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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY TYRONE CLARK, APPELLANT

Review of Court of Appeals #45013-4-II

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 11-1-03699-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO THE COURT'S REVIEW.

1. Was defense counsel deficient for failing to object when the jury was informed that the case did not involve the death penalty, where counsel's failure to act may have been strategic?
2. If deficient for failing to object, did the deficiency prejudice the defendant's case?
3. Was the defendant's right to present a defense violated when the trial court properly excluded irrelevant evidence of the defendant's "mental limitations," where diminished capacity was neither plead nor proven?

B. STATEMENT OF THE CASE.

1. Procedure

On September 9, 2011, the State charged Anthony Tyrone Clark, hereinafter referred to as "Defendant," by information with premeditated first degree murder in count I, second degree unlawful possession of a firearm in count II, and unlawful possession of a controlled substance with intent to deliver in count III. CP 1-2. Counts I and III alleged that "the defendant, or an accomplice, was armed with a firearm." CP 1-2.

On October 24, 2012, the State filed an amended information, which changed count II to felony first degree murder, changed count III to first degree robbery, and added count IV, unlawful possession of a controlled substance with intent to deliver, and count V, second degree unlawful possession of a firearm. CP 183-85. *See* 10/12/12 RP 376.

Counts I through IV alleged that “the defendant, or an accomplice, was armed with a firearm.” CP 183-85.

2. Facts

On September 7, 2011, the defendant, Anthony Clark, met his friend, D.D. whom he called “Shorty” on the street in their east-side Tacoma neighborhood. RP 1620. The defendant invited him to go to a barbeque that another friend was having. RP 1622. The defendant invited D.D. to his home first. RP 1623. The two went to the defendant’s room to listen to music and view the defendant’s Facebook page. RP 1630.

D.D. opened his coat and showed the defendant a container of crack cocaine and a gun. RP 1635, 1642. D.D. asked the defendant if he knew anyone to sell the cocaine to. RP 1643. The defendant suggested that, to get money to buy food for the barbeque, they steal his mother’s jewelry and pawn it. RP 1644.

The two went to another room, where the mother’s jewelry was hidden in a closet. RP 1645. When it appeared that the defendant could not reach where the jewelry was, D.D. offered to try. RP 1648. Before climbing up in the closet, D.D. removed the gun from his pocket and removed the magazine. *Id.* D.D. handed the gun to the defendant. RP 1649.

While D.D. climbed into the closet, the defendant sat on the floor just outside. RP 1649, 1651. The defendant aimed the gun at the area of the closet where D.D. was, and shot him. RP 1657, 1664.

The defendant went to a neighbor's apartment. RP 1666. There, he told the neighbors, Noccoa Eller and Tanya Bassett and Fred Woods that he needed help getting rid of a body. RP 850, 907. He told them that he had shot his friend. RP 1666, 1669. When they asked the defendant why he had done so, he explained that the victim had beaten his "baby's mom." RP 850, 907.

The defendant disposed of the body in Eller's trash bin. RP 1671. Eller later saw the body in the trash bin. 865. Eller was frightened. RP 912. She and Bassett fled the apartment to McKinley Park nearby. RP 869. There, they saw police conducting an unrelated investigation. RP 870, 914. They told police of the dead body and the defendant's statements. *Id.*

Police responded to the apartment building. RP 573, 683. They found the trash bin outside, containing the victim's body. RP 605-606, 757. Police later arrested the defendant nearby. RP 610.

C. ARGUMENT.

1. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE FROM COUNSEL'S FAILURE TO OBJECT TO NOTIFICATION THAT THE CASE DID NOT INVOLVE THE DEATH PENALTY.

a. Counsel failure to object to the notification may be attributed to trial strategy.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. See *Strickland v. Washington*, 466 U.S. 668, 685-

687, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.*, at 684. In *Strickland*, the Supreme Court summarized:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id., at 686.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, at 687; *State v. Thomas*, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). “Surmounting Strickland’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–335. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *McFarland*, 127 Wn.2d at 336. Strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690.

Strickland warns that “It is all too tempting to second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689. The Court went on to say “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.*, at 690.

In *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), the Court followed previous rulings to hold that the jury in a noncapital case may not be informed about the penalty for the charged crime. This is because “[t]he question of the sentence to be imposed by the court is never a proper issue for the jury’s deliberation, except in capital cases,” *Id.*, (quoting *State v. Bowman*, 57 Wn.2d 266, 271, 356 P.2d 999, 1002 (1960)).

In *Townsend*, before jury selection began, the prosecutor requested the court to instruct or inform the venire that this murder case did not involve the death penalty. 142 Wn.2d at 842. The trial court agreed. *Id.* Later, when the venire was present the prosecutor prompted the court, which also instructed the jury that the case did not involve the death penalty. *Id.*, at 842-843. Defense counsel did not object to any of those comments.

Townsend considered this as an issue of an improper instruction. *Id.*, at 844. In the present case the court did not instruct or inform the jury, the prosecutor did. However, in *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008) the Supreme Court “declined to recognize a distinction between a court or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty.” *Id.*, at 487, 488.

The Supreme Court’s holding in *Townsend* has been seen by some as a strict, *per se* rule on one means of deficiency of trial counsel. But in *Strickland*, the United States Supreme Court rejected *per se* rules on the subject of performance by defense counsel and recognized the difficult and varied decisions that different cases present to defense counsel. 466 U.S. at 688-689. This Court has also pointed out that the issues of ineffective assistance of counsel are “generally not amenable to *per se* rules.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), quoting *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

Subsequent opinions have recognized that, in some circumstances, notifying the venire that the murder charge does not involve the death penalty may be a valid strategic decision by counsel. In *State v. Mason*, 160 Wn.2d 910, 930, 162 P.3d 396 (2007), the Court recognized this possibility. In *Hicks*, Justice Chambers, who authored the *Mason* opinion, wrote a separate opinion. In his concurrence, Justice Chambers acknowledged the rule in *Townsend*, but disagreed that counsel’s performance was deficient. 163 Wn.2d at 495. Justice Chambers pointed

out the reality “that for the trial lawyer, jury selection is a mix of science, art, and gut feeling.” *Id.*, at 496-496. He pointed out an example where jurors’ fear of the weight and responsibility of a decision on the death penalty could deprive the defense of sympathetic jurors. *Id.*, at 496.

In the recent case of *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012), the defendants were charged with three counts of aggravated first degree murder arising from the murders of Rafay’s father, mother and sister. *Id.*, at 774. The case received much coverage in the press. Jury selection alone lasted a month. *Id.*

Defense counsel sought to ascertain whether potential jurors' views on the death penalty affected their ability to be fair in a case involving a very serious crime. *Id.*, at 778. The Court of Appeals recognized that “the identification of jurors who would allow the potential punishment to affect their determination of guilt or innocence is a legitimate goal of voir dire.” *Id.* The Court also recognized that, where the case had been highly publicized, it would benefit defense counsel for the venire to understand the status of the case and so better to be able to be impartial and open to the defense theory of the case. *Id.*, at 779. The information also had a direct bearing on their planned assertion that an accomplice witness confessed and implicated the defendants in order to avoid the death penalty himself. *Id.*, at 779-780.

The defense counsel were well aware of the concern that jurors who know the death penalty is not involved may be less attentive during

trial and less likely to hold out in support of their views. Counsel were also aware that the jury would be expressly instructed before deliberations that it was not to consider the fact that punishment may follow conviction “except insofar as it may tend to make you careful.” The Court of Appeals found that defense counsel were in the best position to assess such concerns in light of their own voir dire and trial strategies. 168 Wn. App. 781.

In the present case, before jury selection began, the court raised the topic of informing the jury that this was not a capital case. RP 39. The court related that, in a past murder case, failure to so inform the jury led to confusion. *Id.* The prosecutor clarified that the court would not prohibit either party from so informing the venire during jury selection. *Id.* The court replied that “that would be appropriate whenever counsel believes it would be appropriate.” *Id.* As it turned out, it was the prosecutor who mentioned it: once during private questioning of Juror 11(RP 120-121), and once before the venire. RP 372.

Not every murder case will be as notorious or present the same issues for counsel to deal with as in *Rafay*. But every murder case is a serious charge, which jurors know involves a heavy penalty, sometimes death. As this Court pointed out in *Townsend*, there is the concern that, upon learning that the death penalty is not involved, jurors may be more relaxed and pay less attention. 142 Wn.2d at 847. On the other hand, as Justice Ireland pointed out in her concurrence in that case, the information

“should tend to quell the jury's natural speculation about the death penalty and, thus, to minimize the number of jurors seeking dismissal from jury service, thereby enhancing the array of potential jurors available to try the case.” *Id.*, at 851, quoting Court of Appeals’ *Townsend* opinion, 97 Wn. App. 25, 30-31, 979 P.2d 453 (1999). Justice Ireland also advocated for giving jurors proper credit in following the court’s instructions and being diligent in their deliberations, especially in serious cases as where murder is charged. *Id.* at 852.

This Court should avoid using the *Townsend* case as a *per se* rule. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

Instead of a rigid rule, the Court should follow Strickland’s guidance and view defense counsel’s decisions in light and context of all the issues and evidence presented in a trial. The *Townsend* rule must be balanced with the professional judgement of defense counsel. In such an evaluation, it must be remembered that it is counsel who has observed and interacted with the venire, read the answers to the jury questionnaires, knows the theory of the defense case and how this particular venire may react to it.

As Justices Ireland and Chambers have pointed out, defense counsel may have a legitimate tactical reasons not to object or move for a mistrial in this circumstance: the same jurors who expressed concern about being responsible for a harsh or excessive punishment are likely to be very sympathetic towards a criminal defendant. A defense attorney could reasonably make the tactical decision that, while jurors are not entitled to weigh sentencing concerns, a panel with such concerns would afford a criminal defendant a better chance at acquittal. *See Townsend*, 142 Wn.2d at 853; *Hicks*, 163 Wn.2d at 496.

Further, it is conceivable that defense counsel made the strategic decision to remain silent rather than interposing an objection with the expectation that, because the defense did not invite the error, the announcement regarding the death penalty could form the basis of a later appeal if the defendant was convicted. Indeed, that was the result in *Mason*, *Hicks*, *Rafay*, and the present case.

Here, defense counsel may have been favorably impressed by this panel of prospective jurors. The conversation between Jury Panelist 11 and the prosecuting attorney took place during individual questioning, after the questionnaires had been returned. The questionnaires gave defense counsel a basis upon which to assess the venire. Counsel may have made the tactical determination that the risk of requesting a mistrial, which would have caused the existing venire to be replaced, possibly by a panel counsel found more problematic, outweighed the risk of moving

forward with the existing panel. Because counsel's actions could have been strategic, the defendant cannot prove that counsel's performance was objectively unreasonable.

To preserve the *Townsend* rule but to allay and disarm such concerns of some potential jurors, two admonitions from WPIC 1.02 should be included in the introductory instruction WPIC 1.01 (Part 1):

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially.

and

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

In cases such as *Rafay*, where specific concerns from the venire regarding the death penalty require an exception to the *Townsend* rule, defense counsel should be permitted to request the court notify the venire that the death penalty does not apply to the case. This would be done at a hearing outside the presence of the venire, where counsel could make a record, specifying the reasons. The court could then make an informed ruling, which could be reviewed.

- b. No prejudice resulted from informing the jury that this was not a capital case.

The determination of prejudice in this case must begin with the court's instructions to the jury. The Court properly instructed the jury that "the lawyers' statements are not evidence," and that it "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 274-335 (instruction no. 1). In the same instruction, the jury was told.

You have nothing whatsoever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

Jurors are presumed to follow the court's instructions. *See, e.g., State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). It must be presumed that the jury disregarded the prosecutor's statements that this not being a death penalty case, and did not allow those statements to affect their decision. This eliminated any real possibility of such prejudice.

Therefore, there is no "reasonable probability that the outcome [of the trial] would have differed," *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) had the defendant's attorney objected to the deputy prosecutor's statements in voir dire. As a result, even assuming his trial counsel's performance was deficient, the defendant cannot show "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

Here, as in *Townsend*, the State's evidence of premeditated murder was strong. As in *Townsend*, "[t]here was ample evidence of premeditation," such that there is no reasonable probability that the outcome of the trial would have differed, even absent counsel's objection to informing the jury regarding the death penalty. *See Townsend*, 142 Wn.2d at 848.

"Premeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *Townsend*, at 848. *See* CP 274-335 (Instruction No. 10).

At trial, the defendant admitted shooting D.D. RP 1657, 1663. The defendant testified that he could have stepped on the shelf in the closet and accessed jewelry that he intended to steal at any time. RP 1645, 1647, 1648. But, he had the victim come to his apartment, enter the closet, turn his back to him, and climb up the shelves of the closet, all while the defendant was holding a pistol. RP 1647-53. The defendant admitted that he aimed the pistol at the ceiling of the closet, where the victim was then located. RP 1595, 1664. He also admitted that the victim was "directly in his line of fire" when he fired that pistol. RP 1664.

The defendant confessed to three neighbors; Eller, Basset, and Woods, that he had killed a man in his apartment. RP 851, 906, 1666. They asked him why he did it. RP 907. He explained that a boy had

“beat[] up his baby’s mom and that his mom [and/or dad] had taught him to never let a man put his hands on his baby’s mom.” RP 850, 907. The defendant told them that he called the boy over to his house, told him to reach for something in his closet, and “popped him in the back of his head” with a “[d]euce deuce,” that is, a .22-caliber pistol. RP 852, 907.

The defendant wanted money. He suggested stealing his mother’s jewelry. RP 1644. Later, before telling them of the shooting, the defendant told the same neighbors that a friend had just given him a container of cocaine. RP 844. He wanted to sell it to make some money. RP 844, 849, 904. He offered to give half of the profit from its sale to whomever helped him sell it. RP 849-50, 904-05, 1005.

In his conversation with neighbors Eller, Bassett, and Woods, the defendant disclosed his “deliberate formation of and reflection upon the intent to take a human life.” *Townsend*, 142 Wn.2d at 848. The defendant called the victim to his house, formulated a ruse to have the victim turn his back to him, and only then shot him. He then took the crack cocaine. This evidence strongly supports the jury’s conclusion that he engaged in “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *Townsend, supra*. Given such evidence, there is no “reasonable probability that the outcome of the trial would have differed,” even had the defendant’s attorney objected to the deputy prosecutor’s statements in *voir dire*.

There is no showing that the defendant was deprived of a fair trial or that the trial outcome likely would have differed. There is no indication that the jurors failed to take their duty seriously. Moreover, there is abundant evidence in the record to support the defendant's conviction, making a guilty verdict likely even if the jury had not been informed that the case was noncapital. Under these circumstances, there is not a reasonable probability that the jury would have implicitly accepted the defense explanation and acquitted him of the charge of murder if only they had not been relieved of a hypothetical, mistaken belief that he might be subjected to capital punishment. The defendant establishes neither deficient performance nor prejudice.

2. DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS NOT VIOLATED WHERE THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution "grant criminal defendants two separate rights: (1) the right to present testimony in one's defense, and (2) the right to confront and cross-examine adverse witnesses." *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) (internal citations omitted).

Although a defendant "does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of

otherwise inadmissible evidence.” *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). In other words, “[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *Rafay*, 168 Wn. App. at 795 (quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). Hence, “a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting *Hudlow*, 99 Wn.2d at 15).

A trial court’s decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. *Aguirre*, 168 Wn.2d at 361.

Such evidence would have been relevant is if defendant had asserted a diminished capacity defense, but he specifically chose not to. When considering the relevance of the proffered evidence of the defendant’s mental capacity, the court repeatedly pointed out that the defense was not asserting diminished capacity.

Diminished capacity is an affirmative defense in which the 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). See *State v. Ellis*, 136 Wn.2d 498, 521, 963 P. 2d 843 (1998).

This case is different than *Ellis*. *Ellis* pleaded diminished capacity and had expert witnesses whom the defense wished to present. 136 Wn.2d at 501-502. Here, the defense specifically denied the defense of diminished capacity. Therefore, evidence of the defendant's mental limitations was not relevant and not admissible regarding *mens rea*.

The defendant never proffered or presented evidence beyond the mere existence of his mental limitations. To make evidence of a mental limitation relevant, the defendant must do more than show that he had that limitation; he must show, through expert testimony, that this limitation diminished his capacity to form the requisite *mens rea*. As the Supreme Court has stated:

It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.

Atsbeha, 142 Wn.2d at 921; see *State v. Greene*, 139 Wn.2d 64, 73-74, 984 P.2d 1024 (1999).

Evidence that the defendant suffers mental limitations in the absence expert testimony that this decreased the probability of him forming the relevant *mens rea*, may induce jurors to make the conceptual link that the former necessarily causes the latter. This is not a leap lay

jurors are qualified to make. *See Atsbeha*, 142 Wn.2d at 921; and *Greene*, 139 Wn.2d at 73-74.

Early in the case, on December 17, 2012, the court heard the parties' motions in limine. The State requested an update on discovery from the defense. 12/17/12 RP 8, 10. The State opposed defense evidence regarding the defendant's intellectual capacity. *Id.* at 12. The State specifically pointed out that the defense was not raising a diminished capacity. *Id.*, at 15-16. After hearing argument, the court agreed that such evidence would be irrelevant in absence of a diminished capacity defense. *Id.*, at 19-20. The court went on to consider the evidence under ER 403 also:

With respect to whether it qualified under ER 403, I do believe that parts of that rule apply in that, by putting on an expert, the jurors will be confused and misled, and in a sense, will be looking for a diminished capacity case which is not being pled or brought forward in this manner, so that bootstrapping would cause the juror confusion, and that would be another basis for excluding it.

12/17/12 RP 20. *See* 02/15/13 RP 19-22, RP 1417-19.

Despite its ruling, the court allowed further briefing, 12/17/12 RP 23-24. On February 15, 2013, again heard the State's motion to exclude testimony regarding the defendant's alleged "mental deficiencies" as not relevant and unduly prejudicial. 02/15/13 RP 4-22. At the hearing, defense counsel confirmed that they were not pleading a diminished capacity defense. *Id.*, at 13.

The court again excluded the defense proffered evidence of mental disability, absent proper pleading and foundation. 02/15/13 RP 19. The court again pointed out that the defense was not pursuing a diminished capacity defense, so the proffered evidence was inadmissible as irrelevant. *Id.*, at 21.

On March 13, 2013, the defendant again raised the issue, RP 496-504, and the court again affirmed its earlier ruling, holding that “I see no basis and no relevance in the expert’s testimony absent a diminished capacity defense, which doesn’t exist and has not been pled or brought forward.” RP 504-05. The defendant again asked to “be able to get into why [he] is on SSI” during the trial itself, and the court again denied this motion. RP 564-68.

During his case in chief, the defendant made an offer of proof of Katherine Horning’s proposed testimony. RP 1378-86. The court again held that “Because we are not dealing with diminished capacity defense, I do not find any of this relevant.” RP 1389.

Such evidence, as proposed by the defense, would have been more likely to evoke sympathy, and hence, “unfair prejudice” under ER 403, than a reasoned analysis of whether the elements of the crimes charged had been proven beyond a reasonable doubt. Despite numerous chances, invitations, perhaps, by the trial court, the defense declined to offer a defense of diminished capacity. The likely reason for this is that defense counsel probably did not believe that the defendant’s condition qualified

as diminished capacity. The trial court did not abuse its discretion, nor did it deny the defendant the right to present a defense.

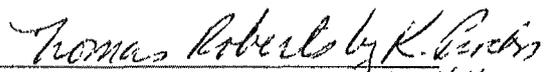
D. CONCLUSION.

There were strategic reasons why defense counsel did not object when the State informed the venire that this murder case did not involve the death penalty. Even if this was deficiency of counsel, the defendant does not show prejudice from it. The trial court correctly excluded evidence of the defendant's mental capacity where the defense was not asserting diminished capacity.

The State respectfully requests that the judgment and the holding of the Court of Appeals be affirmed.

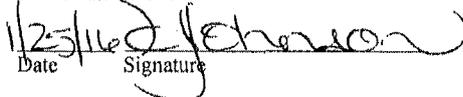
DATED: January 25, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney


THOMAS C. ROBERTS #17442
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{air}U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/25/16 
Date Signature

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Attached is the Supplemental Brief of Respondent