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NO. 92021-4

RECEIVED BY E-MAIL
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Petitioner.

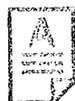
ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

SUPPLEMENTAL BRIEF OF PETITIONER ANTHONY CLARK

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A. ISSUES

1. Whether defense counsel provided ineffective assistance in failing to object to jurors being told Clark's first degree murder case did not involve the death penalty?

2. Whether the trial court violated Clark's constitutional right to present a complete defense in excluding evidence of Clark's mental disability, which was relevant to his state of mind in connection with the charged murder?

3. Whether cumulative error violated Clark's due process right to a fair trial?

B. STATEMENT OF THE CASE

The relevant facts are set forth in Clark's petition for review. A few are repeated here. In deciding Clark's fate, the jury did not get to hear expert testimony about his mental retardation. The trial court refused to allow evidence of Clark's mental limitations because his counsel did not plead a diminished capacity defense. CP 227-28; 19RP 20-21; 21RP 16-17; 22RP 504, 1699. The jury did hear this murder case was not a death penalty case. 22RP 120-21, 372, 419. The evidentiary portion of the trial started on March 14, lasting a month. 22RP 551-1693. Closing arguments finished on the morning of April 17, and the jury returned guilty verdicts that afternoon. 22RP 1856-59, 1863.

C. ARGUMENT

1. **TAKING ALL THE EVIDENCE INTO ACCOUNT, LETTING JURORS KNOW THIS WAS NOT A DEATH PENALTY CASE UNDERMINES CONFIDENCE IN THE OUTCOME.**

"The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a first degree murder case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Hicks, 163 Wn.2d 477, 481, 181 P.3d 831 (2008). This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. Specifically, "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id. at 847.

Before voir dire, the trial court nonetheless invited counsel to tell jurors this was not a death penalty case. 22RP 38-39. Seizing the opportunity, prosecutors told jurors during the course of jury selection that Clark's case did not involve the death penalty. 22RP 120-21, 372, 419. Defense counsel did not object.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Consistent with precedent, the Court of Appeals held defense counsel was deficient failing to object to jurors being told Clark's case did not involve the death penalty. State v. Clark, noted at 188 Wn. App. 1028, 2015 WL 3883513 at *6 (2015); Townsend, 142 Wn.2d at 847; Hicks, 163 Wn.2d at 481.

Unlike State v. Rafay, the record here does not indicate counsel made a deliberate and legitimately strategic choice to disclose to jurors the fact that the defendant was not subject to the death penalty. State v. Rafay, 168 Wn. App. 734, 778-81, 285 P.3d 83 (2012), review denied, 299 P.3d 1171 (2013). Rafay distinguished itself from previous cases such as Townsend, "which involved only brief references to the death penalty" or "complete failure to object." Rafay, 168 Wn. App. at 780. Clark's case is like Townsend, not Rafay. Clark's counsel did not affirmatively participate or even agree to disclose to jurors that the case did not involve the death penalty. Counsel simply remained silent and failed to object. Nor is this a case where a potential juror expressed an anti-death penalty belief during voir dire and arguably betrayed potential sympathy toward the defense. Hicks, 163 Wn.2d at 495-96 (Chambers, J., concurring)

(where the majority held counsel was deficient even in this scenario). No such dynamic presents itself in Clark's case.

Turning to the prejudice prong, Clark argued the evidence against him on the first degree murder charge was not overwhelming based on his testimony. Clark, 2015 WL 3883513 at *6. Citing sufficiency of evidence cases, the Court of Appeals concluded Clark's argument "requires this court to weigh the evidence and determine the credibility of the witnesses, both of which are within the province of the jury." Id. at *7 (citing State v. Andy, 182 Wn.2d 294, 303, 340 P.3d 840 (2014); State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

The Court of Appeals viewed the evidence in the light most favorable to the State in determining the deficient performance had no effect on the murder verdict. Instead of viewing the evidence in its totality as mandated by the United States Supreme Court, the Court of Appeals disregarded Clark's exculpatory testimony on the theory that credibility determinations are for the jury to make.

Clark argues ineffective assistance, not insufficiency of evidence. In assessing whether an error affected the verdict, "[a]n appellate court ordinarily does not make credibility determinations." State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). This means the reviewing court will not presume one side's witnesses are credible and the other

side's witnesses are not. What the Court of Appeals did was find the testimony of the State's witnesses credible and drew the most unfavorable inferences available from Clark's testimony, while relegating the available exculpatory effect of Clark's countervailing testimony to oblivion.

The salient question is whether there is a reasonable probability that, absent the error, "the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. More pointedly, the question in Clark's case is whether there is a reasonable probability that the error affected the jury's credibility and factual determinations such that confidence in the outcome is undermined.

Crucially, Strickland mandates "a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury." Id. at 695. The totality of evidence includes Clark's exculpatory testimony, from which reasonable inferences favorable to Clark could be drawn. Errors stemming from counsel's deficient performance can affect how the trier of fact resolves the case. Id. at 695-96. The ineffective assistance standard thus requires the reviewing court to view the evidence from the standpoint of a reasonable jury and consider how the error may have affected its resolution of the factual issues before it.

Taking into account Clark's testimony, the State's proof on the first degree felony murder charge was not overwhelming. The predicate for the

felony murder charge was first degree robbery. CP 303. Taking property from a dead person as an afterthought is theft, not robbery. State v. Allen, 159 Wn.2d 1, 10 n.4, 147 P.3d 581 (2006); State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962). Clark's testimony provided a basis for a reasonable jury to find Clark took the cocaine as an afterthought so that his mother would not find it, as opposed to causing D.D.'s death during a robbery. 22RP 1664, 1673, 1678.

Taking into account Clark's testimony, the State's case for premeditated murder was also underwhelming. Clark's testimony about the shooting being an accident provided the basis for a reasonable trier of fact to find Clark committed manslaughter instead of murder. 22RP 1596, 1657, 1663. State witnesses testified that Clark told them that he shot D.D. in the head and said something about the boy beating up his baby's mom. 22RP 850-51, 907, 1035. Clark, however, had no children. 22RP 1682, 1690. One witness maintained Clark said he had called the boy over to his house and told him to reach for something in the closet. 22RP 907. Clark's statements could be viewed as posturing — an attempt to make himself look tougher than he actually was — rather than admit the shooting was an accident.¹

¹ The trial court excluded evidence that Clark had the communication skills of an eight or nine year old child. CP 227-28; 10RP 292-94.

In any event, Clark's testimony painted a different picture. According to Clark, his invitation for his long-time acquaintance D.D. to come over to his house flowed from a chance encounter on the street and D.D.'s interest in Clark's computer, not some sinister plot to lure D.D. to his death. 22RP 1622-23, 1630-34. Clark further testified that he sat down on the floor, "messaging around with the gun," "[a]iming it toward the closet of the ceiling" when the gun went off. 22RP 1594-95, 1649, 1651, 1683-84. After Clark's attempt at resuscitation failed, he went up to Eller's apartment and told the others that he accidentally shot his friend with a "deuce deuce." 22RP 1596, 1666-69.

Which version of events is accurate? That was for the jury to decide, but its deliberation was rendered unreliable by the knowledge that this was not a death penalty case: "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, 142 Wn.2d at 847.

Clark's case is distinguishable from those where no prejudice resulted from counsel's deficient conduct. In those cases, the evidence was overwhelming or other indicia showed the outcome was not affected. See Townsend, 142 Wn.2d at 848-49 (Townsend brought a gun to the encounter, had spoken about 'taking care of' Harkins, after shooting

Harkins the first time, which may have been accidental, Townsend shot Harkins in the head after being told he was still alive); Hicks, 163 Wn.2d at 488-89 (abundant evidence in the record supported conviction, trial court particularly noted the active deliberation of the jury, most notably, a different jury in the second trial on the attempted murder charge convicted without mention of the death penalty, and defendants were not convicted by the first jury of the most serious charges); State v. Murphy, 86 Wn. App. 667, 668, 672-73, 937 P.2d 1173 (1997) (no prejudice where jury acquitted on first degree murder), review denied, 134 Wn.2d 1002 (1998).

As argued, evidence of first degree murder was not overwhelming in Clark's case. The trial lasted a month. 22RP 551-1693. But the jury returned guilty verdicts on the most serious charges in less than a day, shortly after closing argument was presented. 22RP 1856-59, 1863. The swiftness with which the jury reached its verdict does not inspire confidence in the outcome.

2. THE TRIAL COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING EVIDENCE ABOUT CLARK'S MENTAL DISABILITY.

Expert testimony that Clark suffered from mental retardation was admissible to protect his right to present a defense to the State's charges. This testimony was admissible under the rules of evidence, regardless of

whether it satisfies the foundation for a diminished capacity defense. Evidence of mental retardation made it less likely that he acted with premeditation and intent. The Court of Appeals, however, held Clark's argument was in actuality a diminished capacity defense that was not pleaded. If so, then the court erred in excluding the evidence because the label attached to the defense should not control the admissibility of the underlying evidence.

a. **The diminished capacity defense: inability to form a state of mind versus impairment that stops short of inability.**

Clark argued to the Court of Appeals that the diminished capacity defense means a defendant lacked the capacity or ability to form the requisite mens rea. Clark distinguished that conception of diminished capacity from his own proffered defense: he has the capacity to form the state of mind, but his mental retardation impaired his ability to form the state of mind, making it less likely that he in fact premeditated and acted with intent or recklessness at the time of the charged offenses. Brief of Appellant at 31-32; Reply Brief at 6-16; see 22RP 1268 (counsel did not raise diminished capacity defense because "we're not saying that Anthony was not or is not capable of forming knowledge.").

Clark did not have an expert to testify he lacked the capacity or ability to form those states of mind. What he did have was an expert to

testify that his mental limitations interfered with that capacity or ability. The diminished capacity defense should encompass Clark's proffered defense, but case law has narrowed the availability of the defense to situations where there is a lack of ability to form the requisite state of mind, as opposed to mere impairment of the ability that does not preclude a defendant from forming the state of mind. The diminished capacity defense should include the latter situation.

State v. Ferrick was the first Supreme Court case to address the defense and its language conveys a narrow sense of what that defense entails: "competent evidence of [a condition not amounting to legal insanity] is admissible wherever it tends logically and by reasonable inference to prove or disprove that a defendant was *capable of forming* a required specific intent." State v. Ferrick, 81 Wn.2d 942, 944, 506 P.2d 860 (1973) (emphasis added). To support instruction on diminished mental capacity, "the evidence must logically and reasonably connect the defendant's alleged mental condition with the *asserted inability* to form the required specific intent to commit the crime charged." Ferrick, 81 Wn.2d at 944-45 (emphasis added) (citing State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971)).

Clark did not have an inability to form the state of mind at issue. Despite his developmental disability, he had the capability. Under Ferrick,

it would seem Clark was unable to meet the requirements of the diminished capacity defense.

Other cases follow Ferrick's lead. In State v. Atsbeha, the Court pronounced "[t]o maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The expert's testimony in Atsbeha was properly excluded because the expert conceded the defendant still had "the ability" on the date in question "to form the requisite culpable mental state" and "could" form the intent, and so such testimony "did not reasonably relate to impairment of [his] ability to form the intent to deliver the controlled substance." Atsbeha, 142 Wn.2d at 918-19.

Other Supreme Court cases likewise convey a narrow sense of what the diminished capacity defense requires.² They seem to equate

² State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993) ("Diminished capacity is a mental condition not amounting to insanity which *prevents* the defendant from possessing the requisite mental state necessary to commit the crime charged."); accord State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) (quoting Furman, 122 Wn.2d at 454); State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (quoting Warden, 133 Wn.2d at 564); State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983) ("Diminished capacity instructions are to be given whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental

impairment with lack of ability or capacity, as opposed to an impairment that does not preclude the capacity or ability to formulate the state of mind.

Yet a defendant like Clark can have the capacity or ability to form a mens rea but not actually possess it at the particular time an alleged offense occurred. A mental condition that does not preclude the defendant from being able to form the state of mind can still interfere with his ability to do so. To challenge whether the State proved the defendant acted with the requisite mens rea during the commission of the alleged crime, the defendant should be able to present evidence of a mental condition that interfered with the ability to form the state of mind at issue.

Other jurisdictions in which a diminished capacity defense is unavailable as a matter of law recognize evidence of mental disability can

condition with the *inability to possess* the required level of culpability to commit the crime charged."); State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995) (expert testimony on mental condition "which would have made him *incapable of forming* the specific intent to assault" admissible to support diminished capacity defense); State v. Cienfuegos, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001) ("Cienfuegos submitted considerable evidence that he was *incapable of forming* the requisite intent due to cognitive impairment. The evidence was sufficient to support a diminished capacity instruction."); State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001) (no ineffective assistance in failing to present expert on diminished capacity defense where it could not "be determined from the record on appeal that any expert would have testified that Turner *lacked the ability* to form the specific intent required to commit the crimes with which he was charged."); State v. Damon, 144 Wn.2d 686, 694, 25 P.3d 418, 33 P.3d 735 (2001) (diminished capacity defense established where doctor testified not only was capacity impaired but defendant also lacked the ability to form the requisite criminal intents).

still be relevant and admissible when used to attack the mens rea element of the government's case.³ Consistent with those courts, the question raised by Clark's excluded defense is not whether Clark lacked the capacity to form the requisite mens rea, but whether the criminal acts were actually committed with the requisite mens rea after taking relevant evidence of Clark's mental condition into account.

Criminal defendants have the constitutional right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed.

³ See United States v. Peterson, 509 F.2d 408, 417 (D.C. Cir. 1974) ("An abnormal mental condition may influence the probability that a defendant premeditated and deliberated — and so be taken into account by a jury in determining whether those states of mind existed in fact (beyond a reasonable doubt) — even though it did not eliminate the capacity for premeditation."); United States v. Pohlot, 827 F.2d 889, 890, 897, 905 (3d Cir. 1987), cert. denied, 108 S. Ct. 710, 98 L. Ed. 2d 660 (1988) (although defense of diminished capacity is prohibited under federal statutory law, evidence of mental abnormality is still admissible to disprove an element of the crime by showing the defendant actually lacked the mens rea in committing the charged crime); United States v. Cameron, 907 F.2d 1051, 1066-67 (11th Cir. 1990) (under federal law, psychiatric evidence that a defendant "lacked the capacity" or was "incapable" of forming the intent necessary for the crime charged is inadmissible, but psychiatric evidence offered to negate specific intent is admissible when such evidence focuses on the defendant's specific state of mind at the time of the charged offense); People v. Larsen, 205 Cal. App.4th 810, 827, 140 Cal. Rptr.3d 762 (Cal. Ct. App. 2012) (recognizing distinction between whether a defendant had the mental capacity to form a specific intent and whether a defendant actually formed a mental state that is an element of a charged offense; at issue "is the actual formation of intent in light of the defendant's mental disorder, not the capability to do so.").

2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, §§ 3, 22. Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622.

ER 401 and ER 702 govern admissibility. Atsbeha, 142 Wn.2d at 921. Clark's evidence was relevant under ER 401. The disputed issue at trial was whether the State proved the existence of the required state of mind as an element of its case. Dr. Oneal performed a psychological evaluation on Clark. 10RP 260. Testing showed Clark had limited attention, concentration and short term memory. 10RP 280-81. Mentally retarded individuals such as Clark have difficulties with regard to reasoning. 10RP 312-14. That information is relevant because it tends to make the existence of Clark's premeditation and intent less probable than it would be without the evidence. Such evidence increases the probability that he acted with recklessness rather than intent. See State v. Sexton, 311 N.J. Super. 70, 88, 709 A.2d 288 (N.J. Super. App. Div. 1998) (defendant's mental ability relevant to the presence or absence of reckless state of mind; rejecting argument that such evidence would open a "back door" into the diminished capacity defense), aff'd, 160 N.J. 93, 733 A.2d 1125 (N.J. 1999). Whether such evidence is sufficient to create a

reasonable doubt as to Clark's premeditation, intent and knowledge is a question for the jury. Eakins, 127 Wn.2d at 502-03.

Under ER 702, Dr. Oneal's expert testimony would have assisted the trier of fact to understand the significance of Clark's mental disability in relation to the mens rea elements of the State's case: whether Clark acted with premeditation, had the requisite intent to murder the victim and rob him, and whether he knew of the risk of harm. "[M]ental disorders are beyond the ordinary understanding of lay persons." State v. Ellis, 136 Wn.2d 498, 517, 963 P.2d 843 (1998). An expert witness was necessary to explain the significance of Clark's mental retardation to the lay jury. The retardation diagnosis was "capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). The defense expert could have explained to the jury the effects of permanent retardation on Clark's mental functioning. From that, the jury would have had a complete picture by which to judge whether Clark actually acted with premeditation and intent on the day in question.

Evidence of a mental condition that falls short of precluding the ability to form the requisite state of mind is still relevant and helpful to the trier of fact if it interferes with that ability. It ought not to be an all or nothing proposition. Reality is seldom that black and white. This Court

should hold the diminished capacity defense is expansive enough to encompass Clark's proffered defense. In the alternative, this Court should hold the evidence was admissible because it was relevant under ER 401 and helpful to the jury under ER 702, even though it does not technically satisfy the foundation for a diminished capacity defense.

b. A pleading failure should not control admissibility.

The Court of Appeals affirmed the trial court's exclusion of evidence of Clark's mental limitations because Clark did not plead a diminished capacity defense. According to the Court of Appeals, "Clark argues that his mental retardation affected his ability to form the required mens rea. But this is precisely a diminished capacity defense—which Clark did not plead." Clark, 2015 WL 3883513 at *4.

The pleading requirement is a discovery rule. CrR 4.7. The diminished capacity defense must be declared pretrial. State v. Harris, 122 Wn. App. 498, 506, 94 P.3d 379 (2004) (citing CrR 4.7(b)(1); CrR 4.7(b)(2)(xiv)). But if the Court of Appeals is correct that the proffered defense was actually a diminished capacity defense, the question becomes whether the evidence was properly excluded because of the failure to call the defense by its correct label.

Exclusion of defense evidence as a sanction for the failure to plead the defense — a discovery violation — was not an available remedy.

There was no showing of surprise or bad faith. See Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) ("It is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.").

The purpose of CrR 4.7 is "to accelerate the timing of disclosure and thereby prevent last minute surprises and the resulting continuances and trial disruption." State v. Johnson, 90 Wn. App. 54, 66, 950 P.2d 981 (1998). Argument and ruling on the admissibility of this evidence took place well before trial. 19RP 12-24; 21RP 16-17. All understood the substance of what Clark's counsel was arguing. If the Court of Appeals is right and Clark's proffered defense was actually a diminished capacity defense, then the defense should have been treated for what it was, rather than the label attached to it. The words "diminished capacity" have no talismanic significance. Clark's right to present a defense cannot turn on whether defense counsel gave the correct label to the defense being advanced. Diminished capacity is not an affirmative defense. State v. Nuss, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988). "When a defendant claims diminished capacity, the State has the burden of proving that the defendant had the required mental state when he committed the alleged acts." In re Estate of Kissinger, 166 Wn.2d 120, 129, 206 P.3d 665 (2009).

And no jury instruction on diminished capacity is needed to argue the defense: Cienfuegos, 144 Wn.2d at 229-30 (general instructions on intent and knowledge enabled counsel to argue theory to jury). For these reasons, the trial court erred in not allowing Clark to present evidence that was in actuality a diminished capacity defense.

c. Evidence of mental disability was also admissible to help the jury accurately evaluate Clark's credibility.

Evidence of Clark's mental retardation was also relevant to "the jury's evaluation of defendant's demeanor and credibility as a witness at trial." Sexton, 311 N.J. Super. at 88. Defense counsel argued jurors in charge of judging Clark's credibility might draw negative inferences from his flat affect or the manner in which he responded to questions. CP 207; 22RP 1694-95. The Court of Appeals did not believe the evidence was admissible for this purpose, noting the trial court allowed Clark to present evidence that he was in special education and that people who knew him considered him "slow." Clark, 2015 WL 3883513 at *5 (distinguishing Sexton). That information was so vague as to be irrelevant without Clark's expert being allowed to testify what Clark's disability consisted of and how it affected his mental processes. The jury was instructed to consider numerous factors in assessing the credibility of a witness, including "the manner of the witness while testifying." CP 276. Clark's mental disability

affected his demeanor in a case where his credibility was crucial. The jury, however, was permitted to draw a negative inference about his credibility without being told about the mental disability that could impact its assessment of his credibility. The evidence should have been admitted to provide all relevant information to the jury in assessing Clark's credibility.

d. The error was not harmless beyond a reasonable doubt.

The denial of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). In exhorting the jury to convict, the prosecutor invited the jury to view Clark as a normally functioning person that lured the victim to his death in a cold and calculating manner. 22RP 1761-63, 1767, 1771-72, 1796-1800. That is a distorted, misleading picture of Clark. He is mentally impaired and the jury, had they heard testimony on the issue, may well have come to a different result. The State does not even argue the error was harmless. See Lamar, 180 Wn.2d at 588 ("The State makes no attempt in its briefing to this court to show harmless error, and accordingly the presumption of prejudice stands.").

3. CUMULATIVE ERROR DEPRIVED CLARK OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Clark has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). The combined prejudicial effect of excluding defense evidence regarding Clark's mental disability and counsel's failure to object to the jury being told the death penalty was not involved produced an unfair trial.

D. CONCLUSION

For the reasons stated, this Court should reverse the murder convictions.

DATED this 29th day of January 2016

Respectfully Submitted,

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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

ANTHONY CLARK,

Petitioner.

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NO. 92021-4

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER ANTHONY CLARK** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY CLARK
DOC NO. 365895
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JANUARY 2016.

X Patrick Mayovsky

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Attached for filing today is a supplemental brief of petitioner for the case referenced below.

State v. Anthony Clark

No. 92021-4

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