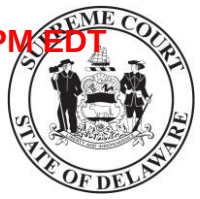

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN ORTIZ,	)	
Defendant Below,	)	
Appellant,	)	No. 650, 2015
	)	On Appeal from the
v.	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
Plaintiff Below,	)	for Kent County
Appellee.	)	

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

APPELLANT'S CORRECTED OPENING BRIEF

Herbert W. Mondros, (#3308)
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 888-1112

Samuel J.B. Angell (*pro hac vice*)
Elizabeth Hadayia (*pro hac vice*)
Federal Community Defender
Eastern District of Pennsylvania
Suite 545 West-Curtis Building
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520

Attorneys for Appellant

Dated: June 20, 2017

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PRELIMINARY STATEMENT CONCERNING CITATIONS AND FORM

Citations preceded by "A" refer to the Appendix. Citations preceded by "Op." refer to the initial Opinion denying Rule 61 relief issued on January 15, 2013 which is attached as Exhibit "A" to this brief. Citations preceded by "Supp.Op." refer to the Opinion denying relief to the Supplemental Petition for Rule 61 relief issued on October 28, 2015 and reissued on November 4, 2015, which is attached as Exhibit "B" to this brief. The Superior Court's Order dated February 15, 2017 denying Mr. Ortiz's Motion to Vacate Death Sentence and for New Sentencing Hearing is attached as Exhibit "C" to this brief. Mr. Ortiz is referred to by name or as Appellant.

NATURE OF PROCEEDINGS

A. Introduction

Appellant Juan Ortiz appeals the denial of post-conviction relief, pursuant to Superior Court Criminal Rule 61. In 2001, Mr. Ortiz was living with his girlfriend Deborah Clay. The two had a tumultuous relationship which became further troubled when Ms. Clay began an affair with another man and wanted to break things off with Mr. Ortiz. Mr. Ortiz, who has been diagnosed with organic brain damage and was traumatized both physically and sexually during his childhood, snapped under the stress of the situation and shot Deborah Clay after ongoing arguments about her infidelity. At trial, his lawyers failed to investigate, present and argue the available evidence which would have supported an extreme emotional distress ("EED") defense. Mr. Ortiz is entitled to a new trial.

B. Procedural History

On August 5, 2003, a jury convicted Mr. Ortiz of first degree murder for the shooting death of his girlfriend, Deborah Clay. A2539. After a penalty hearing, the Honorable James T. Vaughn, of the Superior Court of Delaware for Kent County sentenced Mr. Ortiz to death on September 26, 2003 and also imposed a life sentence on the weapons charge under 11 Del. Code 4214 (a). A2709. Mr. Ortiz was represented by lead trial counsel, Lloyd Schmid, and second chair

counsel, Deborah Carey. On appeal, this Court affirmed the Superior Court on January 25, 2005. *State v. Juan Ortiz*, 869 A.2d 285 (Del. 2005). The United States Supreme Court denied Mr. Ortiz's petition for writ of certiorari on October 5, 2005. *Ortiz v. Delaware*, 126 S.Ct. 55 (2005).

On August 31, 2006, Mr. Ortiz filed a *pro se* motion for post-conviction relief pursuant to Del. Super. Ct. Crim. R. 61 and on June 19, 2007, Mr. Ortiz filed a first counseled petition represented by Joseph Gabay and Jennifer-Kate Aaronson. A2690. Judge Vaughn held an evidentiary hearing on various dates between 2009 and 2011.[1] After post-hearing briefing, Judge Vaughn denied relief on January 15, 2013. *See* Op., Exhibit "A" attached. Petitioner filed a timely appeal to this Court.

Mr. Patrick J. Collins entered his appearance on behalf of Appellant on March 13, 2013. On July 15, 2013, Mr. Ortiz, through his counsel, filed a Motion For Stay of Briefing and Remand because his original Rule 61 counsel, Joseph Gabay, had been charged with sexual harassment of one of Appellant's witnesses

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[1] The Superior Court conducted the initial Rule 61 evidentiary hearings in this case on March 26, 2009, April 27-30, 2009, May 11-12, 2009, May 14, 2009, July 12, 2009, July 19-21, 2010, July 19, 2011 and July 21, 2011. Depositions were taken as part of the Rule 61 proceedings as follows: February 23, 2007 (Linda Miller), March 16, 2009 (Thomas Stewart), and May 12, 2011 (Dr. Stephen Mechanick).

in the Rule 61 proceedings. A3567-70. On August 30, 2013, this Court ordered as follows:

> Given the unique factual circumstances of this capital case, the Court will grant newly appointed defense counsel a stay of the briefing schedule in this appeal for a period of three months in order to allow counsel the opportunity to review the record below more thoroughly and to determine if there are any additional or modified postconviction claims that should have been, but were not, raised by postconviction counsel.[2]

Accordingly, Petitioner's counsel filed a renewed motion for remand on December 23, 2013 and this Court ordered Appellant's case remanded to the Superior Court on March 20, 2014. A3573-83. Pursuant to the remand order, Mr. Ortiz filed a Supplemental Petition for Post-Conviction Relief. A3628-52. The Superior Court held evidentiary hearings on September 23 and December 15, 2014, and depositions were conducted on September 2, 2014. Justice Vaughn denied the supplemental claims on November 4, 2015.[3] *See* Supp. Op., Exhibit "B" attached.

Mr. Ortiz again filed a timely notice of appeal to this Court and on January 14, 2016, Mr. Collins moved for leave to withdraw as counsel and Mr. Herbert W.

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[2] A3574.

[3] Justice Vaughn was elevated to sit on the Delaware Supreme Court on October 29, 2014. He then was officially assigned to continue to preside over the Rule 61 proceedings.

Mondros entered his appearance in this Court on behalf of Appellant. A4249-53. On the same date, Mr. Mondros moved for the admission *pro hac vice* of Elizabeth Hadayia and Samuel J.B. Angell from the Federal Community Defender Office for the Eastern District of Pennsylvania which this Court granted. A4254-65. On January 26, this Court granted Appellant's motion for an extension of time to file his opening brief and appendix until April 15, 2016. A4266-68.

On March 4, 2016, Appellant filed a motion to stay his appeal pending this Court's decision in *Rauf v. State*. A4269-72. This Court granted that motion by Order dated March 8, 2016. A4273. On August 2, 2016, this Court decided that Delaware's death penalty scheme was unconstitutional. *Rauf v. State*, 145 A.3d 430, 433-434 (Del. 2016). On August 24, 2016, the Court further stayed proceedings in this case to await the outcome of *Powell v. State*. A4274. On December 15, 2016, this Court held that its decision in *Rauf* should apply retroactively to a death sentence that was already final when *Rauf* was decided. *See Powell v. State*, 153 A.3d 69 (Del. 2016).

By Order dated January 26, 2017, this Court granted Petitioner's motion for remand and stay of appeal for Mr. Ortiz to be re-sentenced to a term of life imprisonment in accordance with this Court's decision in *Powell*. A4275.

On February 15, 2017, Mr. Ortiz filed a Motion to Vacate Death Sentence and for a New Sentencing Hearing. A4286. The Superior Court denied that motion by letter dated the same day. *See* Letter Order and Opinion, attached as Exhibit "C."

On February 21, 2017, the Honorable John A. Parkins, Jr. of the Superior Court of Kent County vacated the death sentence and sentenced Mr. Ortiz to a term of life imprisonment on the first degree murder charge and left in place the life sentence imposed on Mr. Ortiz for the firearm charge pursuant to 11 Del. Code 4214 (a). *See* A0035; *see also* A2709.

SUMMARY OF ARGUMENT

1. The lower court erred in denying Appellant's claim that trial counsel were ineffective for failing to adequately investigate and present evidence in support of Appellant's defense that the homicide occurred while he was under extreme emotional distress ("EED"). Counsel had no tactical or strategic reason for failing to present expert testimony supporting the EED defense. They did not have funding to have the psychiatrist retained, Dr. Stephen Mechanick, evaluate Mr. Ortiz a second time to see if he could give an opinion that helped the defense. They did not seek such funding from the trial court. Mr. Ortiz was prejudiced because the jury did not hear testimony, supported by the record, explaining how he was under EED at the time of the homicide. In Rule 61 proceedings, three mental health experts, including Dr. Mechanick, testified that Mr. Ortiz met the criteria for EED. The State did not call any expert to dispute the testimony from the defense experts.

2. The lower court erred in denying Mr. Ortiz's request for a new sentencing hearing. In *Rauf v. State*, 145 A.3d 430 (Del. 2016), this Court declared that, 11 Del. C. §4209, the statute under which Mr. Ortiz was sentenced was unconstitutional and not severable. Without a valid penalty provision for first degree murder and because first-degree murder is a Class A felony in Delaware,

Mr. Ortiz should be sentenced pursuant to the sentencing provision for second degree murder in place at the time of the offence or pursuant to the penalty provision for Class A felonies, 11 Del. C. § 4205, and the case should be remanded for a new sentencing hearing.

STATEMENT OF THE FACTS

Juan Ortiz was romantically involved with the victim, Ms. Clay, and had been living with her and her daughter, Ashley, while he was under home confinement during the spring/summer 2001. A1027-31. Their relationship was volatile and became increasingly so in the weeks leading up to the murder. A1076-77. Mr. Ortiz was serious about his relationship with Ms. Clay and wanted to build a life with her – making his intentions known to her when he gave her an engagement ring and proposed marriage in 2001. A1077-79; A1109; A3705-07.

However, when he came to live with Ms. Clay, Mr. Ortiz became aware that, behind his back, Ms. Clay had rekindled a relationship with a former boyfriend, Mike Ratledge. A1030; A1093-94. Ms. Clay took steps to end the relationship with Mr. Ortiz. She demanded that Mr. Ortiz move out of her trailer but since Mr. Ortiz was required to stay with Ms. Clay as part of his home confinement sentence, he faced the possibility of returning to jail if he could not find a suitable replacement. A1030-31; A1224-26. Ms. Clay removed his car from her insurance policy. A3699-A3702.

Mr. Ortiz became distraught and emotional about the relationship ending. A1038; A1321. He was upset and crying all the time which further irritated Ms. Clay. Her daughter, Ashley, recalled that on the night of July 5 she spoke to her

mother on the phone who told her to tell Mr. Ortiz "if he was crying and boohooing when she got home that she was leaving." A1042. Deborah Clay belittled Mr. Ortiz by telling him Mike Ratledge was a better man. A3752.

Mr. Ortiz started acting irrationally. The day before the murder Ashley noticed that the water bed in her mother's room was deflated and when she asked Mr. Ortiz what happened he told her that he tried to shoot himself but instead shot the bed. A1038; *see also* A1234-35. Ashley described Mr. Ortiz as upset and crying and he told her that "he was going to call his sister and have her come take him to a mental institution." A1039.

On the day of the murder, July 6th, 2001, Mr. Ortiz told the victim during an argument he was going to kill himself after she told him he was not going to be seeing Ashley anymore. Her threat was devastating to Mr. Ortiz because he had been like a father to Ashley. A3701-02. Mr. Ortiz had been drinking. A3740. Ms. Clay went to take a shower which signaled to Mr. Ortiz that she had sexual relations with Mike that day.[4] A3701; A3683. He grabbed the shotgun and pointed it at the bathroom wall and fired it through two pillows which he had taped

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[4] Mr. Ortiz's suspicions were correct because the victim had, in fact, had sexual relations with Mike Ratledge that afternoon. *See* Tr. 7/24/03, 68 (testimony of Amy Rust).

together. A3705-09. Debbie then shouted and Mr. Ortiz saw her step out of the shower with blood on her and the gun went off again. A3710. He described feeling numb and could not remember what he was thinking but he knew he was mad. *Id*. Afterwards, he set fire to the trailer so that Ashley would not come in and find her mother's body. *Id*.

Mr. Ortiz was ill-equipped to handle the stressors which culminated in his violent actions. He had a long history of mental instability and emotional disturbance that first emerged during his early childhood. A3850-52. Juan Ortiz was raised in a highly dysfunctional and abusive environment. From the start, his life was a challenge. His father, an alcoholic, began physically abusing his mother when she was pregnant with Juan. A3881-84. Juan's mother also abused alcohol and admitted that she drank while she was pregnant with Juan. A2808. Juan was born prematurely and when he was a toddler family members observed Juan repeatedly banging his head. A2807, A2813, A2817. Juan was also diagnosed with lead exposure as a young child. A2797-98.

Juan was physically and sexually abused throughout his childhood. A3850-51. His father became violent when he was intoxicated and Mr. Ortiz was often the target of his aggression which went well beyond normal discipline. A3883-85. Mr. Ortiz was also exposed to his parents' philandering from a young age, and

observed his mother performing oral sex on another man. A3897-A3901. Juan himself was sexually abused between the ages of nine and thirteen by six different women. A3854. Before he was seventeen he fathered a child with a female friend of his father who was in her thirties. A3878. Exposure to alcohol *in utero*, toxic amounts of lead, domestic violence, and physical and sexual abuse in childhood are all risk factors for brain damage and mental illness. A2976.

Not surprisingly, Juan exhibited behavioral problems in school from a young age, spent several years in an institutional setting and never successfully integrated back into a mainstream classroom. A3619. The youth placements recorded details of Juan's learning disabilities and mental health problems, including numerous threats of self-harm. Even though the various institutions had information that Mr. Ortiz was being abused, he was treated like a "bad" kid instead of an abused child. A3924-26. After his discharge from juvenile placement, Mr. Ortiz did not receive mental health treatment again until he was incarcerated. A2968, A2997. That treatment was discontinued when he was released from prison shortly before the homicide of Deborah Clay. A2704-05.

Mr. Ortiz's counsel failed to thoroughly investigate this psychiatric history and follow up with expert witnesses about whether Mr. Ortiz could assert any mental health defenses at trial. Prior to trial, counsel hired forensic psychiatrist Dr.

Stephen Mechanick to evaluate Mr. Ortiz. A4198. At the initial evaluation, Mr. Ortiz maintained, as he had stated to the police, that his shooting of Ms. Clay was accidental, and so Dr. Mechanick could not find that Mr. Ortiz had committed the crime under extreme emotional distress. A3718-19; *see also* A4176. However, as time progressed, Mr. Ortiz came to terms with his actions and admitted that the shooting was not an accident, but that he was very angry and had gone numb when he fired the shots.[5] A4231-32; A4179-80. Trial counsel did not send Dr. Mechanick back to reevaluate Mr. Ortiz. A4180-81. In fact, counsel never sought funding from the trial court to have Dr. Mechanick conduct an updated evaluation of Mr. Ortiz. A3049.

At trial, counsel lacked a coherent strategy. At times, counsel appeared to be making an extreme emotional distress defense, and at other times appeared to be making an accident defense, but nevertheless failed to present evidence supporting

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[5] Psycho-forensic evaluator, Linda Zervas, met with Mr. Ortiz when he was first arrested and described him as extremely distraught and explained that "[Mr. Ortiz] spent the entire time crying . . . because he was so upset that, you know, she was dead and he was responsible for it." A2894. In April of 2002, Ms. Zervas emailed trial counsel about having Dr. Mechanick see Mr. Ortiz again with respect to an EED defense because Mr. Ortiz has come to terms with what happened. A4180; A4231-32.

either defense.[6] In fact the prosecutor, Mr. Welch, commented in his closing argument about the lack of evidence supporting EED presented by the defense when he told the jury that "essentially, extreme emotional distress -- and this is the first you've heard of it today, I think -- concedes an intentional killing." A2415. Nonetheless, the Court did provide an instruction to the jury on EED. Without a coherent presentation of facts supporting EED or expert testimony, though, the jury had little, if anything, upon which to make such a finding.

If counsel had arranged for Dr. Mechanick to re-evaluate their client, evidence supporting the EED defense would have been readily available. As part of the remand proceedings in this case, Dr. Mechanick re-evaluated Mr. Ortiz and rendered an opinion that at the time of the homicide, Mr. Ortiz was operating under EED. A3697. Dr. Mechanick based his opinion on the numerous stressors at the time of the homicide including Ms. Clay's infidelity, belittling of Mr. Ortiz, and her demands that he leave the home when he was on house arrest. A3702-03.

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[6] *See* A0195 (Defense opening statement): "Now having said all this, ladies and gentlemen, one of the things I'm trying to suggest to you is that the evidence in the end shows that this is a relationship between two people that was happy and troubled. And that, as a consequence of that, you will need to take all of that into account." *Cf* A2390 (Defense Closing); "[Mr. Ortiz] wished and certainly hoped and said it was an accident. You may take that at face value and conclude it's an accident after hearing that instruction."

In addition, on the day of the homicide, Ms. Clay came home and before getting in the shower told Mr. Ortiz that he would never see Ashley again which hit him particularly hard since his oldest daughter, Crystal, had been taken from him at a young age. A3709. When he fired the shots at Ms. Clay he felt "numb" and didn't remember what he was thinking. A3710.

ARGUMENT

I. COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AT THE GUILT PHASE OF PETITIONER'S CAPITAL MURDER TRIAL DEPRIVING PETITIONER OF HIS RIGHTS UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.

QUESTION PRESENTED

Whether trial counsel was ineffective for failing to investigate and present evidence, including impeachment evidence, which supported Petitioner's defense to murder in the first degree that at the time he killed Deborah Clay he was acting under an extreme emotional disturbance? (Preserved at A2744; A3630-33)

STANDARD OF REVIEW

This Court reviews Rule 61 decisions for abuse of discretion. *Swan v. State*, 28 A.3d 362, 382 (Del. 2011). It reviews questions of law – including those involving constitutional violations, appearance of impropriety and Rule 61(i) bars – and mixed questions of law and fact *de novo*. *Zebroski v. State*, 12 A.3d at 1115, 1119 (Del. 2010); *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008); *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

MERITS OF ARGUMENT

Trial counsel were ineffective when they failed to present available testimony that, at the time the victim was killed, Mr. Ortiz was operating under an extreme emotional disturbance ("EED"). Counsel obtained from the trial court a

jury instruction on EED and did not have a strategic reason for failing to put on additional evidence to support the defense. Also, trial counsel were ineffective for failing to impeach witnesses the State presented in its case to rebut the EED defense.

A. Failure to present available evidence of EED.

Extreme emotional disturbance is an affirmative defense to the charge of first-degree murder. If the defendant can prove beyond a preponderance of the evidence: 1) he was acting under the influence of extreme emotional distress at the time of the killing, and 2) there is a reasonable explanation for the extreme emotional distress, the crime of murder in the first degree is reduced to manslaughter. 11 Del. C. §641.

In *Boyd v. State*, 389 A.2d 1282, 1288 (Del. 1978), this Court explained:

> The purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them . . . . Traditionally, an action taken under the heat of passion meant that the defendant had been provoked to the point that his "hot blood" prevented him from reflecting upon his actions. An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.

See also State v. Magner, 732 A.2d 234, 243 (Del. Super. 1997) ("Evidence of Defendant's psychiatric condition and his history of abuse may be used to demonstrate that he suffered from significant mental trauma that affected his mind over a long period of time; and that this history combined with the recent events between Defendant and Mr. Hendrick are relevant to Defendant's reasonable explanation or excuse for the existence of extreme emotional distress.") (citing *Boyd*, 389 A.2d at 1288).

In Mr. Ortiz's case, trial counsel retained two mental health experts to evaluate Mr. Ortiz: Dr. Stephen Mechanick, a psychiatrist, and Dr. Abraham Mensch, a psychologist. Each of these experts met and evaluated Mr. Ortiz. A3067-68. Trial counsel presented Dr. Mensch during the sentencing phase, but his testimony was limited to mitigation and the theory of abandonment homicide. A2571-74. Because of lack of funding, Dr. Mechanick was not presented at trial. A3004. In Rule 61 proceedings, both doctors, as well as Dr. Jonathan Mack, testified that Mr. Ortiz met the criteria for the EED defense. The State presented no expert to contradict them.

Evidence in support of EED included that, the victim, who was engaged to Mr. Ortiz, was having an affair with Mike Ratledge. On the afternoon of the homicide, when she got home, she and Mr. Ortiz argued. She told him he was

going to have to move out and would not be seeing her daughter Ashley anymore. He had known Ashley since she was a child and she was like a daughter to him. That threat devastated Mr. Ortiz, because he had lost contact with his own daughter, Crystal. Also, it meant that he would likely have to go back to prison because the victim's home was his placement for supervised release. She went into the shower which was something she typically did after having sex. He grabbed a shotgun from the closet, intentionally pointed it at the bathroom wall and fired it. He did not care if he hit her as she was taking shower. He went into another room, reloaded the gun. He saw her jumping out of the shower and she was bleeding. He gripped the gun and it went off again. A3024; A3700.

1. Dr. Stephen Mechanick

As part of the remand proceedings in this case, Dr. Mechanick re-evaluated Mr. Ortiz and rendered an opinion that at the time of the homicide, Mr. Ortiz was operating under EED. A3697.

Mr. Ortiz was living with the victim, Deborah Clay, and his relationship with her was meaningful to Mr. Ortiz. She had been a significant support to him while he was in prison. He wanted to have a committed relationship and they got engaged. At Mr. Ortiz's request, Ms. Clay's son got an engagement ring that Mr.

Ortiz gave to Ms. Clay. They made plans to get a place and move away from Mike Ratledge. A3705-06.

There were a number of stressors on Mr. Ortiz at the time of the offense. Ms. Clay was having an affair with Mr. Ratledge. She denied it, but Mr. Ortiz saw signs that confirmed his suspicions, like her car parked at Mike Ratledge's house. A3699-A3700. Mr. Ortiz "was distressed that [Ms. Clay] continued to have a relationship [with Mike Ratledge] after he got out of prison, that she lied to him about it and tried to deceive him, that she was essentially sneaking behind his back to carry on that relationship." At times she would say that Ratledge was a better man than he was. A3752. On the day of the offense, Mr. Ortiz correctly surmised that Ms. Clay had had sexual intercourse with Ratledge. She came home and took a shower, which was out of character and something she usually did after she had sex. A3701-02.

Ms. Clay threatened that Mr. Ortiz would never see her daughter Ashley again. Mr. Ortiz had a close relationship with Ashley. His relationship with her predated his relationship with Deborah Clay. It was a longstanding one. His former girlfriend had babysat for Ashley. Ashley referred to herself as Little Ortiz, suggesting a family relationship. "[H]e treated her like a daughter and related to her that way." Mr. Ortiz had a biological daughter with whom he had earlier lost

contact. That was already a sore point for him, and the threatened loss of a relationship with Ashley upset him. A3701-02; A3704.

Because of his probation supervision, Mr. Ortiz was required to live in Ms. Clay's house. Ms. Clay was telling him he had to move out by Sunday. Consequently, Mr. Ortiz was trying to contact his probation officer about possibly moving somewhere else. Yet, Mr. Ortiz had not been able to contact the probation officer. A3699.

Mr. Ortiz's and Ms. Clay's relationship was volatile. There were times they were having a very good time; and then that could change abruptly and she would tell him he had to leave. Ms. Clay was verbally belittling and abusive to Mr. Ortiz. Ms. Clay took Mr. Ortiz's truck and car off her insurance policy. He didn't have the insurance he needed for the vehicles he needed for work. A3700-01.

At the time of the homicide, the tools that Mr. Ortiz used to work had been stolen. This was an additional stressor. A3708. The stressors experienced by Mr. Ortiz were primarily due to the actions of Ms. Clay. A3703.

Dr. Mechanick described the day of the offense, July 6, 2001. On that day, Mr. Ortiz was at home. He had been drinking, but was not drunk. Deborah Clay came home and said she was going to take a shower. She told him he was not

going to see Ashley again. He was upset and shot Ms. Clay through the wall and through a pillow. Mr. Ortiz wasn't sure why he shot Ms. Clay: to prevent her from taking Ashley or because she was sleeping with Mike. After the shot, Debbie called out, why did you do that? He saw her step out of the shower with blood on her. The gun went off again. He felt numb at the time but said, "I knew I was mad at her." He set a fire in the trailer so Ashley would not come into the trailer and see her mother. A3709-10.

Although, as stated, Mr. Ortiz had been drinking that day, the EED he experienced was not created by the drinking. That is explained by the fact that Mr. Ortiz's distress was not limited to periods when he was intoxicated. Even when he was sober the issues relating to Debbie's behavior bothered him significantly. His EED was, however, exacerbated by his drinking. A3714, A3736-38, A3787. Mr. Ortiz expressed to Dr. Mechanick remorse for killing Ms. Clay. A3721-22.

Furthermore, even though Dr. Mechanick diagnosed Mr. Ortiz as having anti-social personality disorder ("ASPD"), that disorder does not prevent or preclude a person from having feelings just like other people. While ASPD could affect how someone responded, it would not stop that person from experiencing EED. A3778-79.

Moreover, even if someone forms the intent to kill that does not mean that EED is not present. People can act in a conscious detailed fashion while under the influence of EED. A3781; A3792-93 (explaining that the intentionality of a criminal act does not eliminate EED and someone can have EED over an extended period of time).

The defense of EED was available at the time of trial. A3720; *see also* A3791-92 (what Juan told Dr. Mensch in May 2003 and Dr. Mechanick in December 2013 was substantially the same). The presence of intoxication did not remove the possibility of EED as a defense. A2987. Dr. Mechanick explained that EED is a possible defense in circumstances where a defendant is acting in a sequential way that is fueled by an extreme state of emotional distress. A2985.

2. Dr. Abraham Mensch

At the Rule 61 hearing, Dr. Abraham Mensch, the only defense mental health expert to testify at the trial and who testified only at the penalty phase, explained that after the guilt phase of the trial proceedings he learned more information that supported an EED opinion, including Mr. Ortiz's lead and prenatal alcohol exposure. As to the former, Mr. Ortiz' mother had stated that she had taken Mr. Ortiz as a child to the hospital for lead exposure. A3249. Dr. Mensch explained that "[b]oth of these constitute a double whammy when it comes

to behavior and the ability to control behavior and culpability." A3203. The second time Dr. Mensch saw Mr. Ortiz, Mr. Ortiz told Dr. Mensch he meant to shoot at the victim, which supported the EED defense. Dr. Mensch explained that two shots at the victim were consistent with EED:

> [I]f you have somebody who has a history of early lead poisoning, and that doesn't get better; who has a history of intrauterine alcohol exposure, who has a documented low frustration tolerance, you can see that as part of the same actions, the two shots were connected.

A3242. If counsel had provided Dr. Mensch with information about lead and prenatal alcohol exposure, he would have concluded that Mr. Ortiz suffered from EED "because the trigger is set much lower for kids who have been exposed." A3209.

3. Dr. Jonathan Mack

At the Rule 61 hearing, psychologist and neuropsychologist Dr. Jonathan Mack testified that it was his opinion to a reasonable degree of psychological certainty that Mr. Ortiz was under extreme emotional distress at the time of the homicide. A3459. Mr. Ortiz has a number of psychological traits that predispose him to extreme emotional reactivity and discontrol of aggression and anger. A3454. Mr. Ortiz' global assessment of functioning is only 45 out of 100, meaning he is seriously impaired in social, occupational and school functioning.

A3456. Mr. Ortiz had brain dysfunction and huge psychosocial causative factors that combined to create an "extremely reactive impulsive hyperactive individual." A3457. These factors were present in 2001 at the time the victim was killed and before. A3458-59. Dr. Mack explained that Mr. Ortiz' alcohol intake before the victim was killed indicated Mr. Ortiz was self-medicating his extreme reactivity. A3546.

Dr. Mack summarized the different factors that combined in Mr. Ortiz at the time the victim was killed: "[T]he reactive attachment piece, the threatened loss piece, you're with Mike, I'm losing Ashley," reactive attachment issues, in combination with an extremely reactive personality, based on all these underlying conditions that were not in his control "bipolar, ADHD, borderline personality led to an extreme explosion related to the reactive attachment issue, in my opinion." A3560-61.

4. Ineffective assistance of counsel.

Appellant's claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668, 686, 696 (1984), which requires a showing that counsel's performance was deficient under prevailing norms, and that but for counsel's errors, there is a reasonable probability of a different outcome. *Strickland* prejudice analysis is not an outcome-determinative test. *Id*. at 693-94.

5. Deficient Performance

Counsel performed deficiently when they failed to have Dr. Mechanick evaluate Mr. Ortiz again after he came to terms with the homicide. Even though over a year and a half passed between the time when Dr. Mechanick initially evaluated Mr. Ortiz and the start of the trial, trial counsel never sought funding from the Court to have Dr. Mechanick conduct an updated evaluation of Mr. Ortiz. *See* A3004. Additionally, even though Dr. Mechanick evaluated Mr. Ortiz, counsel never met with Dr, Mechanick. A2954.

Counsel had no tactical or strategic reason for not putting on evidence of Mr. Ortiz's past mental health issues in support of an EED defense. A3004, A3014. In fact, counsel wanted Dr. Mechanick to testify about EED:

> Q. And this is probably an obvious question, but if you had expert testimony supporting EED in the guilt phase or the penalty phase, would you have presented it?
>
> A. Oh, that's what we were trying to do. We were trying to get Dr. Mechanick.

A4142; A3026 (if counsel had had an opinion from Dr. Mechanick that Mr. Ortiz was suffering from EED, he would have used it). But counsel failed to get funding for Dr. Mechanick and failed to consult him. A3003-04; A2954. *See Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam) (counsel performed deficiently because counsel could have sought – but did not seek – additional funds to retain

an expert whom he would have considered more effective than the expert he presented).

6. Additional Deficient Performance: Ineffectiveness for Failing to Adequately Impeach Two State Witnesses.

Counsel was ineffective for failing to impeach two of the State's witnesses. *Berryman v. Morton*, 100 F.3d 1089, 1098-99 (3d Cir. 1996) (counsel ineffective for failing to impeach government witness). These witnesses are Amy Rust and Mike Ratledge whose testimony the State presented to diminish the EED defense.

Counsel failed to impeach Amy Rust, who was a friend of the victim and testified that she had not seen Mr. Ortiz having emotional difficulties. A1259. Before Ms. Rust testified, the State revealed that Ms. Rust had previously used an alias, Faith Cahall. A1191. Also, the State revealed that Ms. Rust had a conviction for knowingly inserting false information on the face of a temporary registration. A1215. This impeachment was proper under Del. R. Evid. 609 and should have been pursued, but was not. Counsel admitted that she had no tactical or strategic reason for not using this impeachment. A4128-92.

Counsel also failed to impeach Mike Ratledge. Mr. Ratledge was a State witness who had a romantic relationship with the victim. However, he denied he was having such a relationship with the victim during June 2001, the month before the homicide. A1268. Mr. Ratledge had an extensive criminal record consisting of

over twenty criminal arrests and multiple violations of probation. Mr. Ratledge's criminal history includes crimes of dishonesty such as theft and bad checks. Also, Mr. Ratledge had a pending case when he was questioned by the police in this case. A4277-85. Counsel should have cross-examined him with the pending case. *Davis v. Alaska,* 415 U.S. 308 (1974). Mr. Ratledge's prior crimes of dishonesty were admissible to attack his veracity under Del. R. Evid. 609. Counsel had no tactical or strategic reason for not impeaching Mr. Ratledge with his open criminal charges or with *crimen falsi*. A4182, A4186-87.

7. Cumulative Prejudice

While defense counsel obtained a jury instruction on EED, they did not put on significant evidence to support that defense. By their inadequate representation, counsel failed to present the jury with substantial evidence of a viable defense upon which the jury could have decided to not find Murder in the First Degree. Mr. Ortiz was prejudiced because there is a reasonable probability of a different result at trial if the testimony had been presented. *Jacobs v. Horn*, 395 F.3d 92, 102, 104 (3d Cir. 2005) (counsel ineffective for failing to utilize competent and informed mental health expert to present diminished capacity defense); *see Siehl v. Grace*, 561 F.3d 189, 197-98 (3d Cir. 2009) (petitioner made out *prima facie* case that counsel was ineffective when counsel failed to call criminal forensic expert to

rebut prosecution's trial testimony about timing of fingerprint and make up of blood evidence); *Showers v. Beard*, 635 F.3d 625, 632-33 (3d Cir. 2011) (counsel ineffective for failing to retain medical examiner who would have supported defense theory that the victim died by suicide, as medical examiner would have testified that victim's morphine overdose could not be masked and could not have been administered surreptitiously or forcibly).

In addition to failing to adequately present the EED defense, counsel also failed to properly impeach witnesses who the State used to diminish the EED defense.

Prejudice to Mr. Ortiz is further supported by the fact that only nine of the twelve jurors found the second proffered aggravating factor alleging that the killing of Deborah Clay was "premeditated and the result of substantial planning." A2721. This indicates members of the jury had doubts as to whether the killing was a planned, premeditated crime, as the State argued, or whether it was an impulsive act that Mr. Ortiz had little control over, as the defense argued. The jury's failure to find this aggravating factor shows a reasonable probability that the jury would have credited mental health evidence of Mr. Ortiz' extreme emotional distress at the time of the crime. Effective counsel could have presented testimony from or similar to Dr. Mack's, Dr. Mensch's and Dr. Mechanick's post-conviction

testimony about Mr. Ortiz's mental health and his state of mind at the time of the crime. If they had, there is a reasonable probability that the jury would not have convicted Mr. Ortiz of Murder First Degree, particularly given that the State presented no expert testimony to contradict the doctors' opinions that Mr. Ortiz suffered from EED.

8. The Lower Court Erred.

The Superior Court held that counsel did not perform deficiently because Mr. Ortiz originally said the shooting was an accident. Op. 15-16. Apparently, the court was surmising that this was counsel's reason for not putting on a full EED defense. However, the court based its decision on an error of law. The court may not substitute its own strategy for counsel's actual strategy. *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) (condemning court's "*post hoc* rationalization of counsel's conduct"); *Kimmelman v. Morrison*, 477 U.S. 365, 388 (1986) (court cannot use hindsight to evaluate reasonableness of counsel's decisions).

The court incorrectly stated that Mr. Ortiz made an untimely admission during trial that he intended to shoot at the victim. Op. 15. But this admission was made over one year before trial. A4231. Trial counsel knew before trial that Mr. Ortiz had changed his explanation of the homicide. A4180.

While the court stated that the jury would view Mr. Ortiz as a liar because he changed his description of how it happened, Op. 17-18, just the opposite is more likely. Mr. Ortiz's testimony that the shooting was intentional conforms with the State's theory that the shooting was intentional. The jury would be more likely to believe Mr. Ortiz's version that the shooting was intentional. *Wearry v. Cain*, 136 S.Ct. 1002 (2016) (the jury credited a prosecution witness's testimony even though he had given five different materially different statements); *Van Arsdall v. State*, 524 A.2d 3 (Del. 1987) (restriction on cross-examination was prejudicial because jury could have found defendant not guilty in keeping with the second statement he gave police); *accord* Tr. 5/12/09 (Dr. Mechanick: "It's very common for defendants to offer more than one version of events in a variety of ways.").

The Superior Court stated that there was no reasonable likelihood of a different outcome because of pre-planning evidence. Op. 18-19. However, a defendant can be – and Mr. Ortiz was – in extreme emotional distress over an extended period of time. Thus, any pre-planning does not negate the defense of EED. A3742-43 (Dr. Mechanick: the EED was "a buildup to a crescendo on July 6th"); A3781 (Dr. Mechanick: "people can act in a conscious, detailed fashion while under the influence of extreme emotional distress").

In the Supplemental Opinion, the Superior Court stated that it would not credit Mr. Ortiz's explanation given to Dr. Mechanick in 2013 because it was 13 years after the crime. Supp.Op., 3. That ruling is clearly erroneous because the explanation provided in 2013 is substantially the same as the one given by Mr. Ortiz in 2002 to Ms. Zervas and to Dr. Mensch in 2003.

The Superior Court also asserted that the version Mr. Ortiz gave Dr. Mensch in 2003 was different than the version he gave Dr. Mechanick. Supp. Op. 3. That is not so. In both, "he acknowledged the intent to shoot [Ms. Clay]." There were many similarities between what Mr. Ortiz told Dr. Mensch and what he told Dr. Mechanick. A3790-92.

While the Superior Court stated that the State could rebut claims of EED with evidence of anti-social personality disorder, here, it did not present a witness to do that. Supp.Op., 5. Dr. Mechanick explained that Mr. Ortiz's personality disorder did not prevent him from claiming EED as a defense. The disorder does not prevent or preclude a person from having feelings just like other people. A3715, A3778. The State offered no expert testimony contradicting Mr. Ortiz's EED defense.

The Superior Court did not directly address the prejudice to Mr. Ortiz because of trial counsel's failure to impeach Ms. Rust or Mr. Ratledge. Supp.Op.,

4. Alone and in combination with counsel's other failures, there is a reasonable probability that Mr. Ortiz would not have been convicted of first degree murder if counsel had adequately impeached these witnesses.

II. MR. ORTIZ IS ENTITLED TO A NEW RE-SENTENCING HEARING

QUESTION PRESENTED

Whether the lower court erred when it held that, even though this Court declared 11 Del. C. § 4209 void and not severable in *Rauf v. State*, that Mr. Ortiz should be sentenced pursuant to that statute? (Preserved at A4286)

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010); *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008); *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

MERITS OF ARGUMENT

In its Order dated January 26, 2017, this Court granted Mr. Ortiz's motion for remand and stay of appeal and stated "[t]o the extent that the only alternative sentence is life in prison, as dictated by *Hooks v. State*, the Superior Court may, in the exercise of its discretion, vacate Ortiz's death sentence and enter a new sentencing order without the need for a defense motion and without holding a hearing." A4275.

As explained above, in *Rauf v. State*, 145 A.3d 430 (Del. 2016), this Court struck down 11 Del. C. § 4209. The Court also held that the statute was not severable because "the respective roles of the judge and jury are so complicated

under § 4209, we are unable to discern a method by which to parse the statute so as to preserve it." *Rauf*, 145 A.3d at 434. Therefore, § 4209 is void and unenforceable.

The Delaware legislature could have provided for an alternative sentence in the event the death penalty sentencing scheme was deemed unconstitutional, however it did not. The legislature included such a provision in the statute found unconstitutional by the Delaware Supreme Court in response to the Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976); *see* 59 Del. Laws, ch. 284, § 2 (1974). The Court held that the provision for life without parole was severable because the legislature specifically provided that if the death penalty was found unconstitutional then "the penalty for first degree murder shall be life imprisonment without benefit of parole." *State v. Spence*, 367 A.2d 983, 988-89 (1976). In *Rauf*, by contrast, this Court found § 4209 is not severable, and thus is void and unenforceable.

In *State v. Dickerson*, 298 A.2d 771 (Del. 1973), this Court looked at the issue of what sentence to apply when the then-current death penalty statute was determined to be unconstitutional. The Court stated that the punishment must be "at least as severe as that prescribed for a lesser-included-offense,"

specifically, second degree murder. *Id.* at 771. While, in *Dickerson*, the Court also looked to the next preceding statute, here, that statute, promulgated in 1991, was also unconstitutional because it employed judge sentencing. The earlier capital sentencing statute promulgated in 1977 is too remote to be used as a guide.

In the sentencing statute in place at the time of Mr. Ortiz's offense, the punishment for second degree murder was 10 to 20 years. 67 Del. Laws ch. 350, § 29 (1990); 67 Del. Laws ch. 130, §§ 6 and 8 (1989).

Without a valid penalty provision for first-degree murder and because first-degree murder is a Class A felony in Delaware, this Court should look to the penalty provision for Class A felonies, 11 Del. C. § 4205. Section 4205 provides in pertinent part:

> (b) The term of incarceration which the court may impose for a felony is fixed as follows:
>
> > (1) For a Class A felony not less than 15 years up to life imprisonment to be served at Level V except for conviction of first degree murder in which event § 4209 of this title shall apply.

It is submitted that, pursuant to 11 Del. C. § 4205, Appellant is entitled to be considered for a sentence of less than life in prison.

The lower court's decision on this claim does not appropriately account for

this Court's holding that § 4209 could not be preserved. See Exhibit "C" attached. *Rauf*, 145 A.3d at 434. This Court saw "no way to sever § 4209." *Id*. When vacating the death sentences in other cases, *Powell*, *Phillips* and *Reyes*, this Court did remand for imposition of a life sentence without parole pursuant to § 4209. *Powell v. State*, 153 A.3d 69, 76 (2016); *Phillips v. State*, 154 A.3d 1130, 1146 (Del. 2017); *State v. Reyes*, 155 A.3d 331, 357 (Del. 2017). However, this Court did not explain how the decision to resentence pursuant to § 4209 could be reconciled with *Rauf*'s unequivocal holding.

It is respectfully submitted that the holding in *Rauf* dictates that Mr. Ortiz cannot be sentenced pursuant to § 4209 and, accordingly, should be sentenced pursuant to the sentencing statute applicable to second degree murder at the time of the offense or, in the alternative, pursuant to 11 Del. C. § 4205.

CONCLUSION

For the reasons and authorities cited and discussed above, Mr. Ortiz requests that this Court vacate his judgments of conviction, and grant a new trial. In the alternative, Mr. Ortiz requests that the Court vacate his life sentence from the homicide conviction and remand for a re-sentencing hearing.

Respectfully submitted,

/s/ Herbert W. Mondros
HERBERT W. MONDROS, ESQ.
MARGOLIS EDELSTEIN
Delaware Bar #3308
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112

Samuel J.B. Angell (*pro hac vice)*
Elizabeth Hadayia (*pro hac vice)*
Federal Community Defender
Eastern District of Pennsylvania
Suite 545 West-Curtis Building
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520

Counsel for Appellant
JUAN ORTIZ

Dated: June 20, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 20, 2017, I served a copy of *Appellant's Opening Brief and Appendix* on the following person via LexisNexis File & Serve and by First Class Mail, postage prepaid, upon the following:

John Williams
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750

/s/ Herbert W. Mondros
Herbert W. Mondros
Del. Bar. No. 3308