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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 REPLY 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

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INTRODUCTION

Appellant Juan Ortiz files his Reply Brief to the State's Answering Brief. In short, trial counsel had adequate time before trial to develop a defense of extreme emotional distress but did not do so. Mr. Ortiz was prejudiced because important, available and supportive expert testimony was not presented to the jury. Furthermore, Mr. Ortiz's alternative request in this appeal for resentencing is not moot.

I. COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AT THE GUILT PHASE OF PETITIONER'S CAPITAL MURDER TRIAL DEPRIVING PETITIONER OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Trial counsel were ineffective for failing to investigate and present evidence, including impeachment evidence, which supported Appellant's defense that, at the time he killed Deborah Clay, he was acting under an extreme emotional disturbance. At the time of the murder, Mr. Ortiz and Ms. Clay were involved in a romantic relationship but Ms. Clay sought to end the relationship, asked Mr. Ortiz to move out of her home, and was involved with another man. The State contends that counsel could not have presented this defense because Appellant told police that he shot Ms. Clay by accident and did not tell trial counsel that the shooting was intentional until the middle of trial. The State's assertion is false. Long before trial Appellant admitted that the shooting was not an accident. Nonetheless, counsel failed to take the necessary steps to develop the defense of extreme emotional distress ("EED").

Mr. Ortiz was prejudiced by counsel's deficient investigation and presentation. The jury never heard the evidence developed in Rule 61 proceedings that Appellant's traumatic childhood and mental trauma, combined with the stressors leading up to the murder of Ms. Clay supported the defense claim that Mr. Ortiz acted under an extreme emotional disturbance at the time he committed the crime. The State asserts that Appellant did not suffer prejudice for a number of

reasons. The State's arguments lack merit as they have no basis in law or fact. The State failed to address whether counsel was ineffective when he failed to impeach State's witnesses, therefore, Appellant rests on his arguments presented in the opening brief.

A. Counsel's Performance Was Deficient.

After Appellant's arrest he gave a videotaped statement to police in which he told authorities that he had accidentally shot Ms. Clay. Not long after arrest, defense counsel had Mr. Ortiz evaluated by Dr. Abraham Mensch, a psychologist, and Dr. Stephen Mechanick, a psychiatrist.[1] During both of those interviews Mr. Ortiz reiterated what he told police when he was asked about the murder.

Appellant's initial claim that the shooting was accidental lacked common sense and was viewed with skepticism by the defense team. During Rule 61 proceedings Dr. Mechanick stated that accidental shooting was an impediment to him offering an opinion of EED, but explained that he had been dubious of Mr. Ortiz's initial explanation of the murder: "This was a case where I certainly didn't think that Mr. Ortiz's first accounting of events was likely to be accurate, or the

[1] Dr. Mechanick initially interviewed Mr. Ortiz on November 9, 2001 and Dr. Mensch conducted interviews on November 10, 2001 and May 31, 2003. A3653; A4228; A3205.

most accurate version of events."[2] A2953 (Mechanick). In November of 2001 an email exchanged among the defense team documents that Dr. Mechanick would reconsider EED "[i]f [Ortiz] changes his mind re the 'accident', then he can go back and reevaluate him." A4228.[3]

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[2] Dr. Mensch was likewise unable to express an opinion on EED given Mr. Ortiz's account of accident. A3180-A3181.

[3] At trial, the State presented crime reconstruction testimony to dispute the accident defense. Such a defense was not supported by the physical evidence and, as a result, not persuasive. In closing, the State pointed out:

> [The gun] had to be aimed. He knew where she would be when he shot the gun at her. And you can tell by looking at State's 17 where the bullet came in, in relation to the shower wall. Where it came in, in relation to the shower wall. It's almost dead center.
>
> (Prosecutor displaying picture on ELMO.)
>
> It's almost dead center. And Detective Marvel testified that it came in at a twenty degree angle, which is consistent with somebody holding a shotgun up to their shoulder and aiming down into the homemade silencer.
>
> . . .
>
> After that, the defendant engaged in a four step process. The act of reloading the bolt action shotgun . . . . In order to reload this gun, you have to pull up on the bold, pull it back, the shell ejects. The spring pushes another live shell into the gun and then has to be locked and it's ready to fire again.

A2351.

After meetings with the defense team, Mr. Ortiz admitted the truth – that the shooting was intentional. A2856. As early as April 19, 2002, Mr. Ortiz told defense investigator Linda Zervas that the shooting was intentional. In an April 23, 2002 email, Ms. Zervas reported to Lloyd Schmid, trial counsel, that Mr. Ortiz told her "[h]e INTENTIONALLY pointed [the gun] at the bathroom wall and fired it . . . . 'I didn't care if it hit her or not – but I shot it to say I've had enough.'" A4321. This was over a year before trial.

Mr. Ortiz remained consistent. An email dated March 21, 2003 (more than three months prior to trial), documents that the defense team was aware that Mr. Ortiz agreed that the shooting was intentional and that they asked Drs. Mechanick and Mensch whether "this new info would change your ideas about using EED?" A4235-A4236. Thus, the State's assertion that "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" is flatly contradicted by the record. State's Answering Brief ("State's Brief") at 2, 16.[4]

In its initial Rule 61 opinion, the Superior Court made the same erroneous conclusion: "Ortiz maintained [accident] from the time of his arrest until the

[4] While the State quotes Ms. Carey's testimony in making this point, it does not add that she qualified her answer by stating, "My memory could be failing." A3122. As a further sign of lack of effective assistance of counsel, Ms. Carey is not copied on the initial emails that Ms. Zervas sent to Mr. Schmid explaining that Mr. Ortiz had said that the shooting was intentional.

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." *Op*. 15-16 (emphasis in original), Exh. A to Appellant's Corrected Opening Brief.

The State acknowledges that when Dr. Mensch re-evaluated Mr. Ortiz on May 31, 2003, Mr. Ortiz admitted that the shooting was not an accident. However, the State claims that this information was not communicated to defense counsel. State's Brief at 16-17. The State does not provide a citation to the record to support this assertion. *Id*. This claim is directly contradicted by the emails discussed above which document that the attorneys were aware long before trial that Ortiz agreed to an intentional shooting. The State seems to suggest that Deborah Carey's testimony during the Rule 61 hearing would support this conclusion, but she admitted during her testimony that after meeting with Mr. Ortiz several times he admitted that the shooting was intentional. A2856. Moreover, Mr. Schmid, who was lead counsel, admitted that the email correspondence was the most reliable account of when they became aware of this information. A4217-A4218.

The State's arguments regarding counsel's performance rest entirely on this erroneous assumption that counsel was unaware until trial was underway that Mr.

Ortiz acknowledged the shooting was intentional. It offers no alternative argument that counsel acted reasonably even if they received the information as early as April 2002. In fact, it admits that the evidence of EED presented at trial was "limited." State's Brief at 9. As documented by the emails, counsel was aware of this information over a year before trial but did not (as the Superior Court suggested the defense should have) investigate and prepare a credible EED defense. Defense counsel wanted Dr. Mechanick to re-interview Mr. Ortiz in light of this information but did not do this because they were denied funding. A3026 (Schmid); A4142 (Carey).

Ultimately, the defense did obtain funding for Dr. Mensch to re-interview Appellant but it does not appear that trial counsel asked him to evaluate the possibility of an EED defense in light of the new information. During Rule 61 proceedings, Mr. Schmid testified he did not remember if he had instructed Dr. Mensch to evaluate whether EED was an available defense during this second interview. A4209. The emails in which Mr. Schmid begged for funding to have Dr. Mensch re-evaluate Mr. Ortiz focused on mitigation, not EED. In an April 10, 2003 email, Mr. Schmid told a colleague the trial defense needed additional expert funding because "[w]e need help in mitigation." A4239; *accord* A4237 (March 25, 2003 email from Mr. Schmid: stating that things have changed "and some issues may be addressable in the penalty phase"). Counsel's performance

regarding the investigation and presentation of Mr. Ortiz's defense do not meet the standards of *Strickland*.

B. Appellant Suffered Prejudice

The State makes four principal arguments claiming that Appellant did not suffer prejudice: (1) Dr. Mechanick's opinion during Rule 61 proceedings lacks credibility because it changed over twelve years after his initial examination of Mr. Ortiz and was not available to trial counsel, (State's Brief at 3, 21); (2) there were sufficient facts in the record which undermined the defense of EED and supported intentional murder (*id*. at 9); (3) that presentation of an EED defense would have resulted in Mr. Ortiz testifying and the jury would have been further prejudiced by the introduction of Mr. Ortiz's criminal record (*id*. at 19); and (4) Mr. Ortiz's personality disorder, rather than EED, better explains his actions on the day of the homicide (*id*. at 23-25).

First, the State claims that Dr. Mechanick changed his opinion twelve years after his initial interview of Mr. Ortiz and found that Mr. Ortiz acted under EED when he killed Ms. Clay. The state claims that this "revised opinion first expressed in an August 26, 2014 written report was never available to trial counsel in July 2003." State's Brief at 18. The State's argument lacks merit. Dr. Mechanick did not change his opinion in 2014 as to whether Mr. Ortiz had acted under EED at the time of the murder. Dr. Mechanick never considered this

defense in his pretrial evaluation because of Mr. Ortiz's early claim that the shooting was accidental, which, at the outset, precluded consideration of an EED defense. In Rule 61 proceedings, Dr. Mechanick testified that he had not reached an opinion about whether Mr. Ortiz acted under EED until he explored this issue during his second interview on December 16, 2013. A3694-A3695. At that time Mr. Ortiz explained that he had intentionally shot Ms. Clay, so Dr. Mechanick explored the circumstances of the crime and formed the opinion that Mr. Ortiz had acted under EED. Dr. Mechanick explained that he would have been able to provide the EED opinion he gave at the Rule 61 remand proceedings at the time of trial, if he had been able to re-interview Mr. Ortiz before trial. He explained that his opinion was based on Mr. Ortiz's description of the events in December of 2013, which was substantially the same as the account he told Dr. Mensch prior to trial in May 2003. A3756. The State's argument has no basis in fact.[5]

Second, the State argues that there are substantial facts in the record which are inconsistent with a defense that Mr. Ortiz acted under EED: 1) Mr. Ortiz's

[5] Of course, forensic mental health experts frequently testify at trials about a defendant's state of mind and they do this retrospectively. Dr. Mechanick's re-evaluation did not occur sooner because the trial lawyers did not obtain funding and because former Rule 61 counsel, who was conflicted and removed from this case, did not seek the re-evaluation. Dr. Mechanick's opinions have additional indicia of reliability because he *did* evaluate Mr. Ortiz in 2001. In any event, the State has not presented any conflicting testimony from a mental health professional.

actions consistent with premeditation such as crafting a "homemade silencer," telling the victim's daughter, Ashley Clay, not to come home and lying to Ms. Clay's son that he had not been able to retrieve the guns; 2) Mr. Ortiz's own infidelities undercut Ms. Clay's infidelity with Mike Ratledge; and 3) his actions after the murder such as the setting of fires at the crime scene coupled with his cutting off his ankle monitor, flight from the scene and his initial false story to the police that the shooting was accidental. State's Brief at 9, 18.

The above facts demonstrate why expert testimony was so critical at Mr. Ortiz's trial and why the defense attorneys wanted such testimony. *See* A4142 ("Q. [I]f 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.") (Carey). The State asked Dr. Mechanick about all of these factors during Rule 61 proceedings and he explained why these circumstances did not negate the existence of EED. Juan believed he had a future with Ms. Clay and had sustained a relationship with her for many years. A1072 (Ashley Clay). Mr. Ortiz and Ms. Clay became engaged in 2000. A1077. While Mr. Ortiz had relationships with other women during this time, they were either casual or instigated as a reaction to Ms. Clay's infidelity. A3706, A3732, A3753. Most importantly, Dr. Mechanick explained that Mr. Ortiz's actions which were intentional do not take away from the fact that he acted under

EED at the time he murdered Ms. Clay because intentional conduct and EED are not mutually exclusive. A3781. *See Boyd v. State*, 389 A.2d 1282, 1289 (Del. 1978) (the defense of EED puts before the jury "whether the circumstances of an intentional killing justify mitigating the resulting crime from murder to manslaughter").

The State claims that presentation of EED would have resulted in greater prejudice to Mr. Ortiz because it would have resulted in him testifying and his prior criminal record would have been admitted for the jury's consideration. State's Brief at 19. This argument conflicts with the record. Both Mr. Schmid and Ms. Carey testified that it was their intention to pursue and present a defense of EED. A3026, A4142. However, counsel never testified that they did not pursue this strategy because it would necessitate Mr. Ortiz's testimony. In fact, Ms. Carey explained that "with the different statements Mr. Ortiz had made to us, we believed that there would be a very good extreme emotional distress defense." A2856. When she was further pressed on what evidence they would present to support that, she explained that "Obviously, Mr. Ortiz did not testify." A2856. Indeed, much of the evidence in support of EED was presented at trial through the testimony of Ashley Clay. *See, e.g.*, A1071-A1072, A1074-A1075, A1077-A1078. Mr. Ortiz's testimony was not necessary for the defense and counsel had no intention to present his testimony in support of it. Furthermore, the State points to no legal

authority to support their claim that all of Mr. Ortiz's prior convictions would have been admissible if he took the stand in his defense.

The State claims that Mr. Ortiz's diagnosis of Anti-Social Personality Disorder provides a better explanation for his actions than EED. Dr. Mechanick specifically rejected this assertion in his Rule 61 testimony. Dr. Mechanick testified that the events leading up to the murder would have been stressful to individuals regardless of whether they have a personality disorder. A3777-A3778. Dr. Mechanick explained that Mr. Ortiz did not choose to have a personality disorder. That disorder developed "through a combination of genetics and developmental and social factors," for instance, his "history of neglect, abuse, precocious sexual experiences, which have been appropriately labeled as sexual abuse [and] early exposure to substances." A3795.

The State urges unconvincingly that there is no reasonable explanation for Mr. Ortiz's EED. State's Brief at 26. However, there is one. As noted, Mr. Ortiz had been engaged to Mr. Clay since 2000, she was actively having an affair with another man in June and July 2001, he was about to lose his living arrangements and would have to go back to prison because she was kicking him out, and the victim told him he was going to lose someone he considered to be his daughter.[6]

[6] The State's legal argument invoking the Federal Rules of Evidence has no relevance. State's Brief at 14-15. Neither the trial nor the Rule 61 proceedings were governed by the Federal Rules.

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

In *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016), this Court declared that 11 Del. C. § 4209, the punishment statute for first degree murder was unconstitutional, not severable and therefore void. Accordingly, Mr. Ortiz requests that he be sentenced pursuant to the punishment for second degree murder or, in the alternative, pursuant to 11 Del. C. § 4205, the penalty provision for Class A felonies. *See* Appellant's Corrected Opening Brief, 33-36.

The State raises a new argument in its Answering Brief, asserting that Mr. Ortiz's request is, in effect, moot. The State states that Mr. Ortiz has been sentenced to life as an habitual criminal pursuant to 11 Del. C. § 4214(a). State's Brief, 31. It appears to argue that any relief as to Mr. Ortiz's sentence will not be meaningful because he already has another life sentence. However, Mr. Ortiz has an opportunity to petition for a modification of that sentence under 11 Del. C. § 4214(f). Consequently, the request in the homicide case for resentencing to a sentence less than life without parole is not moot.

This Court addressed a similar question in *Williamson v. State*, 669 A.2d 95 (Del. 1995). In *Williamson*, the State asked this Court not to grant a defendant relief from a murder conviction because he was already serving a life sentence without possibility of parole for a separate homicide conviction. The Court rejected the State's argument:

> [T]he future effects of affording appellate relief to Williamson are not now clear. Although it appears that reversal of Williamson's conviction will have only a nominal impact at present, the future is unknown. A situation may arise where Williamson's additional conviction could act as an impediment to clemency or pardon.

Id. at 99. Here, the case for addressing Mr. Ortiz's request for re-sentencing is even stronger. He has a known avenue available to him to lessen the habitual criminal sentence.

The State appears to argue that a petition under section 4214(f) is not available to Mr. Ortiz because the Superior Court declared him a habitual criminal on February 21, 2017, when his Mr. Ortiz's death sentence was vacated, and after § 4214(f) was promulgated. State's Brief at 29. However, the declaration in February 2017 did not modify Mr. Ortiz's sentence. The Superior Court had already declared him a habitual criminal in 2003 and sentenced him, as a result, to life in prison for that offense. A2692; A2709 (Sept. 26, 2003). Mr. Ortiz's situation fits the language of the statute. He was "sentenced as an habitual criminal to a minimum sentence of not less than the statutory maximum penalty for a violent felony pursuant to 4214(a) of this title." 11 Del. C. 4214(f).[7] He is eligible

[7] Based on the punctuation in the statute, it appears that a defendant may petition for sentence modification if he was sentenced as a habitual criminal under section 4214(a) without regard to whether the sentence was imposed before July 19, 2016. In any event, Mr. Ortiz was sentenced under section 4214(a) before July 19, 2016.

to file a petition for sentence modification. Mr. Ortiz's request for resentencing on the homicide conviction is not moot.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's Corrected Opening Brief, Appellant requests that the Court grant him a new trial or, in the alternative, remand for a re-sentencing.

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: September 19, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 19, 2017, I served a copy of *Appellant's Reply Brief* 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