. The following is a paraphrased version of the questions:

- (1) Under the Sixth Amendment to the United States Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, find the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding?
- (2) If the answer to (1) is, "no,"



and the jury must find this, must that finding be unanimous and beyond a reasonable doubt to comport with federal constitutional standards?

(3) Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 *Del. C.* § 4209, this is the critical finding upon which the sentencing judge “shall impose a sentence of death?”

(4) If the answer to (3) is, “yes,” must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

(5) If any procedure in 11 *Del. C.* § 4209’s capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder and the Court proceed with the instructions to the jury that comport with federal constitutional standards?<sup>9</sup>

### Legal Landscape in Flux

The *Hurst* Court resolved an important question about Florida’s death penalty. Alabama’s capital punishment law, which is virtually the same as Florida’s, will undoubtedly also be reviewed at some point. That is despite the fact that the United States Supreme Court recently denied a certiorari petition in a capital case from Alabama filed shortly after *Hurst* was handed down.<sup>10</sup> In fact, just recently, an Alabama trial court judge ruled that the state’s death penalty was unconstitutional in light of *Hurst*.<sup>11</sup> Several questions remain unresolved, however, and the answers will potentially impact Delaware law.

One claim raised but not addressed in *Hurst* is about juror unanimity. Knowing it must re-write the death penalty statute to leave fact-finding on aggravators to a jury, the Florida Leg-

It has been many years since the Supreme Court has taken up the question of whether the death penalty violates our Constitution. Rather, jurisprudence has addressed specific issues in the implementation of the death penalty, holding that, for example, juveniles or mentally retarded defendants may not be executed.

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islature has passed a bill which calls for a jury to unanimously decide beyond a reasonable doubt that at least one aggravating factor exists. If none are found, a death sentence may not be imposed. If the jury finds one or more aggravators, it will then weigh them against any mitigating evidence and decide whether the aggravators outweigh the mitigators and that the sentence ought to be death. The jury then issues a recommendation to the judge.

The bill requires that at least 10 jurors agree before the jury can issue a recommendation of death.<sup>12</sup> *Hurst* does not specifically require unanimity, but many argue that doing so promotes fairness or that the Supreme Court may one day rule that the lack of a unanimity requirement for a death sentence violates the Constitution.<sup>13</sup> In fact, the American Bar Association urges states to require unanimity in a vote for a death sentence. Under current Delaware law, a capital jury may recommend a death sentence by a simple majority vote.<sup>14</sup>

Another open issue particularly relevant to Delaware is whether a finding of additional aggravating circumstances beyond the one needed for death eligibility must be placed in the hands of a jury, rather than the judge. As already noted, the Delaware statute allows a judge on his or her own to find ad-

ditional aggravators and then put any found into the mix when weighing aggravators against mitigators.

The *Hurst* decision does not preclude this *per se*. However, language in *Hurst* opens the door for an argument that any and all aggravating circumstances offered by the prosecution must be decided upon by a jury. After all, at the weighing phase, all aggravators will be weighed against any proven mitigation. It is altogether possible that for the judge, an aggravator not found by the jury might tip the balance in favor of death.

There is a rational argument that *Apprendi* requires jury verdicts for all aggravating circumstances because these factual findings expose a defendant to a death rather than a life sentence. In fact, Florida’s new law does not allow the judge to consider any aggravators that were not unanimously found by the jury.

Both Florida’s invalidated law and Delaware’s law leave the weighing phase and the final sentencing decision in the hands of the judge. Both have a jury make a recommendation to the court, but this is merely advisory. Nothing in *Hurst* or other Supreme Court decisions clearly rules it unconstitutional to do so.

Nevertheless, the bill passed by the Florida Legislature in the wake of

*Hurst* limits judicial discretion. Apparently the Legislature was unwilling to risk having its new law struck down as was its previous law. The bill requires a judge to impose a life sentence if that is what the jury recommends. On the other hand, if the jury recommends a death sentence, the judge may impose death but has the discretion to impose a life sentence instead.

Whether Delaware's procedure of allowing a judge to override a jury's recommendation of life and impose death is viable after *Hurst* is one of the questions certified to the Supreme Court of Delaware. Unlike a legislature, the Delaware Court is unlikely to do more than interpret *Hurst* as opposed to directing a "play it safe" change to the State's capital punishment law.

It remains possible, however, that the Delaware Supreme Court will declare that even Delaware's weighing phase procedures cannot be justified under *Hurst*.

### What's Next?

Without a crystal ball, one cannot know what lies down the road for death penalty jurisprudence. However, there are a few signs that cannot be ignored. As was the case with Justice Harry Blackmun in 1994,<sup>15</sup> Supreme Court Justice Stephen Breyer recently announced that he believes that the death penalty likely violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>16</sup>

It has been many years since the Supreme Court has taken up the question of whether the death penalty violates our Constitution. Rather, jurisprudence has addressed specific issues in the implementation of the death penalty, holding that, for example, juveniles<sup>17</sup> or mentally retarded defendants<sup>18</sup> may not be executed.

A case worth watching, however, is *United States v. Fell*. In *Fell*, a federal district court judge ordered a hearing on a general constitutional challenge to the death penalty.<sup>19</sup> In addition, surveys continue to show that more and more people are disturbed about the high

number of exonerations after convictions<sup>20</sup> and racial inequities in the administration of capital punishment.<sup>21</sup>

The Supreme Court of Delaware has an important job to do in answering the questions about Delaware law raised by *Hurst*. Of course, a post-*Hurst* Delaware death sentence, even one sanctioned by Delaware courts, may ultimately be reviewed by the United States Supreme Court.

Thus, Justice Breyer's new perspective, the perspective of Justice Scalia's replacement, and evolving community standards regarding the ultimate penalty will mean a great deal for those on Delaware's death row. ♦

### NOTES

1. See *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016). The decision was nearly unanimous, with Justice Alito the lone dissenter. See *id.* at 624.

2. See *e.g.*, 42 Pa.C.S.A. § 9711; Ga. Code Ann., § 17-10-31. A capital defendant may waive his or her right to a jury for the penalty phase.

3. See Ala. Code § 13A-5-47.

4. Admin. Directive of the President Judge of the Super. Ct. of Del. No. 2016-2 (Feb. 1, 2016).

5. 530 U.S. 466, 494 (2000).

6. 536 U.S. 584, 591 (2002).

7. 11 Del. C. § 4209.

8. *Hurst*, 136 S.Ct. at 624.

9. See *State v. Rauf*, Cr. A. Nos. 15-12-1177, etc., EFiled ID 58473552 at 6-7 (Super. Ct. Del., Jan. 25, 2016). These certified questions will be briefed and argued before the Court. The opening brief was filed by the Office of the Public Defender on March 3, 2016.

10. *Brooks v. Alabama*, 136 S.Ct. 708 (2016).

11. *Judge Rules AL Death Penalty Scheme Unconstitutional*, <http://www.wbrc.com/story/31377781/judge-rules-als-death-penalty-scheme-unconstitutional>, last visited Mar. 3, 2016.

12. 2016 FL H.B.7101 (NS), Feb. 17, 2016, Fla. 118 Reg. Sess. At the time this magazine went to press, the bill had been sent to the Governor for his signature. The Florida Senate narrowly rejected a bill requiring unanimity.

13. In its opening brief, the Delaware Office of the Public Defender argues that a unanimity requirement is dictated by the Sixth and Eighth Amendments to the United States Constitution and by the Delaware Constitution.

14. 11 Del. C. §4209. Cf. Leo E. Strine, Jr., *Criminal Justice and (A) Catholic Conscience*, 56 SANTA CLARA L. REV. \_\_\_\_ (forthcoming 2016), U of Penn Law School, Public Law Research Paper No. 16-6 at 23-24. Available at SSRN: <http://ssrn.com/abstract=2734349> (questioning the wisdom of allowing a non-unanimous jury to recommend a death sentence).

15. See *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun J. dissenting) (exclaiming, "from this day forward, I no longer shall tinker with the machinery of death").

16. See *Glossip v. Gross*, 135 S.Ct. 2726, 2756 (2015) (Breyer J. dissenting).

17. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

18. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

19. See *United States v. Fell*, Case No. 5:01-cr-12-01 (D.C.D.Vt.) (scheduling a hearing to consider defendant's challenge to the legality of the death penalty, Feb. 9, 2016).

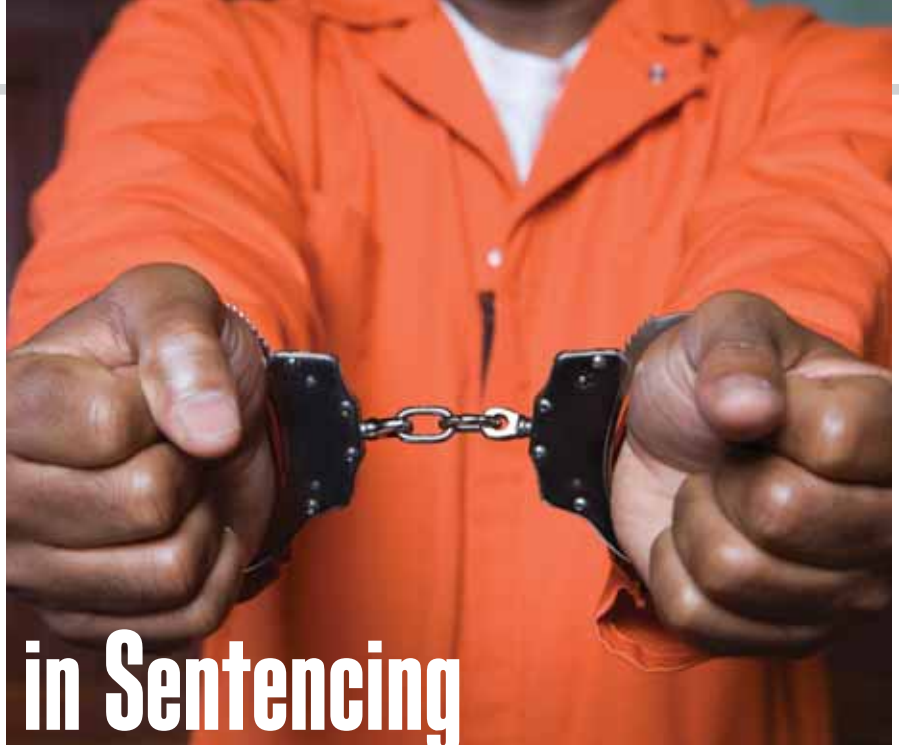
20. See The National Registry of Exonerations, *Exonerations in 2015*, (Feb. 3, 2016), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf).

21. See *e.g.* Frank R. Baumgartner, *The Impact of Race, Gender and Geography on Florida Executions*, (Jan. 14, 2016). See also Strine *supra* note 12 at 26-27.

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# Racial Disparities in Sentencing



With African Americans over-represented in our courts and jails, the Committee on Fairness in the Criminal Justice System examines possible causes and solutions.

Delaware, like many other states across the country, has experienced a steady increase in its incarceration rate over the past four decades. The incarceration rate in Delaware is about 12% higher than the national average at a rate of about 440 people per 100,000.<sup>2</sup>

**A**lthough African Americans comprise about 22 percent of Delaware's population,<sup>3</sup> they represent over 64 percent of its jail and prison population. This is despite the fact that only 41 percent of arrests involve African Americans.<sup>4</sup>

By contrast, the rate of incarceration for white individuals is about 35 percent, although 56 percent of arrestees in Delaware are white.<sup>5</sup>

The racial disparities in Delaware's criminal justice system also permeate the state's death penalty. According to a 2012 study of Delaware's death penalty, 49 persons have been sentenced to death since 1972 under the modern statutory sentencing scheme.<sup>6</sup> Of those, 19 (or 39 percent) were white. Twenty-six (or 53 percent) were African American, and four (or 8 percent) were Hispanic or Native American.

The same study similarly found that in 2012, 59 percent of the death row population was African American, 23 percent was white, and 18 percent was Hispanic. This means minorities comprise 77 percent of the state's death row population, even though almost 64

percent of the state population is white (and not Hispanic).<sup>7</sup>

The disparity is even starker when considering the pattern of imposing death sentences on African American defendants with white victims versus on defendants who are the same race as the victim. As of 2012, based on the limited set of 49 persons who have been sentenced to death in Delaware under guided discretion statutes,<sup>8</sup> African American defendants who killed white victims were seven times more likely to receive the death penalty than black defendants who killed black victims. Additionally, African American defendants who killed white victims were more than three times more likely to be sentenced to death than white defendants who killed white victims.<sup>9</sup>

Minorities in Delaware are plainly having contact with the criminal justice system at rates out of proportion with the state's overall population makeup. Accordingly, members of the Delaware legislature and judiciary and community leaders are working in various ways to investigate possible causes for the disparity.





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In December 2014, the Delaware Supreme Court established the Access to Justice Commission with the mission of examining Delaware's criminal justice system to identify any barriers that may exist and develop recommendations for access to justice.

One of the Commission's subgroups, the Committee on Fairness in the Criminal Justice System, has been tasked with examining the causes of racial disparity in the Delaware criminal justice system and proposing ways to reduce those disparities.

The Committee on Fairness is working with nationally recognized experts — including staff from the University of Pennsylvania Law School's Quattrone Center for the Fair Administration of Justice, the Equal Justice Initiative and the University of Delaware — to examine racial fairness in Delaware's criminal justice system. So far, these experts have presented reports on topics including alternatives to incarceration, root causes of disparities in Delaware's criminal justice system, bail and pre-trial detention issues, and charging and sentencing.<sup>10</sup>

The Committee on Fairness also recently held public forums across the state for community members to share their ideas on how the criminal justice system could be improved. The speakers at the public forums highlighted a number of important topics for consideration, including the death penalty. For

example, speakers noted that Delaware has the fifth-highest rate of death sentences per capita, and that the race of the defendant is often a factor in death versus non-death sentences in Delaware.

Given what appear to be significant patterns of racial disparity in contact with the criminal justice system, incarceration, and death penalty sentencing and application, members of the Committee on Fairness hope that the efforts of the Delaware legal community will result in a clearer understanding of how and why race affects a defendant's access to justice.

The work of the Committee is ongoing, as it works to gather information to inform future recommendations. The Committee encourages all members of the Delaware bench and bar to become involved and contribute to this vital cause. ♦

*Additional information is available on the Supreme Court of Delaware's website at <http://courts.delaware.gov/supreme/access.stm>.*

## NOTES

1. Lori Will, Jessica Kunz and Matthew Majarian are associates in the Wilmington, Delaware office of Skadden, Arps, Slate, Meagher & Flom LLP, and serve as reporters for the Access to Justice Commission's Committee on Fairness. The authors thank Thomas J. Allingham II, Co-Chair of the Access to Justice Commission's Committee on Fairness, for his guidance in preparing this article.

2. See National Institute of Corrections, Corrections Statistics by State — Delaware, <http://nicic.gov/statestats/?st=de> (last visited February 19, 2016). See generally "Equal Justice Initiative, Delaware Access to Justice Commission's Committee on Fairness in the Criminal Justice System — A Report on Alternatives to Incarceration" (Oct. 2015), at 1-3, [http://courts.delaware.gov/supreme/docs/EJI\\_DelawareAlternativesPaper.pdf](http://courts.delaware.gov/supreme/docs/EJI_DelawareAlternativesPaper.pdf) (last visited February 19, 2016).

3. See United States Census Bureau, State and County QuickFacts — Delaware, <http://quickfacts.census.gov/qfd/states/10000.html> (last visited February 19, 2016).

4. See Thomas P. Eichler, "Race and Incarceration in Delaware," at 4-5, <http://prisonpolicy.org/scans/RaceIncarceration.pdf> (last visited February 19, 2016).

5. *Id.* at 5.

6. Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans, & Martin T. Wells, "The Delaware Death Penalty: An Empirical Study," at 18 (Mar. 11, 2012), Iowa Law Review, Forthcoming; Cornell Legal Studies Research Paper No. 12-24, available at SSRN: <http://ssrn.com/abstract=2019913> or <http://dx.doi.org/10.2139/ssrn.2019913>.

7. *Id.* at 19.

8. *Id.* at 18.

9. *Id.* at 20-21 (recognizing that comparisons between the population and death sentences as a measure of racial disparity must be interpreted cautiously because differences in underlying offenses may explain such disparities, but noting that examination of death sentence rates for race of defendant and race of victim combinations are "less likely to stem from differences in criminal behavior" if the sentencing patterns reveal large racial disparities).

10. Copies of those expert reports and videos of the corresponding informational hearings are available at <http://courts.delaware.gov/supreme/access.stm>.

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# Soldiers, Crowds, Tear Gas and A Death Sentence

An ugly Sussex County case from the 1920s brought together race, rape and a mob of angry citizens.

The modern era of capital punishment in place since *Furman v. Georgia*<sup>2</sup> limits the types of criminal cases where the death penalty may be imposed. In the early part of the Twentieth Century, that was not the case. In the 1920s, it was not uncommon to find capital punishment laws of Delaware employed to punish crimes which today would not be considered appropriate for such a drastic penalty.

Such was the situation on January 21, 1926, when Harry Butler committed a crime in Sussex County which led to his death in a most unusual case in Delaware legal history. Many of Delaware's luminaries of the Bar participated in the events which follow.

## The Trial

On Tuesday, February 8, 1926, 21-year-old African American Harry Butler was tried, convicted, and sentenced to death for the rape of a 12-year-old Caucasian girl from Bridgeville. The case is notable not simply for the brevity of the trial proceedings and the Supreme Court's review, but also for the large crowds that gathered outside the Georgetown courthouse, precipitating the need for the National Guard of Delaware to deploy tear gas. This

may have been the first time in recorded U.S. history that American troops used tear gas on its own citizens in order to disperse a crowd during a criminal trial.

The trial was prosecuted by Attorney General Clarence A. Southerland,<sup>3</sup> as well as by Deputy Attorney Generals James R. Morford<sup>4</sup> and Howard J. Cooke.<sup>5</sup> Two attorneys were appointed to represent Butler — Daniel J. Layton<sup>6</sup> and James M. Tunnell.<sup>7</sup> The trial was presided over by Chief Justice James Pennewill,<sup>8</sup> with Judge William W. Harrington<sup>9</sup> and Judge Charles S. Richards,<sup>10</sup> sitting.

Prior to this case, Butler had pleaded guilty to felonious assault in 1922 and larceny in 1923. He was paroled on both charges, but later imprisoned for six months for violating said parole. Butler was released in January,<sup>11</sup> shortly

before the incident which resulted in his trial.

Butler had previously confessed to the crime, according to Corporal James of the Delaware State Police, who presented a confession described as having been signed voluntarily.<sup>12</sup> According to two State witnesses, including a State detective, as well as Butler's own testimony, Butler had been making his way towards Maryland to look for work when he encountered two men from whom Butler presumably procured a large quantity of liquor.

Butler then passed by the home of 12-year-old Ellnora Steinmetz. Butler approached the girl and asked her to take a walk with him. Steinmetz "child-like consented" to walk with Butler.

The State contended that Butler then assaulted and raped Steinmetz; Butler "frankly admitted" all of the allegations except that Butler testified he never consummated the act, despite attempting twice unsuccessfully. He also stated that he was intoxicated at the time and not responsible for his actions.

Butler admitted to attacking Steinmetz with a board once she started screaming. According to *The Evening Journal*, Butler showed no appearance of nervousness on the stand or during the proceedings. Steinmetz suffered five to seven skull fractures as well as bruising to the body and neck. Steinmetz herself did not testify, being unable to do so due to her injuries.

The trial consisted of a morning session and an afternoon session. During the trial, approximately 2,000 persons were present outside the Georgetown Courthouse clamoring for admission. The courtroom itself was guarded by a dozen state troopers who searched all who entered. At the close of the afternoon session, Southerland urged the jury to return a guilty verdict while Tunnell argued for a verdict that would have resulted in life imprisonment rather than death for his client.

The jury deliberated for less than two minutes and returned a verdict of guilty on the charge of rape. The verdict was greeted with applause by

onlookers in the gallery. Butler rolled his eyes, and stated he had nothing to say other than responding to the court by replying "yes sir" when addressed by Chief Justice Pennewill.

Butler showed no emotion as Chief Justice Pennewill imposed the sentence, which, in its entirety, reads as follows:

The sentence of the law now imposed by the court is that you, Harry Butler, be committed to the custody of the sheriff of this county and by him taken from the bar of this court and delivered to the trustees of the New Castle County workhouse, the place from which you came; that you be safely and securely kept in custody at said workhouse until Friday, the 26th day of February, A.D., 1926; that on that day you be delivered by said trustees of the New Castle County workhouse to the sheriff of Sussex County; that on said Friday, the 26th day of February, A.D. 1926, between the hours of 10 o'clock in the morning and 3 o'clock in the afternoon, you be taken to some convenient place of private execution, within the precincts of the prison inclosure of Sussex County, at Georgetown, and that you then and there be hanged by the neck until you be dead; and may God have mercy on your soul.<sup>13</sup>

Butler was subsequently escorted outside the courthouse to be transported back to the New Castle County workhouse. Butler ultimately returned to Georgetown on February 26, 1926, where he was hanged as several thousand spectators watched.

Butler was the first man to be executed in Sussex County since 1897, when James M. Gordy was hanged for murdering his wife. Prior to 1897, death sentences imposed by the court in Sussex County were carried out in the New Castle County workhouse.

### Crowd Control

There was as much drama outside the courthouse as there was inside of

it on February 8, 1926. Prior to the trial, public agitation over the event made scandalous by the press compelled the Governor to take preventative action. Three batteries of the 198th Anti-Aircraft Regiment of the National Guard of Delaware had been stationed in Georgetown since Sunday, February 7, the eve before the trial, by order of Governor Robinson.

The 150 Guard members set up barbed-wire barriers in the courthouse square to keep crowds from approaching too close to the building. In addition, State troopers and the National Guard posted hundreds of signs reading as follows:

"Warning: To the citizens of Delaware — The proclamation of the Governor of Delaware dated February 6, 1926, enjoins the citizens of Delaware from being or loitering in the vicinity of the Sussex County courthouse at Georgetown, Del. In order to insure compliance with the provision of the proclamation, all persons are warned to stay outside the limits of the courthouse square, and warning is hereby issued that trespassers within the forbidden area venture there at the risk of their lives. Take notice that order will be preserved at any cost."<sup>14</sup>

Traffic was detoured around the courthouse and the six-foot-tall barbed-wire fence set up on Cherry Lane reached to Market Street and extended into the green within Georgetown Circle. A restricted enclosure at the courthouse entrance was off limits to the public.

Commanded by Major S.B.I. Duncan and supervised by Adjutant General J. Austin Ellison, the soldiers — wearing full combat gear with Springfield rifles and equipped with gas masks — patrolled the area.

Machine guns were strategically placed around the courthouse, including four at the corner of Market and the Circle. Guardsmen also manned machine guns on the courthouse roof and a "machine gun nest" was even

installed in the cupola for emphasis. It would appear that the courthouse was under martial law.

A large, riotous crowd convened outside the courthouse on February 8 during Butler's trial. The Guard verbally warned spectators to stay away from the restricted enclosure and requested their cooperation in complying. It appears that there were no incidents when Butler was escorted inside at the beginning of the day. Later, however, two men attempted to force their way past the guardsmen into the courthouse, and were taken into custody for disorderly conduct.

The troops experienced no other trouble during the morning. But after 2 o'clock, a half hour before the afternoon session was to begin, the crowd — packed 10-to-15 deep around the only gate through the barbed-wire barrier — made a play to breach the entrance.

Many in the crowd "surged" toward the restricted enclosure in an attempt to join the group of 200 being let into the courthouse. Some men in the crowd appeared to have been drinking and began making threats of violence against Butler. One was overheard to say that they would get Butler "even if they had to dynamite the building." Major Duncan, Captain Fred Marvel and other officers endeavored to quiet the throng, which became a mob in an instant.

As the crowd continued to press toward the courthouse steps, words from the officers were unavailing. The order was given for the guardsmen to don gas masks and throw "tear gas bombs" and "gas candles" into the crowd in order to subdue the imminent riot.

Several "military men and lawyers," unnamed by *The Evening Journal*, told the newspaper that this was the first time tear gas had been used on American citizens as a means of crowd control. Tear gas bombs had been used in the past against criminals barricaded in their houses, but not against crowds of citizens, according to the newspaper's sources.

Twenty-five tear gas bombs were said to have been thrown from the roof of the courthouse into the crowd, al-

## The order was given for the guardsmen to don gas masks and throw "tear gas bombs" and "gas candles" into the crowd in order to subdue the imminent riot.

though it is unclear how many were actually used. Within a few minutes, the mob had calmed down. It was said that the fight had been "gassed" out of the throng.

Despite the large crowd, only four people felt the effects of the tear gas. Three of those were members of the National Guard itself: Private Eugene Smallwood, Gordon Massey and Haler Branner. According to *The Evening Journal*, Smallwood was stationed outside the courthouse when the tear gas was used: "I didn't have any gas mask, but I did have my orders, and the only thing I could do was to remain on duty, which I did until I became so weak I fell," Smallwood told the newspaper.

The fourth person affected was Blanche Sirman, who was passing by the courthouse when the gas was deployed and was not even a member of the crowd attempting to storm the courthouse. The daughter of Sussex County's Recorder of Deeds, Sirman was "partly overcome" by the gas, fainted, and came to in her father's office.

Following the Guard's use of the tear gas, the rest of the day passed with relatively little incident. A crowd member was overheard to say: "If there's anything more like that, there'll likely be some shooting, and some of us will be the ones to do the shooting." The Delaware State Police, which had sta-

tioned 20 officers in Georgetown for the trial, escorted several crowd members out of town and warned them not to return.

Butler's sentence was relayed by Captain Fred Marvel to the throng outside the courthouse nearly as soon as Chief Justice Pennewill imposed it. The news seemed to calm many members of the crowd and helped to subside their fervor. According to *The Evening Journal*, one or two people cried out for Butler to be lynched, "but nobody took the suggestion seriously."

Butler was escorted from the courthouse without incident at approximately 5 p.m., even though "it would have been easy for anybody to have punched the negroe [sic]." The National Guard eventually returned to the Milford armory and no further incidents occurred that day.

As one would expect, after these remarkable and unfortunate events, public "Monday morning quarterbacking" would develop. Superintendent C.C. Reynolds of the Delaware State Police told reporters that the National Guard's presence "wasn't necessary" and "the State Highway Police could have [dealt] with the situation." There was a police presence throughout the proceedings consisting of 25 uniformed members of the State Highway Police.

Once the crisis subsided, Governor Robinson commended the members and officers of the National Guard for the "cool-handedness" by which they handled matters at Georgetown and commented: "It stands to reason, that the members of the National Guard was [were] heckled some by those opposed to soldiers being sent to Georgetown, but I am highly pleased with the manner in which they conducted themselves and handled the situation, and I am glad now that they will soon be home." No doubt, the State Police were a little rankled by these comments.

The tragic events of 1926 are hopefully avoidable today. Yet the fact that only 37 days transpired from the crime to the execution says a lot about the



state of our criminal justice system in that era. Whether Mr. Butler received a fair trial can certainly be questioned.

It was reported that after these events, the Delaware National Guard, having performed their duty, promptly tore down their encampment, removed the barricades, stowed the weaponry and went to supper at the Brick Hotel before departing for home. ♦

## NOTES

1. The author wishes to thank his former law clerk, Brian McCarthy, for his invaluable research, as well as MG William H Duncan, MD (ret.) for materials, including newspaper print and photographs.

2. 408 U.S. 238 (1972).

3. Southerland was elected Attorney General for the State of Delaware in 1925, and became the first Chief Justice of the newly organized Delaware Supreme Court in 1951.

4. Morford was elected Attorney General for the State of Delaware in 1938 and served until 1943. He served as President of the Delaware State Bar Associated from 1940-1942.

5. Cooke was appointed on March 23, 1920, as a Deputy Attorney General for Sussex County.

6. Layton was later elected Attorney General for the State of Delaware in 1932. Six months after his election, he was appointed Chief Justice of the State of Delaware where he served until 1945.

7. Tunnell served as the United States Senator from Delaware between 1941 and 1947.

8. Pennewill was admitted to the Delaware Bar in 1898. He was appointed an Associate Justice of the Delaware Supreme Court and Resident Judge of Kent County at the age of 43. In 1909, he was appointed Chief Justice of the State of Delaware. He retired from the bench in 1933. His record of 36 consecutive years on the bench and 24 years as chief justice still stands to this day.

9. Harrington was appointed to the Superior Court in 1921 and was reappointed in 1933. In 1938, Judge Harrington was appointed Chancellor of the Delaware Court of Chancery.

10. Richards became Resident Judge of Sussex County in 1929, Chief Justice of the State of Delaware in 1945, and the first President Judge of the Superior Court in 1951.

11. No year or exact date of the offense is given, but based on how the article in *The Evening Journal* is written, it may have been 1926, the same year as Butler's trial.

12. *The Philadelphia Bulletin*, Tuesday, February 9, 1926.

13. *State v. Butler*, 133 A. 918, 918 (Del. Ct. of Oyer & Terminer 1926).

14. *The Public Ledger*, Tuesday morning, February 9, 1926. The paper reports further that many of the signs were removed or torn down as souvenirs.

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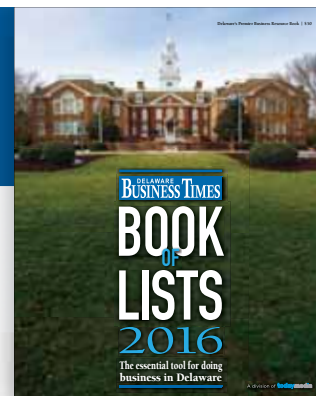
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(Continued from page 28) who had been all-state basketball players.

Sullivan's energy was a tonic for a party that, after a century as the default choice in New Castle County, was annihilated in 1964 on account of a Presidential candidate whose platform and culture proved to be alien to Delaware.

Sullivan coaxed dozens of young lawyers and other professionals into GOP activity, emphasizing the party's good-government roots, social moderation and fiscal rectitude. The Active Young Republicans of Wilmington helped turn a Republican breeze in 1966 into a cyclone. Fielding candidates in every Wilmington neighborhood, just two years after losing all 24 state and local legislative races, the City GOP won both newly-created County Council seats and elected a black man to the General Assembly. The wave yielded the first electoral victories for

Bill Roth, Bill Conner, George Her-  
ing, Laird Stabler Jr., Mike Castle and  
a new Register of Wills, Larry Sullivan.  
The energy and organizational infra-  
structure helped elect Hal Haskell as  
mayor in 1968.

On becoming Public Defender two  
years later, Sullivan continued his tal-  
ent search, identifying lawyers with the  
spunk to represent the indigent accused.  
"You won't have a detective handing  
you a ready-made file," he would tell a  
prospective hire. "You'll have a bigger  
challenge."

One enticement was to permit assis-  
tant public defenders to maintain a pri-  
vate civil practice, a benefit unavailable to  
Deputy Attorneys General. Throughout  
his career, Sullivan himself managed  
a parallel private practice, where his  
clientele included many fellow lawyers.

Sullivan twice sought to reverse his  
role in the criminal justice system, un-

successfully running as the Republican  
nominee for Attorney General against  
Dick Wier in 1974, and in the GOP  
primary against Jane Brady 20 years  
later. After each, he displayed no regrets  
at continuing the job with which his  
name became synonymous.

Sullivan emphasized alternate dispute  
resolution years before it became institu-  
tionalized. "We didn't litigate until we  
had to litigate. We didn't file suit imme-  
diately," says Sullivan. "I would caution  
people not to get involved in litigation  
because lawyers' fees are significant.

"When I first started, we charged  
\$25/hour. I'm glad I'm not practicing  
now, because I couldn't in good con-  
science charge \$500 an hour."

Raised in Union Park Gardens, he  
attended Salesianum at 8th and West  
streets. Sullivan was a quarterback for a  
9-1 Sallies team, although injured and  
missing for its sole loss to P. S. du Pont.

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After Kings (PA) College, he was student body president at Catholic University Law School.

His children were likewise athletic and skilled at deal-making. Katherine (Kasia), one of the most accomplished athletes in Delaware history, was a five-time all-American in field hockey and lacrosse at Williams College, where she was named *College Sports Magazine*’s 1995–96 Division III Female Athlete of the Year. John was second-team all-state running back at Tower Hill. Larry Jr.

was a promising soccer player, but a neck injury made it advisable that he be a mere spectator when his Hiller classmates won the 1985 state championship. Each, with an MBA or law degree, works in competitive fields of finance.

In 2009, Parkinson’s disease made a sudden appearance, and Sullivan ceded his position after four remarkable decades. His mind, friendships and business activities remain vigorous, although he relies greatly on his wife Kate. They winter in Florida and share in the lives of

their six children and 11 grandchildren.

“Larry’s vision and immense belief in providing superb legal services to defendants who could otherwise not afford representation helped develop a Public Defenders Office that is the envy of states throughout our country,” said Mike Castle on the floor of the House of Representatives on Sullivan’s retirement in 2009, adding, “I thank him for being the individual who actually introduced me to the Republican Party and got me involved in public service.” ♦

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# OF COUNSEL: Lawrence M. Sullivan

**L**awrence M. Sullivan, who as a young man helped revive the Republican Party in Delaware at its hour of greatest need, spent the final four decades of his career building a statesman's legacy, creating a Public Defender's office that became a model for the nation.

With over 45 years of law practice, Larry Sullivan was an exemplar of the art of persuasion, breezy or hard-nosed as the case warranted. He was a countywide elected official before he turned 30, yet built lasting influence by developing alliances and friends regardless of party.

His lasting impact came in the role to which Gov. Russ Peterson nominated him in 1970. The Public Defender then headed a sparse office, all but one of its seven lawyers working part-time, at the dawn of an era when public budgets would shrivel, especially for services to the indigent, a time when elected officials built careers on public anger at the accused.

Against this backdrop over 39 years, Sullivan creatively deployed political skills and lawyerly persuasion, cajoling the General Assembly into providing sufficient funding for the Public Defender to represent adequately its thousands of clients and enabling the office to hire many of the State's most talented trial lawyers over two generations, building an environment in which many of them spent their entire careers.

"I played off the Attorney General's office," says Sullivan. "Since we had the responsibility to provide for the defense, I would try to have my budget equal to the prosecution. It was difficult to do. I would point out the disparity between the prosecution and the defense, and try to get the funding for the Public Defender's office as equal to the prosecution as I could."

Reappointed to six more six-year terms, including once when a Democratic State Senate balked at Gov. Sherman Tribbitt's initial nomination of a Democrat, Sullivan was able to secure facilities, staff and infrastructure, even through



**Sullivan creatively deployed political skills and lawyerly persuasion, cajoling the General Assembly into providing sufficient funding for the Public Defender to represent adequately its thousands of clients. . . .**

budget troughs.

"I've admired his tenacity," says Victor Battaglia, Sr., whose practice and public service regularly intersected with Sullivan's. "It was the perfect job for him, and he did it with style and grace."

With more than 70 lawyers and a comparably-sized support staff, the Public Defender handles over 50,000 cases annually. Its lawyers remain overworked by the ideals of ABA standards, but their professionalism is acknowledged by prosecutors and judges, their expertise reflected in case law.

"Larry built a first-rate law firm from scratch," says Brendan O'Neill, who worked in the office for 16 years before succeeding Sullivan in 2009. "He really brought Delaware into the modern age in providing indigent defendants with effective counsel."

"Larry was also a genius in embracing technology. He was an early advocate in acquiring PC's for the attorneys and staff to manage information about their cases. He developed the use of the videophone for communicating with clients in custody."

Larry Sullivan made an impact almost immediately after joining the bar in 1964 after attending

Catholic University Law School and clerking for Judge Thomas Herlihy, Jr. While developing a practice with Steve Potter and then Dave Roeberg, he led a group known as the Active Young Republicans of Wilmington into prominence.

Politics, practiced well, means getting people to work together. Sullivan first got them to play together, in sports and social activities.

"We had a basketball league and a softball league for young kids, with jerseys that said Active Young Republicans of Wilmington, which would be worn in every neighborhood of the city," recalls Sullivan. "They got into the homes of an awful lot of Democrats."

The Young Republicans team in the Metropolitan League was laden with aspiring professionals (*Continued on page 26*)



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