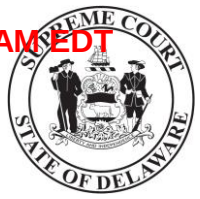

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN ORTIZ,	)	
	)	
Defendant Below-	)	**No. 650, 2015**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

John Williams (#365)
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
JohnR.Williams@State.de.us

DATE: August 11, 2017

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

STATUTES AND OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Juan Ortiz's June 20, 2017 Corrected Opening Brief. This is the State's Answering Brief in opposition to Ortiz's appeal from the two Superior Court decisions of January 15, 2013 and November 4, 2015 denying post-conviction relief and the Superior Court decision of February 15, 2017 denying a motion for resentencing as a Class A felon pursuant to 11 Del. C. § 4205.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court Judge who presided both at the defendant's July 2003 jury trial and the extensive post-conviction relief evidentiary hearings did not abuse his discretion in denying post-conviction relief in two opinions on January 15, 2013 and October 28, 2015. Trial counsel was not ineffective in attempting to present an EED defense at trial based on the limited evidence known at the time. The effort to argue extreme emotional distress was severely hampered by the defendant's own videotaped statement to the police shortly after the July 6, 2001 homicide that his shooting the victim two times was an accident.

Juan Ortiz did not tell his counsel until after trial began on July 16, 2003, that he intentionally shot Deborah Clay and that the killing was not an accident. Until Ortiz admitted his conduct was intentional there was no basis to assert extreme emotional distress in an attempt to reduce an intentional first degree murder to manslaughter.

II. DENIED. Juan J. Ortiz was correctly resentenced in 2017 pursuant to the alternative life sentence provision of 11 Del. C. § 4209(a). Even if Ortiz was only sentenced as a Class A felon under 11 Del. C. § 4205(b)(1), his status as an habitual criminal under 11 Del. C. § 4214(a) and his conviction in 2003 for a

violent felony still requires a mandatory life sentence for the first degree murder conviction.

STATEMENT OF FACTS

On direct appeal in 2005, this Court found the following operative facts concerning Juan Ortiz's July 6, 2001 murder of Deborah Clay:

> Deborah Clay entered into a romantic relationship with Ortiz in 2001. Deborah was forty-one years old in July of that year. In March 2001, Ortiz moved into Deborah's home. At that time, Deborah's fifteen-year-old daughter, Ashley, was living with Deborah.
>
> Ortiz stayed with Deborah and Ashley from March 19, 2001 to May 29, 2001. During that time, Ortiz was under home confinement by the Delaware Department of Corrections. His monitoring device was located in the back bedroom of Deborah's home. Ortiz left for a few months and returned to Deborah's home on June 26, 2001. On July 4, Ashley heard Deborah tell Ortiz he had to move out of her home by that Sunday.
>
> The next evening, July 5, Ashley tried to open the door to her mother's bedroom, but the door was locked. Ortiz was in that bedroom. When he unlocked the door, Ashley noticed Deborah's waterbed was deflated. Ortiz was upset and crying. He told Ashley that he tried to shoot himself but missed and shot the waterbed. Ortiz said that he was going to have Deborah take him to a mental institution.
>
> Later that night, around 11:00 p.m., when Ashley returned home, Ortiz appeared normal. Ashley then called her mother to ask permission to go out with her friends. Deborah did not want Ashley to go out because Deborah feared being alone with Ortiz at her home. Deborah also requested Ashley to tell Ortiz that "he still had to be out by Sunday."
>
> Deborah's son, Brock Pritchett, who was twenty-seven years old, owned a 6 mm rifle and a 12-gauge bolt action shotgun. Deborah and Ortiz stored those guns for Brock at Robert Cox's house. Brock requested possession of his guns a few days before July 6. On July 5, 2001, Ortiz obtained the guns from Cox around 7:00 a.m. When

Brock asked Ortiz about his guns later that same evening, however, Ortiz told Brock that he was not able to get in touch with Cox.

The next day, July 6, 2001, Ashley found Ortiz at home around noon. He told Ashley that he and her mother had not spoken the night before and that "all hell was going to break loose when [Deborah] got home . . . ." That same afternoon, Deborah had called her friend, Amy Rust, around 2:00 or 2:30 p.m. from Mike Ratledge's house. Deborah called Rust later at 3:15 p.m. from her own home and told Rust she was about to get into the shower. She requested that Rust pick her up because she was late for work.

Tonya Russell, a neighbor of Deborah's, testified that on the afternoon of July 6, she saw Ortiz leave Deborah's residence, get into his truck, and go back inside the home. According to Russell, Ortiz was inside the residence for approximately three minutes and then left very quickly. Russell noticed smoke coming from Deborah's home about fifteen to twenty minutes after Ortiz left. Russell knocked on Deborah's bedroom window and the back door. After hearing no response, Tonya called 911 at 3:32 p.m. When Amy Rust arrived at Deborah's home, it was on fire. Firefighters and fire trucks were already on the scene.

As the firefighters were extinguishing the fire, they discovered the body of a female in the bedroom. The body appeared to have been decapitated. The female body was Deborah Clay's. An autopsy revealed that Deborah had been shot in the lower right abdomen and also had sustained a fatal shot to the right side of her head above her ear.

The Delaware State Police also responded to the scene of the fire at Deborah's home. On top of the washing machine, in an alcove adjacent to the bathroom, the police discovered three pillows that were duct taped together. The pillows had a hole in them that corresponded to a hole found in the paneling between the hall and the shower. Inside the pillows, police found half of a Sabot slug and also located two shotgun wads in the bathroom. The police found a hole in the shower stall that was about 22 inches from the top of the tub. It was estimated that Deborah was standing about 25 inches away from the wall when she was shot while standing in the shower.

The Chief Deputy Fire Marshall concluded that the fire at Deborah's home had been started intentionally by an open flame. He also determined that two fires had been set: one in the center bedroom and one in the rear bedroom. The police found a burned 12-gauge shotgun in one of the bedrooms.

The police located Ortiz near Millsboro and took him into custody without incident. Among other things, police found an orange Philadelphia Flyers cigarette lighter. Ortiz told the police that the weapon he used to shoot Deborah was in her trailer. Ortiz stated that he was angry with Deborah and fired the shotgun at her from behind the wall while she was in the shower. Ortiz claimed that he thought the gun was "on safe." He then stated that he went to the bathroom, saw Deborah holding her side, and dropped the gun which went off when he dropped it. He ran from the house and traveled to the home near Millsboro, where he was eventually arrested.

Ortiz v. State, 869 A.2d 285, 289-90 (Del. 2005).

I. TRIAL COUNSEL WAS NOT INEFFECTIVE IN PRESENTING AN EXTREME EMOTIONAL DISTURBANCE (EED) DEFENSE

QUESTION PRESENTED

Was trial counsel ineffective in 2003 in attempting to present evidence of an extreme emotional disturbance (EED) defense?

STANDARD AND SCOPE OF REVIEW

"We review a Superior Court Judge's decision to deny postconviction relief for an abuse of discretion. When deciding legal or constitutional questions, we apply a de novo standard of review." Ploof v. State, 75 A.3d 811, 820 (Del. 2013). See State v. Reyes, 155 A.3d 331, 339 (Del. 2017); Purnell v. State, 106 A.3d 337, 341 (Del. 2014).

MERITS OF THE ARGUMENT

In Claim IV of his 2007 amended motion for post-conviction relief, Juan J. Ortiz's first post-conviction counsel argued that trial counsel in 2003 was ineffective for not presenting evidence that Ortiz's July 6, 2001 fatal shooting of Deborah Clay occurred during a period of extreme emotional distress (EED). See 11 Del. C. § 641. Trial counsel did attempt to present an EED defense to reduce the intentional killing from first degree murder to manslaughter by calling Ashley Clay, the homicide victim's 15 year old daughter, as a witness. Ortiz v. State, 869 A.2d 285, 289 (Del. 2005).

Following extensive post-conviction evidentiary hearing proceedings, the Kent County Superior Court on January 15, 2013 denied post-conviction relief on the EED claim. State v. Ortiz, Del. Super., ID No. 0107004046, Vaughn, P. J. (Jan. 15, 2013) at pp. 11-20. (Exhibit A to June 20, 2017 Corrected Opening Brief). The Superior Court Judge stated: "I find that Ortiz cannot show either deficient performance or resulting prejudice concerning the trial presentation of the EED defense." State v. Ortiz, supra at 15 (Exhibit A to Opening Brief).

In the January 2013 initial Rule 61 post-conviction relief denial of post-conviction relief as to the EED claim, the Superior Court Judge explained:

> Initially, it must be noted that the assertion of an EED defense was in inescapable conflict with Ortiz's own original account of how the event occurred. The EED defense was also weakened from the outset because there was a videotaped statement from Ortiz to the police wherein he claimed the shooting was an accident. Ortiz maintained this position from the time of his arrest until the untimely admission to counsel during trial that he did, in fact, intend to shoot the victim. If he had made this revelation before trial, counsel would have been able to more thoroughly investigate and prepare a credible EED defense without committing resources and time to the accident theory. Although it was later revealed that Ortiz made the admission regarding intent to Dr. Mensch in May 2003, Ortiz's original representations to both Dr. Mensch (after a ten hour psychological evaluation) and Dr. Mechanick (after a four hour psychiatric examination) that the shooting was an accident meant that neither mental health expert was willing to opine definitively as to EED.

State v. Ortiz, supra at 15-16 (Exhibit A to Opening Brief).

Ashley Clay, the victim's minor daughter, did testify for the defense at the

2003 jury trial about Ortiz's distress and an alleged suicide attempt after the victim Deborah Clay told Ortiz that he had to move out of her mobile home. Ortiz v. State, 869 A.2d 285, 289 (Del. 2005). "The jury also was made aware that the threatened move may have been especially upsetting to Ortiz because he was serving a Level IV home confinement sentence, and would have had to return to Level V incarceration if he was unable to find another suitable host residence." State v. Ortiz, supra at 17 (Exhibit A to Opening Brief).

This trial evidence (primarily from Ashley Clay) was sufficient for the defendant at trial to request a jury instruction on manslaughter [11 Del. C. § 632(3)], and to argue to the jury in the guilt phase closing statement that the jury should consider manslaughter as a possible alternative verdict to first degree murder. (A-2390-96). While the EED trial evidence in 2003 was limited, there was still sufficient evidence to warrant manslaughter and EED jury instructions. (A-2434-38). See 11 Del. C. § 303(c) (a defendant is entitled to a jury instruction if some credible evidence of a defense is presented). Although Ortiz's jury had the option to convict him only of manslaughter, the jury rejected the EED defense and found the intentional shooting of Clay twice to be first degree murder. "There are significant facts in the record that are inconsistent with the theory that Ortiz was under 'extreme emotional distress,' and more in accord with the converse notion that the killing involved premeditation and substantial planning." State v. Ortiz,

supra at 18 (Exhibit A to Opening Brief).

In denying post-conviction relief in 2013 (Exhibit A to Opening Brief), the Superior Court Judge, who was also the trial judge in 2003, reiterated some of these inconsistent facts and noted:

> The proof of [premeditation and substantial planning] is in such evidence as the making of the pillow roll, referred to during trial as a "homemade silencer," the defendant's untruthfulness to Brock the day before in saying he hadn't been able to get up with the friend to get the guns, when in fact he already had them; and the fact that the murder occurred only a few minutes after the victim arrived home that afternoon.

State v. Ortiz, 2003 WL 22383294, at * 5 (Del. Super. Sept. 26, 2003).

Furthermore, "The defendant's actions following the shooting are also hard to reconcile with the idea that he was under EED: he intentionally set two fires in the home, one of which was in close proximity to the shotgun used to kill the victim. The fires are highly indicative of an attempt to destroy the evidence of his crime." State v. Ortiz, supra at 19 (Exhibit A to Opening Brief). "Even if counsel was able to acquire and present expert testimony supporting EED after Ortiz admitted his intent, the jury would be free to conclude that Ortiz was simply a liar who changes his story when convenient." State v. Ortiz, supra at 17-18 (Exhibit A to Opening Brief).

In conclusion in 2013, the trial and post-conviction judge found no professionally incompetent conduct by trial counsel or any resulting prejudice as

required by Strickland v. Washington, 466 U.S. 668, 687-88, 693-94 (1984). The Superior Court Judge wrote:

> Ortiz was unable to secure an expert opinion stating that he was under EED at the time of the shooting because he continually insisted that it was an accident. Even if Dr. Mensch and Dr. Mack were to testify regarding EED at the guilt phase of the trial, the jury as the finder of fact would be free to accept or reject their testimony as they saw fit. As discussed earlier, Ortiz's prior claim to police that the killing was an accident would undermine any expert's opinion premised on a new version of events. Similarly, a jury would have no reason to disregard the substantial pre-killing preparation evidence and post-killing arson evidence simply because expert testimony was now introduced. After considering the evidence presented at trial and the defendant's now proffered evidence of "extreme emotional distress," I conclude that Ortiz cannot establish that trial counsel's alleged unprofessional errors affected the outcome of the trial. He has, therefore, failed to rebut the presumption of attorney [competence] mandated by Strickland and failed to show a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."

State v. Ortiz, supra at 19-20 (Exhibit A to Opening Brief).

The Superior Court Judge's 2013 findings of fact are supported by competent evidence presented during the initial, extensive post-conviction evidentiary hearing proceedings and should be upheld on appeal. In addition, the Superior Court Judge's 2013 conclusions of law as to the ineffective assistance of trial counsel claim regarding presentation of an EED defense are also correct and should be affirmed on appeal. Ortiz has demonstrated no abuse of discretion in the Superior Court's 2013 initial denial of post-conviction relief. (Exhibit A to Opening Brief).

The post-conviction hearing evidence discussed by the Superior Court Judge in the initial January 15, 2013 denial of post-conviction relief does not support a conclusion that Ortiz's two trial attorneys (Lloyd Schmid and Deborah Carey) were professionally incompetent in their attempt to present an EED defense at the 2003 trial. Claim IV of the 2007 amended Rule 61 motion is an argument that Schmid and Carey should have presented additional EED evidence in the form of expert psychological testimony that Ortiz was acting under extreme emotional distress (EED) when he shot Deborah Clay using a shotgun muffled with pillows, reloaded the weapon, moved into the bathroom, and shot the bleeding Clay a second time in the head.

Neither of the two defense psychologists (Drs. Abraham Mensch and Jonathan Mack) explain why if Ortiz was committing an intentional murder on July 6, 2001 while under an altered mental state that the defendant set two fires in Deborah Clay's trailer after shooting the victim twice, left the shotgun (the murder weapon) where he set the first fire in Ashley's bedroom, cut off his home confinement ankle monitoring device, took the second weapon (Brock's rife) with him, and fled the County. The fire settings and later conduct, including the false story to the police that he accidently shot Clay twice, are hardly the work of someone in the throes of extreme emotional distress. The post-shooting conduct of Ortiz is purposeful, deliberate, and an obvious attempt to destroy evidence and

avoid apprehension. When caught by the police in Sussex County, career criminal Juan Ortiz simply tried to lie his way out of any criminal responsibility.

An accused has the burden of proving by a preponderance of the evidence the existence of extreme emotional distress in order to reduce a first degree intentional murder to manslaughter. 11 Del. C. § 641. See Cruz v. State, 12 A.3d 1132, 1136 (Del. 2011); Chinski v. State, 2002 WL 1924786, at * 1 (Del. Aug. 14, 2002); State v. Moyer, 387 A.2d 194, 196-97 (Del. 1978). Specifically, the defendant must prove two essential elements: (1) that he acted under the influence of EED; and (2) that there was a reasonable explanation or excuse for the EED. The two required elements of proof are factual. Cruz, 12 A.3d at 1136.

In this appeal from the denial of post-conviction relief, Ortiz's third set of post-conviction counsel faults trial counsel at the July 2003 Superior Court jury trial for not putting on additional evidence to support EED primarily by not presenting a mental health expert witness and not impeaching two State rebuttal witnesses, Amy Rust and Mike Ratledge. (June 20, 2017 Corrected Opening Brief at 15-16). Neither complaint is a basis for post-conviction relief requiring a new trial 14 years after Ortiz's original trial and 16 years after the defendant's arrest.

The primary complaint about not introducing a mental health expert witness to testify that Ortiz was under the influence of extreme emotional distress (EED)

when he fatally shot Deborah Clay on July 6, 2001 highlights an anomaly of Delaware evidentiary law.

Delaware has not adopted Federal Rule of Evidence (F.R.E.) 704(b), which states: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." See State v. Magner, 732 A.2d 234, 244 (Del. Super. 1997) ("Delaware, however, has not adopted this rule but allows expert psychiatric testimony regarding a defendant's mental state that may serve as a defense.").

The anomaly here is at least two-fold. First, if Ortiz was on trial in the federal Delaware District Court, rather than the State Superior Court, F.R.E. 704(b) would prevent him from attempting to present any expert mental health witness to give an opinion that Ortiz had EED when he fatally shot Clay. Second, in Delaware State court proceedings by case law expert witnesses are prohibited from testifying that a complaining witness is telling the truth in describing a crime. See Wheat v. State, 527 A.2d 269, 274-75 (Del. 1987).

Why an expert in a Delaware State court criminal trial may not say a complaining witness is being truthful in describing a crime, but a mental health expert can speculate that a defendant had EED at the time he committed a crime many years earlier is illogical. If an expert cannot present an admissible opinion

that someone is being truthful, why should a psychiatrist be permitted to offer an expert medical opinion that Ortiz had EED 13 years earlier?

The distinction is anomalous and highlights the obviously speculative nature of EED expert opinions based primarily on self-reports of the interested criminal defendant about events often occurring many years in the past. Ortiz's crime was July 6, 2001. At any retrial an EED expert would be giving an opinion about matters occurring at least 16 years previously. The reliability of such an expert opinion in a serious criminal prosecution is dubious, and that is part of the reason for the prohibition of F.R.E. 704(b). A jury, not a speculating expert witness, should be making any determination that reduces an intentional first degree murder to manslaughter.

Another complication here is that EED is a legal, not a psychological, construct. Cruz, 12 A.3d at 1136. While expert testimony is permissible in Delaware State court criminal prosecutions about whether an accused was or was not under the influence of extreme emotional distress at the time of an intentional killing, "A jury may always disregard the testimony of a witness and draw its own conclusions." Magner, 732 A.2d at 245. "The fact finder 'is free to accept or reject in whole or in part testimony offered before it, and to fix its verdict upon the testimony it accepts'." Cruz, 12 A.3d at 1136 (quoting Debernard v. Reed, 277 A.2d 684, 685 (Del. 1971)). "Moreover, when faced with testimony from mental

health experts, fact finders may 'accept it, reject it, or give it whatever weight they [see] fit.'" Cruz, 12 A.3d at 1136 (quoting Longoria v. State, 168 A.2d 695, 704 (Del. 1961)). See also Magner, 732 A.2d at 245.

Deborah L. Carey, one of Ortiz's two attorneys at the July 2003 trial, testified that the defendant told his attorneys at least 5 versions of how the shooting occurred. (A-3089, 3118-19). Only after trial began on July 16, 2003 did Ortiz admit to Carey that the shooting was not an accident. (A-3121-22). This admission during trial in 2003 posed a significant problem for defense counsel because in his 2001 videotaped statement to the police Ortiz claimed the shooting of the female victim was an accident. (A-3117).

Trial counsel for Ortiz had the accused examined before trial by both a psychologist, Dr. Abraham Mensch, and a psychiatrist, Stephen M. Mechanick, M. D. Mensch was asked by defense counsel to look at EED in the initial contact with Ortiz. (A-3179). At the Rule 61 hearing, Mensch testified that Ortiz's claim of an accident and the accused's description of the event made EED doubtful because EED involves intentional action, not accident. (A-3181).

When Mensch saw Ortiz a second time on May 31, 2003, shortly before the start of trial on July 16, 2003, Ortiz changed his story and belatedly acknowledged that he meant to kill Clay. (A-3205). While Ortiz's account to Mensch changed on May 31, 2003 (A-3102), that information from the psychologist was not

communicated to trial counsel. Carey testified that the defense was "trying to get EED" (A-3104), but her information based on the initial 10 hour prison visit by Mensch with Ortiz (A-3185) was that the examining psychologist did not think EED was present. (A-3102-03). Carey also noted that Ortiz's differing versions of the shooting "would backtrack." (A-3103, 3120-21).

The defense psychiatrist, Dr. Mechanick, examined Ortiz for 4 hours (A-2981) on November 9, 2001. (A-3293). Mechanick had strong doubts about the truthfulness of Ortiz's version of the 2001 shooting (A-2983), and the psychiatrist did not think the defendant met the standard definition of EED. (A-2984). Dr. Mechanick testified 3 times in Ortiz's extended Rule 61 hearing proceedings (May 12, 2009, May 12, 2011, and September 2, 2014). In neither his 2009 nor 2011 Rule 61 testimony did Mechanick think Ortiz was acting under extreme emotional distress during the 2001 shooting. (A-3280-81).

After re-examining Ortiz on December 16, 2013 (A-3697), over 12 years after the first examination on November 9, 2001 (A-3693-94), Mechanick changed his EED opinion. In his September 2, 2014 remand Rule 61 testimony (his third testimony in the State collateral review proceedings), Mechanick expressed a different opinion and stated, "That at the time of the conduct charged he was suffering from extreme emotional distress." (A-3697). Obviously, Mechanick's

revised opinion first expressed in an August 26, 2014 written report (A-3696) was never available to trial counsel in July 2003.

Attorney Carey in her own July 20, 2010 Rule 61 testimony discussed at length the difficulty in trying to present an EED defense in July 2003, when to her knowledge neither mental health expert (Mensch and Mechanick) engaged by the defense would say EED was present. (A-3131-46). While the defense wanted the EED information presented to Ortiz's jury (A-3134), they could not get an expert to say the shooting resulted from EED. (A-3135). The defense did get an EED jury instruction, and they presented what evidence they knew was available. (A-3139).

Carey also pointed out that Ortiz's involvement with 6 women at the time of the homicide made an EED defense a problem. (A-3139-40). Carey acknowledged that the prior planning evidence (Ortiz firing at the waterbed the day prior and claiming it was a suicide attempt, taping pillows to Brock's shotgun as a homemade silencer, and telling Ashley Clay not to come home on July 6, 2001) made an EED assertion difficult. (A-3148-49). Carey testified that Ortiz's pillow silencer taped to the shotgun was a major problem for asserting an EED defense. (A-3149). In Carey's mind, the homemade pillow silencer devised by Ortiz was "evidence of premeditation." (A-3149).

Not only was defense counsel handicapped at trial by Ortiz's claim of an accident and the fact that they did not think there was any mental health expert

willing to testify to the presence of EED, but Ortiz's own prior felony assault record made it difficult to put the accused on the witness stand at the guilt phase. Ortiz was a career criminal under 11 Del. C. § 4214(a). (B-1-3). The defendant had pled guilty to 4 prior assaults. (A-3129, 3147-48, 3150-52). The prior convictions involved breaking a man's nose, breaking his son Bubba's collarbone, attacking Vincent Spicer in prison, and a sexual assault of a minor female. (A-3150-52).

Having this violent career criminal record exposed to the jury during the guilt phase if Ortiz was to attempt to testify about his own emotions at the time of the shooting was problematic. Hearing this information at the guilt phase, a lay jury could easily conclude that Ortiz is a violent person and has been so for a long time. Contradicting his prior recorded police statement that the shooting was accidental would undermine Ortiz's credibility at any penalty phase proceeding where Ortiz did allocute. (A-3123).

Juan Ortiz's parents were of little or no assistance to the defense prior to trial. The defendant's father indicated that he did not want to participate in his son's trial and he did not cooperate with trial defense counsel. (A-3011). The defense was unable to locate Ortiz's mother, Delores Arnold, until September 2002 because she had moved. (A-2909-10). Carey testified that the defendant did not supply information in 2001 or 2002 to assist at his trial. (A-3095).

After the Superior Court initially denied post-conviction relief on January 15, 2013 (Exhibit A to June 20, 2017 Corrected Opening Brief), Ortiz appealed to this Court. During the pendency of that appeal, new post-conviction counsel was appointed. Ortiz's new counsel requested that the appeal be remanded in order to permit the presentation of additional post-conviction evidence. The Supreme Court granted the defense remand request on March 20, 2014. Ortiz v. State, 2014 WL 3375593, at * 1 (Dl. Mar. 20, 2014).

On remand from this Court, Ortiz's new post-conviction counsel filed a supplemental Rule 61 motion on August 15, 2014, took two depositions on September 2, 2014 (including Dr. Mechanick's third appearance as a witness in the proceeding), and presented defense witnesses (including Schmid and Carey again) at in-court hearings on September 22, 2014 and December 15, 2014. Ortiz v. State, Del. Super., ID No. 0107004046A, Vaughn, J. (Oct. 28, 2015) (Exhibit B to June 20, 2017 Corrected Opening Brief). After considering this additional 2014 evidence, the Superior Court Judge, who has presided throughout all of Ortiz's trial court proceedings from 2003 thru 2015, again denied post-conviction relief on October 28, 2015. (Exhibit B to June 20, 2017 Corrected Opening Brief).

In 2015 the Superior Court Judge was still not persuaded that Ortiz received ineffective assistance of counsel in 2003, even though Dr. Mechanick after a December 16, 2013 re-interview of Ortiz was now willing to say that Ortiz was

under the influence of EED during the July 6, 2001 shooting of Deborah Clay. Ortiz v. State, supra at 3-5 (Exhibit B to June 20, 2017 Corrected Opening Brief). The Superior Court Judge did not abuse his discretion in again denying post-conviction relief on October 28, 2015. Id.

Initially, the trial judge observed in 2015 that when re-examined by the defense psychiatrist on December 16, 2013, ". . . Ortiz gave Dr. Mechanick a very different version of the killing . . . ." Ortiz v. State, supra, at 3 (Exhibit B to June 20, 2017 Corrected Opening Brief). The trial judge pointed out that "A revised psychological opinion dependent upon Ortiz's own altered report of events and presented over 13 years after the crime and initial evaluation of the defendant should reasonably be viewed with 'extreme skepticism.'" Ortiz v. State, supra, at 3 (Exhibit B to Opening Brief) (quoting State v. Swan, 2010 WL 1493122, at * 11 (Del. Super. Apr. 8, 2010)).

The trial judge in 2015 correctly denied the revised defense post-conviction claims about EED and related Claim IV contentions and stated:

> Trial counsel cannot be found to have been ineffective in 2003 based upon an expert opinion rendered in 2013 which relied in significant part on an altered and far more extensive version of events than Ortiz had apparently been willing to give in 2003. Trial counsel did the best they could to give the jury an opportunity to conclude that Ortiz was suffering from EED, but they could not overcome the statement to the police that the shooting was an accident.

> In connection with this issue, Ortiz also argues that his trial counsel failed to argue other evidence at trial in support of an EED defense, failed to impeach two witnesses, and that the cumulative effect of the EED related factors constituted ineffectiveness.
>
> I find that even if Dr. Mechanick's EED opinion was available in 2003 and the factors mentioned in the preceding paragraph had been pursued at trial, Ortiz cannot establish prejudice as that term is used under Strickland. The jury would be confronted with the fact that Ortiz was giving different versions of how the shooting occurred. There was significant evidence of prior planning, such as the fact that Ortiz had retrieved the two guns from another residence the day before, that he had test fired at the water bed the day before, that he had taped pillows to the shot gun to serve as a homemade silencer, and that he had told Ashley not to come home on July 6. Dr. Mechanick's current opinion also finds that Ortiz had an Anti-social Personality Disorder at the time of the crime. "The State may rebut claims of extreme emotional distress with evidence of anti-social personality disorder." Under all of the facts and circumstances, I find that the defendant has not established that there is a reasonable probability that the new EED evidence would have led to a different result.

Ortiz v. State, supra, at 4-5 (Exhibit B to June 20, 2017 Corrected Opening Brief).

During his September 2, 2014 Rule 61 deposition testimony on remand, Dr. Mechanick explained that he now thought Ortiz was experiencing stress from several sources and that these stressors caused EED in Ortiz on July 6, 2001. (A-3699-3703). It was Mechanick's opinion that Ortiz was not responsible for the stressors that were present on the day of the shooting and arson, so this met the Delaware definition of extreme emotional distress. (A-3703). See 11 Del. C. § 641.

One source of stress for Ortiz identified by Mechanick was Ortiz's belief that "Ms. Clay had had sexual intercourse with Mr. Ratledge on the date of the crime." (A-3701). Of course, Ortiz also acknowledged to Mechanick that he had sexual relations with Stacy Wilson even though Ortiz was engaged to Deborah Clay. (A-3705-07, 3731-32). Another source of stress for Ortiz identified by Mechanick was Clay's decision to remove Ortiz's vehicle from her automotive insurance. (A-3700-01). Again, Ortiz also admitted to Mechanick that he "did not have a license or his license was suspended." (A-3733). Likewise, while Ortiz was stressed by Clay's threat that Ortiz would not see her 15 year old daughter Ashley Clay again (A-3701-02), as a convicted sex offender Ortiz was not supposed to have contact with any minor and certainly should not have been living in the same household. (A-3735).

Ortiz's behavior at times was obviously illogical and self-contradictory. How valid a lay jury would view such perceived stressors based on double standards and illogical thinking is an open question. Ortiz's murderous rage at Clay is as easily explained by the defendant's extensive criminal history of assaultive behavior resulting in prior imprisonment and his diagnosis of antisocial personality disorder as it is by attempting to prove the existence of EED to reduce an intentional first degree murder to manslaughter.

To prove EED, Ortiz had to demonstrate that there was a reasonable explanation or excuse for the EED. Cruz v. State, 12 A.3d 1132, 1136 (Del. 2011). There is nothing reasonable in Ortiz's vengeful and violent behavior on July 5-6, 2001. If Ortiz was truly concerned about losing his Level IV host residence and having to return to Level V prison confinement, murdering Deborah Clay and burning up her trailer was not going to solve that problem. What Ortiz did was a planned, execution-style murder, and there is nothing reasonable in his conduct.

At his 2014 remand Rule 61 deposition, Dr. Mechanick did say that in his opinion Ortiz has antisocial personality disorder. (A-3714). Mechanick explained that the psychological disorder is "an enduring pattern of behavior beginning in late adolescence or early adulthood." (A-3771). To meet the diagnosis criteria for the disorder, a person must exhibit at least three of the identified criteria such as "reckless behavior, behavior that could be grounds for arrest or incarceration, absence of remorse, failure to maintain obligations such as employment or child support . . . ." (A-3771-72).

Ortiz's dismissal history of not paying child support for his numerous illegitimate children is evidence of the defendant's financial irresponsibility. (A-3776). Mechanick did not think Ortiz's antisocial personality disorder caused or created his EED (A-3714-16); however, he did concede that the disorder played a role in Ortiz's violent conduct toward Deborah Clay. (A-3778-79). Ortiz is a

violent, irresponsible mess, and his antisocial personality disorder only makes his outrageous conduct more reprehensible.

Impulsivity and failure to plan ahead are also characteristics of the antisocial personality disorder according to Mechanick. (A-3772). Ortiz's murderous conduct at the time of Clay's killing is certainly impulsive and irrational behavior. If Ortiz was genuinely stressed because Clay informed him that he would not see her 15 year old daughter Ashley in the future (A-3709-10), murdering Ashley's mother was not going to solve that problem.

Likewise, if Ortiz was stressed because he might have to return to Level V confinement (perhaps the most likely explanation for Ortiz's violence), it was Ortiz's prior criminal behavior that resulted in his even being on home confinement. Blaming the homicide victim for her own violent death as Mechanick appears to do when he says that there were numerous things Deborah Clay did "which created the extreme emotional distress" (A-3713) is not a tactic a jury will find appealing.

Trial counsel Deborah Carey pointed out that Ortiz's involvement with 6 women at the time of the homicide made presenting on EED defense hard. (A-3139-40, 4136-37). In her 2014 Rule 61 remand testimony, Carey recalled discussing Ortiz's blatant promiscuity with Linda Zervas in the PD's office. (A-4136-37). Carey testified, ". . . if one of our team was thinking that he didn't have

EED because he had all this promiscuity and all these women, then certainly that would have been thought of by the jurors." (A-4136).

Mechanick's only explanation for this legal conundrum was that "people can have double standards." (A-3789). That flip explanation does not meet the second criteria for EED – that there is a reasonable explanation for the conduct. (A-3711). Having a "double standard" for judging perceived infidelity hardly sounds like a "reasonable" explanation a jury would accept.

As noted, Ortiz's July 6, 2001 murder of Deborah Clay was a planned, execution-style killing of an unsuspecting victim who was taking a shower in her own home. It was not a spur of the moment reaction to an immediate provocation. Ortiz was told on July 4 that he had to leave by Sunday, July 8. Ortiz's actions were not reasonable, but merely the typical violent response of a narcissistic criminal who has taken little, if any, responsibility for his conduct.

Ortiz's actions on July 6, 2001 are merely another example of his uncontrolled rage that resulted in prior imprisonments. Attempting to present an EED defense was fraught with obstacles, and trial counsel in 2003 was not ineffective in their attempts to present what meager evidence was available. Dr. Mechanick's revised EED opinion does not present a reasonable probability of a manslaughter verdict.

Ortiz is not entitled to a complete new trial 14 years after the July 2003 trial to decide the question of his criminal responsibility for Deborah Clay's death. Ortiz has always admitted he shot Clay. He merely for a time pretended that the killing was an accident.

II. THE DEFENDANT WAS CORRECTLY RESENTENCED

QUESTION PRESENTED

Was the former capital defendant correctly resentenced under 11 Del. C. § 4209(a)?

STANDARD AND SCOPE OF REVIEW

The question of which sentencing provision applies to the resentencing of a former capital inmate is an issue of law subject to de novo appellate review. See Harper v. State, 121 A.3d 24, 29 (Del. 2015); Burrell v. State, 953 A.2d 957, 960 (Del. 2008). See also Clay v. State, 2017 WL 2391823, at * 5 (Del. June 1, 2017).

MERITS OF ARGUMENT

Following this Court's 2016 decisions in Rauf v. State, 145 A.3d 430 (Del. 2016), and Powell v. State, 153 A.3d 69 (Del. 2016), Juan J. Ortiz's 2015 pending appeal from the Superior Court's denial of post-conviction relief was remanded on January 26, 2017 for resentencing in the trial court. (A-4275-76). Ortiz filed a motion with the Superior Court arguing that he should not automatically be resentenced to life without parole for his 2003 first degree murder conviction. (A-4286-91). Rather, "Mr. Ortiz requests that the Court sentence him pursuant to the Class A felony statute. 11 Del. C. § 4205." (A-4291). The Superior Court by two page letter dated February 15, 2017 [Docket Item # 320 at A-35] denied the defense sentencing request" . . . . for the reasons stated in this court's February 10, 2017

Memorandum Opinion in Swan v. State . . . ." (Copies of both Judge Parkins' February 15, 2017 letter in Juan Ortiz and his February 10, 2017 Memorandum Opinion in Ralph Swan are attached as Exhibit C to Ortiz's June 20, 2017 Corrected Opening Brief in this appeal).

Thereafter, the Superior Court on February 21, 2017 declared Juan Ortiz an habitual criminal pursuant to 11 Del. C. § 4214(a), and for his first degree murder conviction, Cr. A. No. IK01-07-0438, resentenced the defendant by placing him in the custody of the Department of Correction for the balance of his natural life at supervision level 5. (B-1-4). In the Notes Section of Ortiz's February 21, 2017 Modified Sentence Order, Judge Parkins also vacated the prior September 26, 2003 death sentence and pursuant to the alternative sentencing provision of 11 Del. C. § 4209(a), resentenced Ortiz "to a life sentence without the possibility of parole or probation or any other type of reduction. "(B-3). There is no legal error in Ortiz's February 21, 2017 resentencing, and Ortiz's revised sentence is correct and in accordance with the governing statutory provision (11 Del. C. § 4209(a)).

Contrary to Ortiz's broad assertion, this Court in Rauf v. State, 145 A.3d 430 (Del. 2016) did not strike down 11 Del. C. § 4209 in its entirety. (Opening Brief at 33). Likewise, Rauf does not declare the death penalty per se unconstitutional. Rather, the more limited holding of Rauf is that the procedure for imposing a death sentence contained in a portion of 11 Del. C. § 4209 violates the United States

Constitution Sixth Amendment jury trial right. In the future Delaware may still have a death penalty for first degree murder, but any new legislation must comply with the requirements of Hurst v. Florida, 136 S. Ct. 616 (2016) and Rauf v. State.

The Delaware sentencing scheme for a first degree murder conviction is relatively straight forward. "Murder in the first degree is a class A felony . . . ." 11 Del. C. § 636(b). 11 Del. C. § 4205(b)(1) provides the sentence range for a class A felony conviction (15 years to life), but it contains an express statutory exception for first degree murder convictions and states that for a first degree murder conviction "§ 4209 of this title shall apply." Ortiz cannot be resentenced as a class A felon only as he requested because the governing statute precludes his first degree murder conviction from the normal class A felony category for sentencing purposes.

Ortiz had to be sentenced under 11 Del. C. § 4209 for his first degree murder conviction because that is what the legislative provision 11 Del. C. § 4205(b)(1) says is applicable. 11 Del. C. § 4209(a) announces the punishment for an adult's first degree murder conviction as either ". . . death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction . . . ." Since Ortiz could no longer be subject to a death sentence after this Court's 2016 decisions in Rauf and Powell, 11 Del. C. § 4209(a) required that he be resentenced to a term of imprisonment for his natural life without any

possibility of a sentence reduction. That is the sentence the Superior Court imposed on February 21, 2017 (B1-4), and that sentence is correct.

In both his Superior Court motion (A-4290), and at page 35 of his June 20, 2017 Corrected Opening Brief, Ortiz argues that he "is entitled to be considered for a sentence of less than life in prison," and that he should even be subject to the 10 to 20 year sentencing range for second degree murder. These contentions fail for at least two reasons. First, as noted, the applicable statutory scheme requires that Ortiz receive the alternative life sentence of 11 Del. C. § 4209(a). Second, Ortiz was sentenced as an habitual criminal pursuant to the provisions of 11 Del. C. § 4214(a).

Ortiz murdered Deborah Clay on July 6, 2001. The law in effect at the time of the crime controls the sentence that may be imposed. See Watson v. State, 892 A.2d 366, 369 (Del. 2005) (". . . the status of the crime at the time of conviction is controlling for purposes of repeat offender status."). See also Wehde v. State, 2015 WL 5276752, at * 3 (Del. Sept. 9, 2015). In 2003, Ortiz was convicted of first degree murder.

Both at the time of the crime (2001) and the date of conviction (2003), Ortiz qualified for habitual criminal sentencing on the basis of his four prior assault convictions. (January 15, 2013 Superior Court Opinion at page 18, note 32, attached as Exhibit A to Ortiz's Corrected Opening Brief in this appeal). Ortiz's

2003 first degree murder conviction qualifies as a violent felony. 11 Del. C. § 4201(c). For an habitual criminal sentenced under 11 Del. C. § 4214(a), as Ortiz was on February 21, 2017, for a fourth or subsequent violent felony, the minimum sentence is the statutory maximum sentence for the current violent felony conviction. The statutory maximum sentence for a class A felony is life.

Even if Ortiz was only sentenced as a class A felon under 11 Del. C. § 4205(b)(1), as he argues on appeal, he must still receive a mandatory life sentence because he is an habitual criminal under 11 Del. C. § 4214(a) and his latest felony conviction for first degree murder is a violent felony requiring imposition of the statutory maximum penalty. While the Delaware habitual criminal statute was altered in 2016, Ortiz had to be sentenced under the predecessor statute in existence when the murder occurred and Ortiz was originally sentenced in 2003. In this case Ortiz's status as an habitual criminal under 11 Del. C. § 4214(a) and his conviction for a fourth or subsequent violent felony still requires a mandatory life sentence.

CONCLUSION

The judgment of the Superior Court denying post-conviction relief should be affirmed.

John Williams (#365)
JohnR.Williams@state.de.us
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: August 11, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN ORTIZ,	)	
	)	
Defendant Below-	)	**No. 650, 2015**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 11th day of August 2017, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on August 11, 2017, she did serve electronically the attached State's Answering Brief properly addressed to:

Herbert W. Mondros, Esquire
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801

(3) That on August 11, 2017, she serve by U. S. Mail two copies of the attached State's Answering Brief properly addressed to:

Samuel J. B. Angell, Esquire
Elizabeth Hadayia, Esquire
Federal Community Defender
Eastern District of Pennsylvania
Suite 545 West-Curtis Building
601 Walnut Street
Philadelphia, PA 19106

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN ORTIZ,	)	
	)	
Defendant Below-	)	**No. 650, 2015**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Micrsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7523 words, which were counted by Microsoft Word 2016.

John Williams (#365)
JohnR.Williams@state.de.us
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: August 11, 2017