70069-3

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NO. 70069-3

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOJO EJONGA, Appellant,

AMENDED BRIEF OF APPELLANT

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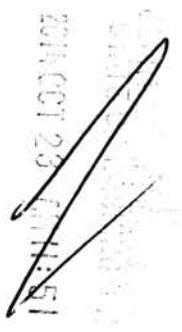

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2. Mr. Ejonga received ineffective assistance of counsel when Defense Counsel erred in the execution of the insanity defense by opting to use an expert wholly lacking in credibility.

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2. Whether a defendant receives ineffective assistance of counsel when Defense Counsel puts forth an insanity defense, but uses an expert the jury could not believe.

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C. STATEMENT OF THE CASE

On a May evening, Mr. Ejonga stabbed three women—fortunately all three survived—with a kitchen knife in an apartment parking lot. As a result of this incident, Mr. Ejonga was convicted of three counts of Attempted Murder in the First Degree and three Counts of Assault in the First Degree.

Background

Growing up in the Democratic Republic of the Congo, Mr. Ejonga dealt with both life changing injuries and physical violence at the hands of the government. Days after he was born, Mr. Ejonga contracted cerebral malaria.[1] Later, as a boy, Mr. Ejonga fell off a balcony and was found unconscious for an unknown period of time.[2] At the hospital, Mr. Ejonga was placed on a breathing machine and was unable to feed himself.[3] Upon returning home, Mr. Ejonga's mother had to teach him how to speak again.[4] Immediately noticeable is a scar that persists to this day, on his forehead.[5]

From that point in time, Mr. Ejonga suffered both physical and mental harms. Upon returning home from the hospital, Mr. Ejonga's

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[1] RP 1/17 at 34.
[2] RP 1/23 at 76.
[3] RP 1/23 at 76.
[4] RP 1/23 at 77.
[5] RP 1/23 at 86.

mother recalled him exhibiting behavioral problems.[6] Mr. Ejonga was angrier and more irritable, he had persistent headaches and fainting spells, he became more impulsive and his attitude and concentration in school became altered.[7]

In 2005, Mr. Ejonga's mother was arrested and had to flee the county in order to escape the increasingly violent military.[8] Around this time, Mr. Ejonga suffered another blow to his head when a soldier, during a raid of Mr. Ejonga's home, struck him with the butt of his rifle, knocking Mr. Ejonga unconscious.[9] In 2006, Mr. Ejonga was finally able to reunite with his mother, who was hiding in Nigeria.[10] By this point, Mr. Ejonga was a different person, plagued with nightmares and flashbacks.[11]

Mr. Ejonga and his mother were finally able to find refuge in the United States around February 2010. [12] However, Mr. Ejonga's troubles persisted. Shortly after his arrival, Mr. Ejonga was rushed to the ER with complaints of headaches, and stomach and back pains.[13] When Mr. Ejonga was finally seen by a doctor, he was hyperventilating and sweating

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[6] RP 1/23 at 86.
[7] RP 1/23 at 86.
[8] RP 1/23 at 86.
[9] RP 1/23 at 87.
[10] RP 1/23 at 87.
[11] RP 1/23 at 87.
[12] RP 1/23 at 88.
[13] RP 1/23 at 88.

heavily.[14] Although the ER doctor could not find a source for the pain, Mr. Ejonga was given a multitude of drugs, including Ativan (a sedative), Dilaudid and Toradol (pain medications), and Zofran (another pain-reliever/anti-inflammatory).[15]

Despite his medical issues, Mr. Ejonga immediately tried to assimilate. Mr. Ejonga made friends with Mr. Bundu Koroma, who says that Mr. Ejonga was overall pleasant, but noted that Mr. Ejonga mentioned he wanted to die at times.[16] On other occasions, Mr. Koroma observed Mr. Ejonga fainting without warning or cause.[17]

Another classmate, Valerie Maganya, had a chance to get to know Mr. Ejonga well; Mr. Ejonga lived with Ms. Maganya's family for some period of time.[18] Valerie felt that overall Mr. Ejonga was normal, except for his secretive nature.[19] Ms. Maganya recalls that Mr. Ejonga talked about learning to be sneaky while living in Nigeria, and that Nigerians were not trustworthy.[20]

Other times, Mr. Ejonga had mood swings, and he would go from "quite happy and friendly" to cold and angry.[21] When Mr. Ejonga was

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[14] RP 1/23 at 88.
[15] RP 1/23 at 88.
[16] RP 1/23 at 78.
[17] RP 1/23 at 79.
[18] RP 1/8 at 31.
[19] RP 1/8 at 34.
[20] RP 1/8 at 35.
[21] RP 1/9 at 35-36.

angry, he would scold Ms. Maganya for dancing with her friends,[22] and when in a good mood, Mr. Ejonga had a habit of saying things that seemed "childish" and odd.[23] Often unprovoked, Mr. Ejonga would inappropriately comment about animals or kids in such a manner that Ms. Manga felt "very uncomfortable."[24]

During the time Ms. Maganya knew Mr. Ejonga, there were no noteworthy events, until her brother's birthday party. At the May 2011 party, Ms. Maganya witnessed Mr. Ejonga jump into her brother's car even though he could not drive.[25] Mr. Ejonga then backed up the car into Ms. Maganya's vehicle.[26] In response, Mr. Ejonga put the car into drive and jumped out, lying on the ground and pretending to be dead. [27]

Afterwards, Ms. Maganya posted on Facebook about her displeasure of Mr. Ejonga's actions. Mr. Ejonga replied to this post in a private message sent to Ms. Maganya, asking that she take down the message in return for Mr. Ejonga paying for the damage he caused to her car and for some money he stole earlier.[28]

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[22] RP 1/9 at 35-36.
[23] RP 1/9 at 47.
[24] RP 1/9 at 66.
[25] RP 1/9 at 22-23.
[26] RP 1/8 at 40.
[27] RP 1/8 at 41.
[28] RP 1/9 at 21.

The Attack

On May 8, 2011, approximately one week after the Facebook conversation, Mr. Ejonga called Ms. Maganya and asked if she wanted to come and pick up her money.[29] Around 8:00 pm that day, Mr. Ejonga began calling Ms. Maganya; in total he called three times throughout the night.[30] Sometime between 8:30 and 9:00 pm, Ms. Mangaya arrived at the parking lot in front of Mr. Ejonga's apartment.[31] When the car pulled up, Mr. Ejonga was upset that Ms. Mangaya had brought along her mother and a friend, Tuwalole Bwamba, but he proceeded to get in the car anyway.[32]

Sitting behind Ms. Maganya, Mr. Ejonga informed the passengers that his money was being held by his cousin in Des Moines and they would have to drive there to collect it.[33] Ms. Bwamba recalled that Mr. Ejonga appeared to be acting normally when he got in the car.[34] Ultimately, Mr. Ejonga directed the car to a dark parking lot where Mr. Ejonga told them to park.[35]

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[29] RP 1/9 at 22-23.
[30] RP 1/9 at 48.
[31] RP 1/9 at 23.
[32] RP 1/9 at 24.
[33] RP 1/9 at 24-25.
[34] RP 1/9 at 102.
[35] RP 1/9 at 25.

Upon arrival, Mr. Ejonga began to fidget. He told Ms. Maganya that his cousin would be out shortly with the money, and then he stepped out to make a phone call. Mr. Ejonga actually called Ms. Bwamba and claimed it was a mistake as he meant to dial his cousin.[36] He then grabbed hold of the rear driver's side window, which was not working correctly, and pulled it up.[37] Mr. Ejonga got back in the car and asked the other passengers what they were doing.[38]

The three passengers mentioned that they were browsing Facebook, then, without provocation, Mr. Ejonga began stabbing the three women inside the car.[39] Ms. Mangaya later recalled that Mr. Ejonga did not seem to be in control of himself.[40] During the attack, Mr. Ejonga's face was blank and he was biting his tongue.[41] Later, she remembered seeing Mr. Ejonga carrying a kitchen knife wrapped in a white towel.[42]

Mr. Ejonga recalled seeing different people in the car chasing him with a knife and gun, and perceived himself to be outside the car.[43] Mr. Ejonga recalls feeling as if he had been struck in the head again, but this

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[36] RP 1/9 at 25.
[37] RP 1/9 at 25.
[38] RP 1/9 at 25.
[39] RP 1/9 at 26.
[40] RP 1/9 at 55.
[41] RP 1/9 at 56.
[42] RP 1/9 at 55.
[43] RP 1/23 at 95.

time his body became energized.[44] He was no longer in the car with Ms. Mangaya; he was being chased by people carrying knives and guns, while his car was suddenly filled with strange men.[45] He recalls that the people chasing him were yelling unintelligible things, which sounded like Swahili—the language he heard when he was struck with the rifle as a child and the language he heard spoken between the men who killed his father.[46]

Investigation and Trial

While detained, Mr. Ejonga was recorded by Officer J. Coppadae in his police vehicle. During the detention, Mr. Ejonga made statements regarding his present state of mind and his belief that he was acting out of self-defense. Upon arrival at the jail, Mr. Ejonga mentioned being suicidal and having a history of panic attacks, but that he was not on any medications.[47] Three days later the jail staff was put on alert as Mr. Ejonga was found in his cell, not moving and unresponsive to moderate pain cues; his speech was slow and unclear.[48] A week after Mr. Ejonga first arrived, a

[44] RP 1/23 at 95.
[45] RP 1/23 at 94-95.
[46] RP 1/23 at 98-100.
[47] RP 1/23 at 102-103.
[48] RP 1/23 at 104.

jail staff member e-mailed the psychiatric nurse that Mr. Ejonga had been hearing voices.[49]

On May 12, 2011, Mr. Ejonga subpoenaed the Des Moines police department and Officer J. Coppadae for evidence relating to the events of May 8, including the video footage taken during Mr. Ejonga's detention. The subpoena included any 911 tapes, written or recorded statements and the substance of any oral statements made by the defendant. After receiving the subpoena but before producing the evidence in discovery, the Des Moines police department and Officer J. Coppadae destroyed the video footage.

When the doctor visited Mr. Ejonga on May 17, Mr. Ejonga continued to report some symptoms while denying others. Mr. Ejonga refused to admit his feelings of suicide or hearing voices, but admitted that his symptoms of anxiety and panic were chronic.[50] At this time, Mr. Ejonga was prescribed Zoloft.[51] The next day, Mr. Ejonga reported trouble sleeping; he was seeing people in his cell that wanted to cause him harm, even when his eyes were open.[52] His medical request also made mention of hearing voices from his past, when his family was being attacked in their home country.

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[49] RP 1/23 at 105.
[50] RP 1/23 at 105-106.
[51] RP 1/23 at 109.
[52] RP 1/23 at 106.

Later Mr. Ejonga reported nightmares and intrusive imagery. The medical professional believed these delusions could be related to PTSD, and Mr. Ejonga was proscribed Prazosin.[53] The medical staff followed up because Mr. Ejonga was still hearing voices; although he reported the Zoloft helped.[54]

A psychiatric nurse practitioner later met with Mr. Ejonga. Mr. Ejonga reporting hearing voices and feeling afraid.[55] After another visit, the medical staff determined Mr. Ejonga's hearing voices was generalized anxiety and PTSD-related symptoms.[56] The reports of nightmares did not begin to abate until the end of July.[57]

By September 1, Mr. Ejonga was denying his psychosis but was still struggling with voices and flashbacks that worsened when speaking with his lawyer.[58] On December 1, Mr. Ejonga was hearing voices and having flashbacks while being held in the downtown jail. He complained to the nurse practitioner that his hand was hurting from a microchip that was placed inside of him. Mr. Ejonga mentioned that he may have ended up in this situation because he unknowingly ingested PCP at some point.[59]

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[53] RP 1/23 at 108.
[54] RP 1/23 at 109.
[55] RP 1/23 at 105-10.
[56] RP 1/23 at 110.
[57] RP 1/23 at 110-11.
[58] RP 1/23 at 111.
[59] RP 1/23 at 111-12.

The nurse practitioner's notes reflect that that Mr. Ejonga exhibited "paranoia, appears logical at times, engaged in interview, frustrated." She diagnosed Mr. Ejonga with PTSD and gave him Abilify, an anti-psychotic useful for treating mood disorders and PTSD.[60]

Overall, Mr. Ejonga was prescribed a variety of medications to help him cope with his symptoms. Mr. Ejonga reported hallucinations, a lack of sleep, depression, and auditory hallucinations, such as voices, babies crying, dogs barking and cats screaming.[61] Altogether, he was prescribed Zoloft, Elavil, Prazosin for PTSD and lithium for mood disorders.[62] It was only after being put on this cocktail that Mr. Ejonga reported feeling more settled, calm, and generally less upset, although the symptoms and hallucinations never disappeared.[63]

At trial, Mr. Ejonga's trial attorney put forth an insanity defense. The non-expert witnesses' collective testimony established undisputed facts regarding the time leading up to the attack, the attack itself, and the attack's aftermath. Due to the insanity defense, the expert witnesses analyzed whether Mr. Ejonga met the M'Naghten test.

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[60] RP 1/23 at 112.
[61] RP 1/23 at 114-18.
[62] RP 1/17 at 87-88.
[63] RP 1/17 at 88.

The defense expert, Dr. Kroll testified first. He diagnosed Mr. Ejonga with PTSD and a delusional disorder.[64] Dr. Kroll based these diagnoses on Mr. Ejonga's extensive history of symptoms and opined that Mr. Ejonga met the insanity standard.

However, on cross-examination, the State revealed several gaping holes in Dr. Kroll's testimony. Dr. Kroll admitted that none of his diagnoses carried symptoms indicating a failure to understand the difference between right and wrong.[65] Additionally, Dr. Kroll admitted that the facts that Mr. Ejonga brought a knife, half pair of scissors, rubber gloves, and a change of clothes and fled the scene were important facts in determining whether Mr. Ejonga knew the difference between right and wrong.[66] Dr. Kroll was also impeached with statements from a pre-trail interview where he could not accurately state and separate Washington's standards for insanity and diminished capacity.[67] Finally, the State elicited evidence belying a thorough psychological analysis: Dr. Kroll did not interview other people other than Mr. Ejonga's mother, he completed his opinion before he received the MRI and EEG results,[68] and the prosecutor used a more recent version of the DSM than Dr. Kroll.

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[64] RP 1/17 at 67.
[65] RP 1/22 at 10.
[66] RP 1/22 at 55-56.
[67] RP 1/22 at 6-8.
[68] RP 1/22 at 17.

Next, Dr. McClung, the State's expert witness, testified that Mr. Ejonga did not meet the insanity standard. Dr. McClung found it probable that Mr. Ejonga suffered from PTSD and antisocial personality traits.[69] Dr. McClung testified that most people who suffer from PTSD are not violent unless antisocial personality traits are also present.[70] Moreover, Dr. McClung harbored strong suspicions that malingering accounted for many of Mr. Ejonga's symptoms. As a consequence, Dr. McClung opined that Mr. Ejonga's PTSD did not cause him to commit the crime[71] nor did Mr. Ejonga meet the insanity standard.[72]

After the conclusion of closing arguments, Mr. Ejonga was convicted on three counts of First Degree Attempted Murder and three counts of First Degree Assault. Accordingly, Mr. Ejonga appeals his convictions.

D. ARGUMENT

At trial, Defense Counsel focused on an insanity defense even though a diminished capacity defense was available. Based on the testimony of the defense expert, the insanity defense had absolutely no chance of success. Putting forth a defense completely certain to fail resulted in the ineffective assistance of counsel. This deficient

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[69] RP 1/23 at 34.
[70] RP 1/23 at 37-38.
[71] RP 1/23 at 59-60.
[72] RP 1/23 at 68.

representation prejudiced Mr. Ejonga because a diminished capacity defense with a self-defense instruction had a reasonable probability of success. Therefore, Mr. Ejonga respectfully requests this court to reverse his convictions and remand for a new trial.

I. THE INSANITY DEFENSE ARGUED BY DEFENSE COUNSEL HAD ZERO CHANCE OF SUCCESS.

Mr. Ejonga's trial attorney put forth an insanity defense even though it had no chance to succeed. First, the expert produced by Defense Counsel acknowledged that Mr. Ejonga did not meet the legal standard of insanity. Next, Mr. Ejonga's actions leading up the assault strongly pointed away from insanity.

a. The Defense Expert Conceded that Mr. Ejonga's Diagnosed Mental Conditions Failed to Meet the Insanity Standard

In Washington, to succeed on an insanity the defense, the defendant must demonstrate that a mental disease or defect either (1) prevented the defendant from perceiving the nature and quality of the act charged, or (2) prevented the defendant from being able to determine right from wrong regarding the act charged.[73] This standard is known as the M'Naghten test.[74] Washington applies this test rigorously.[75] The question

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[73] RCW 9A.12.010.
[74] *State v. Thomas*, 8 Wn. App. 495, 496, 507 P.2d 153, 154 (1973).
[75] *See State v. Crenshaw*, 98 Wn.2d 789, 793, 659 P.2d 488 (1983).

is whether the defendant was mentally impaired at the time of the act.[76] The defendant is required to establish the insanity defense by a preponderance of the evidence.[77]

The insanity defense is a high hurdle for the defendant to cross. Under the first option, proving that the defendant was significantly limited in the ability to perceive the nature and quality of an act is not sufficient; the defendant must show total inability to perceive.[78] To succeed under the second option, the defendant must show that he or she could not understand that the act was legally or morally wrong.[79]

In this case, defense counsel opted to present an insanity defense. However, it would have been impossible for the jury to find Mr. Ejonga was legally insane because the defense's own expert equivocated on his stance that Mr. Ejonga was legally insane and, when pressed, the defense expert demonstrated ignorance of the precise legal standard.

The defense expert, Dr. Kroll, testified on direct examination that Mr. Ejonga was legally insane at the time he committed the act. Dr. Kroll stated that Mr. Ejonga both was unable to know right from wrong and to appreciate the nature of his actions—satisfying either prong of the insanity

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[76] *State v. Jamison*, 94 Wn.2d 663, 619 P.2d 352 (1980).
[77] RCW 9A.12.010(2).
[78] *State v. Jamison*, 94 Wn.2d 663, 619 P.2d 352 (1980).
[79] *State v. Chanthabouly*, 164 Wn. App. 104, 131, 262 P.3d 144 (2011); RCW 9A.12.010(1)(b).

standard.[80] The expert also claimed that he held this opinion to a reasonable degree of medical certainty.[81]

However, the defense expert wavered when questioned about this opinion on cross-examination. Dr. Kroll diagnosed Mr. Ejonga with both a delusional disorder and PTSD.[82] Then on cross-examination, the State asked Dr. Kroll whether either of these diagnoses exhibited symptoms of the inability to know right from wrong.[83] Dr. Kroll admitted "I don't believe any of the diagnoses in this category show an inability to know right from wrong."[84] When the defense expert admits that the diagnosed disorders do not have symptoms that rise to the level of insanity, the jury cannot find the defendant insane. Moreover, this admission by Dr. Kroll cast doubt on the credibility of his entire testimony.

During cross-examination, the Dr. Kroll continued to undermine the value of his opinion on Mr. Ejonga's mental health at the time of the act. Dr. Kroll opined that he doubted the veracity of Mr. Ejonga's self reporting, the primary source from which Dr. Kroll based his opinion.[85]

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[80] RP 1/17 at 100.
[81] RP 1/17 at 100.
[82] RP 1/17 at 67.
[83] RP 1/22 at 10.
[84] RP 1/22 at 10.
[85] RP 1/22 at 31.

Furthermore, Dr. Kroll admitted observing Mr. Ejonga exhibit normal behavior during the psychological examination.[86]

Finally, Dr. Kroll even admitted the importance of the State's evidence that strongly contradicted Dr. Kroll's earlier opinion that Mr. Ejonga satisfied the M'Naghten test. When the State questioned Dr. Kroll about the facts that Mr. Ejonga brought a weapon in the car, carried rubber gloves, fled the scene upon discovery by a witness, and hid the weapon, Dr. Kroll agreed that these were important factors in determining whether someone knows right from wrong.[87] By agreeing with the State and acknowledging the importance of these facts, the defense expert ensured that the jury could not accept the insanity defense.

b. Mr. Ejonga's Actions Leading up to the Stabbing Strongly Pointed Away from Insanity

In addition to the defense expert's fatally flawed opinion vis-à-vis the insanity defense, the undisputed testimony cast extreme doubt about whether Mr. Ejonga met the rigorous insanity standard.

First, none of the people who knew Mr. Ejonga observed behavior that would support a finding that Mr. Ejonga had a mental defect that led

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[86] RP 1/22 at 52.
[87] RP 1/22 at 55-56.

him to meet the rigorous insanity standard.[88] Although the defense expert did not interview anyone other than Mr. Ejonga's mother, the State's expert interviewed multiple people involved in Mr. Ejonga's life. These interviews produced no compelling evidence that Mr. Ejonga had an extreme mental defect.

Moreover, additional evidence caused the defense expert to soften his opinion that Mr. Ejonga was legally insane. For example, Mr. Ejonga claimed that hearing Swahili caused him to be nervous or upset.[89] However, Mr. Ejonga stayed in a home for a period of time where Swahili was spoken regularly.[90] Another piece of evidence that caused the defense expert to retreat from his opinion is that Mr. Ejonga identified himself as "Eric" to the arresting police officer.[91] The State characterized this as suspicious and the defense expert agreed.[92]

Based on the defense expert's own testimony the jury could not have found Mr. Ejonga to be legally insane, because the defense expert admitted that the symptoms from his diagnosis did not rise to the "rigorous" M'Naghten standard. Furthermore, the defense expert conceded that the evidence suggesting Mr. Ejonga knew right from wrong

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[88] Although one acquaintance, Mr. Koroma, reported observing Mr. Ejonga express suicidal ideations and faint. RP 1/23 at 78-79.
[89] RP 1/22 at 49.
[90] RP 1/22 at 49.
[91] RP 1/22 at 53.
[92] RP 1/22 at 53.

was significant. Finally, Mr. Ejonga's actions belied an insanity defense. He intentionally placed himself in a situation likely to trigger negative responses and he gave a false name when questioned by the arresting police officer. Because the defense expert's testimony failed to establish that Mr. Ejonga showed a total inability to perceive or that he could not understand the act was legally or moral wrong, it would have been impossible for a jury to find Mr. Ejonga legally insane.

II. MR. EJONGA WAS PREJUDICED BY DEFENSE COUNSEL'S FAILURE TO ARGUE DIMINISHED CAPACITY WITH A SELF-DEFENSE INSTRUCTION.

To prevail on an ineffective assistance of counsel claim, the petitioner must demonstrate both that counsel's performance was deficient and that the performance prejudiced the defendant.[93] In this case, Mr. Ejonga's representation was deficient because his trial attorney proffered an impossible defense, while failing to argue a plausible alternative. Additionally, Defense Counsel's execution of the insanity defense was deficient. Mr. Ejonga was prejudiced because there is a reasonable probability that the jury would have accepted a diminished capacity defense if Defense Counsel had requested a self-defense instruction.

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[93] *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2025 (1984)).

a. Defense Counsel's Performance Fell Below an Objectively Reasonable Standard By Failing To Argue Diminished Capacity.

The first prong of the ineffective assistance of counsel test requires the defendant to show that Defense Counsel's performance fell below "an objective standard of reasonableness."[94] In other words, trial counsel's performance is deficient if his or her actions were objectively unreasonable.[95] Defense Counsel acts unreasonably if his or her actions cannot be viewed as legitimate decisions of "trial strategy or tactics."[96] In other words, if the court can see no *reasonable* justification for defense attorney's actions, his representation was "deficient" under *Strickland.*

Defense Counsel's assistance can be deficient when Defense Counsel fails to raise a diminished capacity defense. "Failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test."[97] In *Tilton*, the defendant smoked marijuana both before and after the act constituting the crime charged and presented evidence of having a history of blackouts caused by marijuana use.[98] The Court, finding

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[94] *Strickland*, 466 U.S. at 689.
[95] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[96] *See id*; *see also State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)) ("Deficient performance is not shown by matters that go to trial strategy or tactics.").
[97] *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).
[98] *Tilton*, 149 Wn.2d at 784-85.

deficient representation, determined that a "reasonably competent attorney would have raised" a diminished capacity defense.[99]

Defense Counsel's failure to request a diminished capacity instruction can also constitute deficient representation. For example, in *State v. Cienfuegos*, the defendant, a long-time drug addict, experienced severe withdrawal symptoms while being transported between the courthouse and the jail. During transit, the defendant, chained and clad in a red jail outfit, tried to escape. On appeal, the court noted that a diminished capacity instruction "should have been given."[100]

Even the failure to request a voluntary intoxication instruction has also been found to constitute ineffective assistance of counsel. In *State v. Kruger*, Defense Counsel failed to request an instruction even though the testimony clearly revealed that the defendant was intoxicated when he head-butted a police officer. The court held that the failure to request the instruction constituted ineffective assistance because intent was the focus of the defense. Failure jury was not instructed that intoxication could be considered in determining whether the defendant acted with the mental state essential to commit the crime, was found prejudicial.[101]

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[99] *Tilton*, 149 Wn.2d at 785.
[100] *Cienfuegos*, 144 Wn.2d at 230 (the Court found that, despite the error, the defendant failed to show that counsel's errors "were so serious as to deprive him of a fair trial").
[101] *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003) (quoting *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984)).

Other jurisdictions have recognized that failure to raise the defendant's only plausible defense can constitute ineffective assistance of counsel. In *Keats*, the defendant while inside his home, threatened to kill himself and started a fire in the home. The court found deficient representation because defense counsel raised a diminished capacity defense—which Wyoming does not recognize—instead of a NGMI defense because defense counsel failed to conduct an adequate investigation.[102] The opposite mistake that Mr. Ejonga's attorney made.

Overall, Defense Counsel's assistance fell below an objective standard of reasonableness for several reasons. Mr. Ejonga did not meet the legal definition of insanity, which the defense expert conceded. Assuming the insanity defense was not impossible, Defense Counsel produced an expert, who lacked credibility and failed to back up his own opinion. Therefore, in light of the defense expert's admission, Defense Counsel should have argued diminished capacity with a self-defense instruction, which was supported by the facts.

i. Defense Counsel provided deficient representation by proffering a defense that was certain to fail.

In this case, Defense Counsel presented a defense with no chance of success. Defense Counsel should have been aware that the defense

[102] *Keats v. Wyoming*, 115 .3d 1110, 1119, 2005 WY 81 (2005).

expert would not provide sufficient evidence to allow the jury to find Mr. Ejonga legally insane. Additionally, the undisputed facts of the case are inconsistent with insanity. Thus, by concentrating on an insanity defense instead of a diminished capacity argument, Defense Counsel provided deficient representation.

Defense Counsel should have known that the defense expert failed to present enough evidence of insanity to persuade the jury. The defense expert, Dr. Kroll admitted that his diagnoses did not carry symptoms evidencing legal insanity.[103] Dr. Kroll also admitted that there were serious problems with Mr. Ejonga's insanity defense, such as Mr. Ejonga identifying himself as "Eric" to the arresting officer,[104] revealing Mr. Ejonga's attempt to avoid detection by the police. If Mr. Ejonga truly was insane at the act, it is unlikely he would attempt to avoid detection.

Moreover, Defense Counsel knew that the defense expert's credibility would be attacked on cross-examination, so as to undermine the entire defense. The State interviewed the defense expert before trial—but after Dr. Kroll filed his report—in Defense Counsel's presence. During this interview, the State asked Dr. Kroll whether he was familiar with Washington's diminished capacity standard. During the interview, Dr.

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[103]RP 1/22 at 64.
[104] RP 1/22 at 53.

Kroll admitted that "I didn't look into it carefully . . . ."[105] After stumbling through basic questions, Dr. Kroll conceded that he could not recall the diminished capacity test.[106] Dr. Kroll went so far as to admit that, during the interview he mixed M'Naghten and the diminished capacity standards.[107]

Finally, the defense expert essentially admitted that there was strong evidence showing that Mr. Ejonga knew right from wrong. Mr. Ejonga suffered from hallucinations in which Al-Qaeda attempted to recruit him to carry out terrorist attacks. One of these hallucinations caused Mr. Ejonga to believe he was being ordered to bomb the Bellevue Microsoft offices.[108] Mr. Ejonga was reluctant to carry out this assignment and Dr. Kroll conceded that Mr. Ejonga knew right from wrong "in regard to the bombing."[109] Continuing down this road, Dr. Kroll further admitted that Mr. Ejonga had taken several actions—bringing a knife, scissors, change of clothes, and rubber gloves, and fleeing the scene—that were important facts in determining whether Mr. Ejonga knew right from wrong.

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[105] RP 1/22 at 6.
[106] RP 1/22 at 6.
[107] RP 1/22 at 8.
[108] RP 1/22 at 49.
[109] RP 1/22 at 49.

The importance of expert witnesses in an insanity defense is paramount because the defendant must introduce persuasive evidence explaining how the defendant was insane. By putting an expert on the stand whose testimony is insufficient to allow the jury to find the defendant was insane and whose prior interview eroded his own credibility, Defense Counsel guaranteed the failure of an insanity defense.

ii. By using an expert lacking in credibility, Defense Counsel's performance fell below an objective standard of reasonableness.

Even if concentrating on an insanity defense instead of a diminished capacity defense was not deficient, Defense Counsel's execution of the insanity defense constituted deficient representation.

First, Defense Counsel put a defense expert on the stand who did not know the legal standards for insanity or diminished capacity. Dr. Kroll's pretrial interview in which he had failed to coherently explain either standard was discussed heavily on cross-examination and allowing Dr. Kroll to testify on behalf of the defendant ensured a conviction. There was no strategic reason for putting such a vulnerable expert on the stand.

Next, the defense expert's opinion was easily undermined. The defense expert used an outdated copy of the Diagnostic and Statistical Manual (DSM), DSM-IV, even though an update to that version was available. The jury was aware of the updated version because *the*

prosecutor used it.[110] Also, Dr. Kroll did not interview any of Mr. Ejonga's associates aside from his mother.[111] Whereas the State's expert interviewed several people in Mr. Ejonga's life, providing a more thorough opinion. Finally, Dr. Kroll finished his opinion before the results of the EEG or the MRI were known.[112] Although Dr. Kroll explained that normal EEG and MRI results do not preclude brain injuries, he had to admit that a perfectly normal test result was not unimportant, suggesting that Dr. Kroll conducted a sloppy psychological analysis.[113]

In addition to conducting a sloppy analysis, Dr. Kroll, unlike the State's expert, is not a forensic psychologist, nor does he have anything other than limited experience conducting forensic examination.[114] Forensic psychologists specialize in the nexus between psychology and the law.[115] For an expert's opinion to carry weight with the jury, having the ability and credentials to deftly merge psychology and the law is imperative.

Finally, Defense Counsel undermined the insanity defense herself while cross-examining Officer Kevin Montgomery. Defense Counsel asked him to tell the jury about the identification cards inside Mr. Ejonga's wallet. The police officer complied, informing the jury that there

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[110] RP 1/22 at 9.
[111] RP 1/22 at 12.
[112] RP 1/22 at 17.
[113] RP 1/22 at 17.
[114] RP 1/17 at133.
[115] RP 1/17 at 145.

were multiple identification cards that did not belong to Mr. Ejonga.[116] Defense Counsel admitted looking through the wallet, and to failing to see the identification cards.[117] A mistake that was much "to Mr. Ejonga's prejudice."[118] This mistake was especially serious because it supported the prosecution's suggestion that Mr. Ejonga was malingering.

Defense Counsel made myriad mistakes in executing the insanity defense. Putting an outmatched, vulnerable expert in front of the jury ensured that the jury would not find that Mr. Ejonga was insane. This mistake was compounded with more mistakes. None of these actions could be confused with actual trial strategy. Defense Counsel's representation was deficient.

b. It Was Unreasonable Not to Focus on a Diminished Capacity Defense Because Mr. Ejonga's Delusions Caused Him to Act in Self-Defense.

Defense Counsel provided ineffective assistance of counsel by offering an insanity defense that was unsupported by the facts or expert testimony. A diminished capacity defense, which provides a lower hurdle for the defendant to cross, was supported by the record. Thus, Defense Counsel unreasonably by trying to convince the jury of the impossible

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[116] RP 1/10 at 55.
[117] RP 1/10 at 61.
[118] RP 1/10 at 61.

instead of focusing on a far more compelling argument - that Mr. Ejonga's PTSD and delusions caused him to believe he acted in self-defense.

While the jury was given a diminished capacity instruction, Defense Counsel failed to argue it to the jury. Instead, Defense Counsel decided to focus on the much-harder-to-prove insanity defense.

Defense Counsel's actions were unreasonable for several reasons. Defense counsel presented the jury with a diminished capacity instruction, but failed to support the theory with argument, rendering the instruction useless. Under the factual circumstances of the case, a finding of diminished capacity vis-à-vis self defense was the *only* way a jury could have acquitted Mr. Ejonga. Finally, Defense Counsel failed to recognize the inherent advantages of arguing diminished capacity.

i. When faced with a choice, it is generally more beneficial to the defendant to argue diminished capacity instead of insanity.

Although the two defenses may be argued together, when given the chance, Defense Counsel should almost always argue diminished capacity as insanity is much more difficult to prove.[119] For this reason, the insanity defense is rarely used in Washington.[120]

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[119] Brett C. Trowbridge, The New Diminished Capacity Defense in Washington: A Report from the Trowbridge Foundation, 36 GONZ. L. REV. 497 (2001).
[120] *Id.*

Instead, when the defendant is charged with a crime with a *mens rea* element, the better and more common practice is to argue diminished capacity.[121] First, advancing an insanity defense places the burden of proof on the defense, requiring the defendant to prove that he was legally insane.[122] Obviously, the defendant is at an immense disadvantage when he is forced to prove his innocence.

Second, an insanity defense requires a "mental disease or defect" to be the reason for the incapacitation. Such a standard can often limit the defense argument to specific mental disorders. However, diminished capacity includes mental orders fitting under insanity as well as any other incapacitating factor, including voluntary intoxication.[123]

Third, a diminished capacity defense will almost always produce a result more favorable than even a successful insanity defense. If a defendant prevails in an insanity defense, he will likely be sent to a state mental hospital for treatment and may remain a patient at the hospital for up to the maximum sentence for the crime charged.[124] In contrast, a diminished capacity defense allows the jury to either acquit him, or find him guilty of a lesser included offense.

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[121] *In re Estate of Kissinger*, 166 Wn.2d 120, 129, 206 P.3d 665 (2009) (citing Trowbridge at 497).
[122] *Id.*
[123] *Id.*
[124] Trowbridge, 36 GONZ. L. REV. 497.

This is a crucial distinction. Had Mr. Ejonga's trial attorney concentrated on presenting an effective diminished capacity argument, Mr. Ejonga would have been able to avoid the disadvantages and stigma contained in the insanity defense.

ii. Even though Defense Counsel received a diminished capacity instruction, the instruction was not supported by argument.

Although Defense Counsel requested and received a diminished capacity instruction, the diminished capacity instruction was unsupported by effective argument. Much of the trial testimony and arguments were geared toward the impossible insanity defense. Defense Counsel only briefly mentioned diminished capacity as a defense in closing.[125]

Furthermore, in order for the diminished capacity argument to be convincing, Defense Counsel needed to argue that Mr. Ejonga believed he acted in self-defense. Due to its heightened intent requirement, the Attempted First Degree Murder charge may have been undermined by the self-defense instruction.

In order to rebut the First Degree Assault charge, Defense Counsel likely needed to request the self-defense instruction because premeditation is not an element of First Degree Assault. Instead, First Degree Assault requires intent to cause bodily harm. Mr. Ejonga's delusion did not

[125] RP 1/28 at 93, 107.

prevent him from forming this intent—he obviously was trying to harm someone by stabbing with a kitchen knife. But Mr. Ejonga's delusions did cause him to believe he acted in self-defense.

Considering diminished capacity was Mr. Ejonga's only potential defense with any reasonable possibility of success, the failure to assert a workable argument was unreasonable. Additionally, a developed diminished capacity argument, would have required Defense Counsel to request the self-defense instruction.

iii. Evidence presented at trial would have supported a diminished capacity vis-à-vis self-defense defense.

Defense counsel, when faced with a choice, should assert a diminished capacity defense in place of an insanity defense. [126] In this case, Defense Counsel had no reason to deviate from this proposition because diminished capacity was the only defense that could have helped Mr. Ejonga.

a. The evidence supported a diminished capacity instruction

A defendant is entitled to advance a diminished capacity defense if three elements are met: (1) the charged crime contains a *mens rea* element; (2) there is evidence that the defendant suffers from some sort of mental disorder; and (3) expert testimony allows the jury to reasonably conclude

[126] Trowbridge, 36 GONZ. L. REV. 497.

that his mental disorder negated the *mens rea* required for the crime charged.[127] As with all other instructions, the defendant is entitled to advance the defense if these requirements are met after *viewing the evidence in the light most favorable to the defendant.*[128] The testimony must explain the connection between the disorder and the diminution of capacity.[129]

A diminished capacity defense asserts that the defendant was unable to form the requisite mental state at the time of the crime.[130] Diminished capacity is only available when the crime charged contains premeditation, intent, or knowledge as a required mental state.[131] When the defendant raises a diminished capacity defense, the defendant is allowed to introduce evidence relevant to subjective states of mind.[132]

1. All crimes charged against Mr. Ejonga contained a mens rea element.

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[127] *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); State v. Griffin, 100 Wn.2d 417, 418–19, 670 P.2d 265 (1983); *State v. Guilliot*, 106 Wn.App. 355, 363, 22 P.3d 1266 (2001).

[128] *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998); A defendant is entitled to a diminished capacity jury instruction "whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged." *State v Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).

[129] *State v. Edmon*, 28 Wash.App. 98, 103, 621 P.2d 1310, *review denied*, 95 Wash.2d 1019 (1981).

[130] *State v. Edmon*, 28 Wn. App. 98, 103-04, 621 P.2d 1310, 1314 (1981).

[131] *Edmon*, 28 Wn. App. at 103-04.

[132] *Id.* (*citing State v. Stumpf*, 64 Wn. App. 522, n. 2, 827 P.2d 294 (1992)).

Mr. Ejonga was charged with three counts of attempted first degree murder and three counts of first degree assault. All of these charges contained a *mens rea* element. To prove criminal intent, the State must prove that the defendant intended "to commit a specific crime."[133]

Attempted First Degree murder requires the State prove that the defendant acted with "premeditated intent to cause the death of another person," or acts "[u]nder circumstances manifesting an extreme indifference to human life."[134][135] Additionally, the mental state required for criminal attempt is the highest mental state defined by statute.[136] Next, first degree assault requires the State to prove that the defendant acted "with intent to inflict great bodily harm."[137] "When a crime is defined in terms of acts causing a particular result, a defendant charged with assault must have specifically intended to accomplish that result."[138]Thus, all of the charges against Mr. Ejonga carried a *mens rea* element.

2. The evidence presented at trial demonstrated that Mr. Ejonga suffers from a mental affliction.

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[133] RCW 9A.28.020.
[134] RCW 9A.32.030.
[135] Ejonga could not have been charged under "grave risk of death" standard because it does not require specific intent, so it cannot support an attempt charge. *State v. Chhom*, 128 Wn.2d 739, 911 P.2d 1014 (1996).
[136] *State v. Johnson*, 173 Wn.2d 895, 906, 270 P.3d 591 (2012).
[137] RCW 9A.36.011.
[138] *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991).

The evidence presented at trial showed that Mr. Ejonga suffered from a mental affliction. When the other requirements are met, evidence of PTSD may support the defendant's inability to premeditate.[139] In this case, both the State and defense's expert testified that Mr. Ejonga suffered from PTSD.

PTSD "occurs in response to traumatic events outside the normal range of human experience."[140] Mr. Ejonga grew up in a war-torn country and became a victim of the revolution. Later, he fled to Nigeria where he survived until he was granted admission to the United States.

Although the State's expert, Dr. McClung, opined that Mr. Ejonga did not meet the legal standard for insanity, Dr. McClung acknowledged that it was "probable that he had [PTSD]. I also felt that he some antisocial personality traits . . . ."[141] Later, during direct examination, Dr. McClung stated that people with PTSD did not typically become violent unless the suffered from other complicating factors like anti-social traits.[142] This admission from the State's expert was than sufficient to prove Mr. Ejonga suffered from PTSD—a mental affliction satisfying the diminished capacity requirements.

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[139] *State v. Janes*, 64 Wn.App. 134, 822 P.2d 1238 (1992), *remanded on other grounds* at 121 Wn.2d 220, 850 P.2d 495 (1993).
[140] *State v. Janes*, 121 Wn.2d 220, 233, 850 P.2d 495 (1993).
[141] RP 1/23 at 34.
[142] RP 1/23 at 37.

Furthermore, Dr. McClung testified to a series of Mr. Ejonga's physical symptoms. Dr. McClung recognized that after Mr. Ejonga's childhood head trauma, he remained unconscious and had lingering troubles speaking and eating.[143] Mr. Ejonga was also agitated and had trouble sleeping in the time leading up the stabbings.[144] Finally, Dr. McClung interviewed one of Mr. Ejonga's associates, revealing Mr. Ejonga's desire to die and his previous fainting incidents.[145] Dr. McClung acknowledged a host of other symptoms: flashbacks and nightmares about an assault with a rifle,[146] being upset and emotional about being made fun of,[147] taking medication for hearing voices,[148] being found face-down and unresponsive while in jail,[149] and the jail nurse's observations that Mr. Ejonga appeared paranoid, illogical, and frustrated.[150]

The defense expert, Dr. Kroll, made many of the same diagnoses of symptoms. In addition to PTSD, Dr. Kroll diagnosed Mr. Ejonga with delusional disorder.[151] In the time before the stabbing, Dr. Kroll testified that Mr. Ejonga experienced a panoply of symptoms: trouble sleeping, increasing agitation, headaches, nightmares, night thrashing, and

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[143] RP 1/23 at 76-77.
[144] RP 1/23 at 77.
[145] RP 1/23 at 77-80.
[146] RP 1/23 at 87.
[147] RP 1/23 at 83.
[148] RP 1/23 at 105.
[149] RP 1/23 at 104.
[150] RP 1/23 at 112.
[151] *Id.*

flashbacks.[152] Dr. Kroll also said that Mr. Ejonga suffered from paranoia—believing he was being followed.[153]

Regarding Mr. Ejonga's head trauma, Dr. Kroll recounted the cerebral malaria Mr. Ejonga contracted as a newborn, his subsequent delayed development as a toddler,[154] and the fall which left Mr. Ejonga unconscious for a period of time and caused him to be irritable and suffer from headaches after he awoke.[155] Other incidents involved being hit in the head by a soldier in the Congo.[156] Then in 2010, Mr. Ejonga was admitted to the emergency room due to fainting and stomach problems.[157] Dr. Kroll noted that head injuries make a person more susceptible to psychiatric illness.[158]

Finally, Dr. Kroll relayed the observations of the jail staff. Mr. Ejonga reported hearing voices and barking, and experiencing nightmares and intrusive imagery to the jail staff. As a result, the jail staff diagnosed Mr. Ejonga with delusional disorder and PTSD. The jail treated Mr. Ejonga with an anti-psychotic medication. [159]

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[152] RP 1/17 at 58.
[153] RP 1/17 at 54-55.
[154] RP 1/17 at 42.
[155] RP 1/17 at 40.
[156] RP 1/17 at 45.
[157] RP 1/17 at 54.
[158] RP 1/17 at 90.
[159] RP 1/17 at 86-87.

Both Mr. Ejonga's mother and one of the victims offered corroborating evidence for much the expert testimony. Mr. Ejonga's mother, Alembe Lihau, testified about Mr. Ejonga's drastic weight loss as a newborn—dropping from 3.8 Kg to 3.1 Kg, his fall from the upper level, his father's poisoning during the revolution, change in character, increased agitation, and history of losing consciousness. Valerie Maganya, one of the victims, observed Mr. Ejonga's frequent mood swings and nonsensical speech.

Both lay and expert witnesses, for the State and defense, testified to Mr. Ejonga's mental afflictions. There was overwhelming support presented at trial to the jury that Mr. Ejonga suffered from a mental condition that satisfied the diminished capacity standard.

3. The evidence presented would have allowed the jury to find that Mr. Ejonga's mental condition negated his ability to form the requisite intent.

To prevail on a diminished capacity defense, the defendant must prove that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the mental state necessary to commit the crime charged.[160] The evidence should connect the defendant's mental condition with the inability to form the mental state necessary to commit the charged

[160] *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

crime.[161] Here, Mr. Ejonga's PTSD and delusions caused him to believe he was acting in self-defense, preventing him from forming the intent required for Attempted First Degree Murder or First Degree Assault.

The accompanying self-defense instruction requires the court to instruct the jury on four requirements: (1) the defendant perceived danger;[162] (2) from the defendant's perspective, the danger appeared eminent;[163] (3) the degree of force used was reasonable;[164] and (4) the defendant was not the aggressor.[165]

These requirements are generally not difficult to meet. There need only be some evidence which tends to prove that the act charged was done in self-defense. The court must instruct the jury on self-defense even if it is still insufficient to create a reasonable doubt as to the crime charged. [166] The evidence need only be "credible."[167] And the court must view any credible evidence in the light most favorable to the defense.[168]

Here, even though defense counsel made no effort to establish a record to support a self-defense argument, a court would have given such

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[161] *Marchi*, 158 Wn. App. 823, 834, 243 P.3d 556 (2010).
[162] *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980), *appeal after remand*, 33 Wn.App. 741, 657 P.2d 800 (1983).
[163] *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996).
[164] *State v. Griffith*, 91 Wn.2d 572, 576, 589 P.2d 799 (1979).
[165] *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).
[166] *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).
[167] *Id.*
[168] *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990); *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998).

an instruction because there was "some credible" evidence to support each of these elements.

First, Mr. Ejonga believed he was in danger. The expert testimony revealed that Mr. Ejonga was defending himself from an attack by members of Al-Qaeda.[169] Although Mr. Ejonga was threatened, he tried to resist the terrorists. This series of delusions occurred in the time leading up to the stabbing.

Second, Mr. Ejonga believed this danger to be imminent. Mr. Ejonga believed that his refusal to follow orders from the terrorists made him a target. While riding the in car, his delusion "crystallized" and Mr. Ejonga believed that he was in imminent danger.

Third, the Mr. Ejonga's degree of force was reasonable. Mr. Ejonga believed he was attempting to protect himself against members of an international terrorist organization. Although his choice of self-defense was bloody, it does not mean that it was not reasonable.

Fourth, Mr. Ejonga was not the aggressor. He was in the back seat of a car—a position of weakness. The terrorists in Mr. Ejonga's delusion created the dangerous situation. Although it is not clear whether he believed one of the terrorists attacked him first, the terrorists were the first aggressors by constraining him in the car.

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[169] RP 1/17 at 72-73.

The failure to request a self-defense instruction along with logically arguing diminished capacity was unreasonable. Without a self-defense instruction, it would have been difficult for a jury to accept a diminished capacity instruction. Had defense counsel requested an instruction on self-defense, the State would have had to prove that Mr. Ejonga did not act with lawful force beyond a reasonable doubt. In Washington, once self-defense is properly raised, it "becomes another element of the offense which the State must prove beyond a reasonable doubt."[170] The "State may not burden a defendant with disproving an element of the crime charged," such as without lawful authority. To do otherwise would unconstitutionally "presume the existence of a fact necessary for conviction."[171]

Furthermore, the expert testimony supported this line of argument. Both the State and the defense expert agreed that Mr. Ejonga suffered from PTSD.[172] And both experts agreed that certain PTSD sufferers are prone to violence.[173] Mr. Ejonga's PTSD manifested itself in nightmares, re-experiencing trauma (flashbacks), and suspiciousness.[174] In addition to PTSD, the defense expert diagnosed Mr. Ejonga with delusional

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[170] *State v. McCullum*, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983).
[171] *State v. Lynch*, 178 Wn.2d 487, 497, 309 P.3d 482 (2013) (McCloud Concurring).
[172] RP 1/23 at 34 (The State's expert witness, Dr. McClung); RP 1/17 at 67 (The defense expert witness, Dr. Kroll).
[173] RP 1/22 at 22 (Defense expert, Dr. Kroll).
[174] RP 1/17 at 70-71.

disorder.[175] According to Dr. Kroll, this mental condition is characterized by feeling confused and an intuition of danger. These feelings cause the sufferer to pull sinister meanings from everyday events and interactions, all the while feeling the sense of danger and apprehension. Then, in one moment, sudden awareness occurs, which is delusional.[176]

Because Mr. Ejonga's mental condition caused him to act in self-defense, his criminal intent was negated, satisfying a diminished capacity defense. The mental conditions (PTSD and delusions) caused Mr. Ejonga to believe he was sitting in a car full of people who wanted to harm him. He believed that the three other people in the car worked for Al-Qaeda and he feared for his life. This fear tragically caused him to attack the three women. Mr. Ejonga's acted in a reasonable manner compatible with his delusions.

c. Mr. Ejonga Was Prejudiced Because there is a Reasonable Probability that the Jury Would have Accepted a Diminished Capacity Defense with a Self-Defense Instruction.

Once the defendant demonstrates that the Defense Counsel's performance was deficient, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the

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[175] RP 1/17 at 72.
[176] RP 1/17 at 72-73.

proceeding would have been different."[177] This does not mean that the defendant must show that result "would have" or even that it "should have" been different. In fact, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case."[178] The United States Supreme Court has ruled that when the defendant meets such a standard, it is "sufficient to undermine confidence in the [proceeding's] outcome.[179]

i. It is reasonable that the jury would have accepted a diminished capacity defense had it been argued with a self-defense instruction.

Failing to argue diminished capacity with a self-defense instruction eliminated the possibility of an alternative outcome. If Defense Counsel had properly argued diminished capacity, then the chance of Mr. Ejonga being convicted would have been less certain.

In this case, there was not overwhelming evidence of guilt. First, the jury could have found that Mr. Ejonga's mental issues prevented him from forming the required intent. Both experts agreed that Mr. Ejonga suffered from PTSD. This unanimity between the experts produced strong evidence that Mr. Ejonga had a mental condition ripe for a diminished capacity defense.

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[177] *Strickland*, 466 U.S. at 698.
[178] *Id.* at 693.
[179] *Id.* at 694.

In addition to experiencing the requisite mental condition, evidence in the record would have supported a diminished capacity defense vis-à-vis self-defense. Mr. Ejonga experienced severe delusions, causing him to believe he was in the middle of a dispute with Al-Qaeda. When his delusions crystallized, while he was riding in the car with the three women, he believed the situation with Al-Qaeda reached the breaking point—the men were going to kill him. As a result of this delusion, he attempted to protect himself against the people whom he believed were members of a powerful international terrorist organization. This is supported by one witness's report that Mr. Ejonga stabbed wildly during the attack and did not seem to have control over the knife.[180]

Furthermore, even if the jury would not have accepted a full self-defense argument, if Defense Counsel had pursued that line of argument, there is a high probability the jury would have been amenable to imperfect self-defense. A requested jury instruction on a lesser included offense should be given if the evidence "would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater."[181] To be guilty of Manslaughter, the defendant must "recklessly cause the death

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[180] RP 1/9 at 53.

[181] *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

of another person."[182] Here, even if the jury did not believe Mr. Ejonga satisfied all the self-defense requirements, there was sufficient evidence to find Mr. Ejonga acted recklessly within his delusion. If Mr. Ejonga's use of force was too extreme, Manslaughter would have been appropriate and would have still resulted in a shorter sentence.

This evidence, much of which is undisputed, reasonably ties Mr. Ejonga's mental condition to his inability to form the requisite intent to commit the crimes charged. All the evidence was in the record; Defense Counsel simply failed to make the argument. Thus, there was a reasonable probability that the outcome of the proceeding would have been different had Defense Counsel argued diminished capacity.

ii. There was a reasonable probability that the jury would have accepted a diminished capacity defense from a credible expert.

The United States Supreme Court has recognized that a defendant could be prejudiced when a jury does not believe an expert.[183] In *Hinton*, the defense counsel's performance was deficient for failing to understand the maximum amount of funding that could be used for a defense expert. As a result, the defense attorney selected an expert lacking in credibility: the expert had outdated education and one eye. Although the expert gave the necessary testimony—the quality of the bullet sample made it

[182] RCW 9A.32.060.
[183] *Hinton v. Alabama*, 571 U.S. ___ (2014).

impossible to tell whether the bullet was fired from the defendant's gun, the expert was made to look foolish on cross-examination because of his education, vision, and trouble using a microscope. The Court hit the crucial point: [the expert's] testimony would have done Hinton a lot of good *if the jury had believed it*."[184] The Court remanded on the issue of whether prejudice occurred, but it highlighted the potential prejudice when a defense counsel chooses an expert that the jury will surely disbelieve.

Similarly, Defense Counsel put an expert on the stand that the jury was highly unlikely to believe. First, Dr. Kroll is not a forensic psychologist, which is important when the expert merges psychology and the law. Second, Dr. Kroll, in the pre-trial interview, could not even accurately explain the very standard upon which he purportedly offered an expert opinion. Like Hinton's one-eyed expert, Mr. Ejonga's expert was painted as foolish. Defense Counsel was present at Dr. Kroll's pretrial interview, so she knew the impression it would make on the jury.

Defense Counsel's decision to use an expert without credibility prejudiced Mr. Ejonga because, although the expert more or less testified as Mr. Ejonga would have hoped, there was little chance the jury would believe Dr. Kroll.

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[184] *Hinton v. Alabama*, 571 U.S. ___ (2014).

III. MR. EJONGA WAS PREJUDICED BY THE DES MOINES POLICE DEPARTMENT'S INTENTIONAL DESTRUCTION OF EVIDENCE FOLLOWING HIS ARREST.

The purpose of the due process clause and fourteenth amendment is to prevent unfair trials.[185] Defendants in criminal prosecutions have a fundamental right to an opportunity to present a meaningful and complete defense.[186] Washington State's due process clause guarantees a defendant the same protections and rights to discover "potentially exculpatory evidence" as the federal due process clause.[187] Therefore, when materially exculpatory evidence is destroyed, the criminal charges against the defendant must be dismissed.[188]

a. The Video Footage Taken During Mr. Ejonga's Arrest Was Material and Its Destruction Prejudiced Mr. Ejonga.

When material evidence is withheld from a defendant or is destroyed, resulting in a prejudiced jury, a new trial must be granted.[189] The "right to discovery protected by *Brady* includes a duty to carefully preserve evidence during the early stages of the investigation," a failure to

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[185] *Brady v. Maryland*, 373 U.S. 83, 85, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963).
[186] *State v. Wittenbarger,* 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (citing *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).
[187] *Wittenbarger*, 124 Wn.2d at 474.
[188] *State v. Copeland,* 130 Wash.2d 244, 279, 922 P.2d 1304 (1996) (citing *Wittenbarger,* 124 Wn.2d at 475, 880 P.2d 517).
[189] *Brady,* 373 U.S. at 87.

do so risks Brady becoming meaningless.[190] Negligent acts by the police in maintaining the collected are "chargeable to the prosecutor" and is therefore considered to be committed by the prosecutor.[191] Although there is no "undifferentiated and absolute duty to retain and to preserve all material,"[192] the materiality of evidence has "generally... been liberally construed" by Washington courts.[193]

Materiality only requires that the evidence can "undermine confidence in the outcome of the trial" by creating some degree of reasonable doubt.[194] Evidence need only "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[195] This places a burden on the prosecution, both to disclose and preserve material exculpatory evidence.[196]

Evidence that tends to support a defendant while rebutting police testimony can be material. In *Fettig*, a driver was arrested for negligent

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[190] *United States v. Bryant*, 142 U.S.App.D.C. 132, 141, 439 F.2d 642, 651 (1971).
[191] *City of Seattle v. Fettig*, 10 Wash. App. 773, 775, 519 P.2d 1002 (1974). See also, *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *Imbler v. Craven*, 298 F.Supp. 795, 806 (C.D.Cal.1969); Evans v. *Kropp*, 254 F.Supp. 218, 222 (E.D.Mich.1966).
[192] *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337 102 L.Ed.2d 281 (1988).
[193] *State v. Bernhardt*, 20 Wash. App. 244, 246, 579 P.2d 1344 (1978).
[194] *Smith v. Cain*, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012).
[195] *Wittenbarger*, 124 Wn.2d at 475, citing *Trombetta*, 467 U.S. at 489, 104 S.Ct. 2528.
[196] *Wittenbarger*, 124 Wn.2d at 475.

driving and suspicion of driving while under the influence.[197] During his arrest, police recorded Mr. Fettig performing a set of physical sobriety tests. Before trial, police destroyed the video footage.[198] The court held that, because a "reasonable possibility" existed that the suppressed video showed a lack of intoxication, the video was material.[199] Destroying the video footage, in effect, violated Mr. Fettig's due process rights and the conviction for driving while under the influence was reversed.[200]

Mr. Ejonga was also wrongfully denied the discovery of video evidence that supported Mr. Ejonga's testimony. Only four short days after the incident in question, Mr. Ejonga subpoenaed the Des Moines police department to preserve this evidence. But, the Des Moines police department failed to honor that subpoena. Instead of producing the video, Officer Coppadae destroyed the tape without any explanation.

In addition to failing to preserve evidence, the prosecutor denied Mr. Ejonga the reasonable possibility of producing evidence that he was acting in self-defense. While Mr. Ejonga cannot conclusively show that the video footage was material to his defense, the cause of this absence of proof was the prosecutor's negligence. Therefore, because Mr. Ejonga was prejudiced by his lack of opportunity to present a meaningful and

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[197] *Fettig*, 10 Wash. App. at 774.
[198] *Fettig*, 10 Wash. App. at 774.
[199] *Fettig*, 10 Wash. App. at 776.
[200] *Fettig*, 10 Wash. App. at 777.

complete defense, Mr. Ejonga deserves a new trial under *Brady*.

b. The destruction of Mr. Ejonga's video footage occurred in bad faith and warrants a dismissal of criminal charges.

When considering a due process violation, the "suppression of evidence favorable to the accused upon request violates due process… irrespective of the good faith or bad faith of the prosecution."[201] The destruction of potentially useful evidence burdens the court with a "treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."[202] For that reason, courts have held that, a showing the police or prosecutor acted in bad faith can constitute a denial of due process of law.[203]

That is what happened. Mr. Ejonga subpoenaed the Des Moines police department merely four days after his arrest for a copy of the evidence. Without opportunity to determine the value of the footage, or even to review it, the Des Moines police department intentionally destroyed the footage containing Mr. Ejonga's recorded statements.

Though Mr. Ejonga cannot affirmatively prove that the video was material—i.e. by producing the video itself—this deficiency is sole attributable to the State. Because the court will not and realistically cannot

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[201] *Brady*, 373 U.S. at 1196.
[202] *Youngblood*, 488 U.S. at 58, citing *California v. Trombetta*, 467 U.S. 479, 486, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).
[203] *Youngblood*, 488 U.S. at 57.

know exactly what that video actually meant in Mr. Ejonga's trial, dismissal of the charges, or at the very least, a new trial is necessary to preserve Mr. Ejonga's right to a fair trial.

E. CONCLUSION

A trial attorney put forth a defense that was certain to fail, while ignoring defense that the jury could have accepted. Aggravating factors include the destruction of evidence that supported Mr. Ejonga's self-defense claim. Counsel provided deficient representation by failing to argue alternative defenses, by failing to mention the destruction of the video evidence, and by excluding a self-defense instruction necessary to succeed on a diminished capacity defense.

Mr. Ejonga was prejudiced by these failures. Representation that presents a defense with *no* chance to succeed, combined with irreplaceable video evidence that was destroyed by the police, is akin to only having a trial by name.

Given these violations, this court should either dismiss the charges, or at the very least grant Mr. Ejonga a new trial.

Dated September 24, 2014

Mitch Harrison #43040
Attorney at Law

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Amended Brief of Appellant** on the following persons in the manner indicated below:

Washington State Court of Appeals Division 1 600 University St Seattle, WA 98101-1176	☒ U.S. Mail ☐ Email: ☐ Fax:
King County Prosecuting Attorney Appellate Unit 516 Third Avenue, Room W554 Seattle, WA 98104-2362	☒ U.S. Mail ☐ Email: ☐ Fax:

DATED this 22nd day of October, 2014 at Seattle, Washington.

Christopher Wieting
Law Clerk to Mitch Harrison

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On October 22, 2014, I served in the manner noted a true and correct copy of this **Amended Brief of Appellant** on the following persons in the manner indicated below:

Washington State Court of Appeals Division 1 600 University St Seattle, WA 98101-1176	☒ U.S. Mail ☐ Email: ☐ Fax:
King County Prosecuting Attorney Appellate Unit 516 Third Avenue, Room W554 Seattle, WA 98104-2362	☒ U.S. Mail ☐ Email: ☐ Fax:
Appellant, JoJo Ejonga, DOC #366372 Washington State Corrections Center 2321 West Dayton Airport Road, PO Box 900, Shelton, WA 98584.	☒ U.S. Mail ☐ Email: ☐ Fax:

Sworn on this 7th day of November, 2014 in Seattle, Washington.

Christopher Wieting
Law Clerk to Mitch Harrison