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SUPERIOR COURT OF ARIZONA

COCONINO COUNTY

STATE OF ARIZONA

Plaintiff,

vs.

TIMOTHY MAX DURAN

Defendant.

CR 2019-00338

RESPONSE TO STATE'S MOTION TO  
PRECLUDE DIMINISHED CAPACITY  
EVIDENCE

COMES NOW the defendant, by and through his attorney undersigned, and respectfully responds to the State's Motion to Preclude Diminished Capacity Evidence;

The Defense does not intend to introduce Diminished Capacity Evidence. Rather, defense intends to introduce evidence which negates the element of premeditation the State has alleged pursuant to pursuant to *Clark v. Arizona*, 548 U.S. 735 (2006), and *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981). Mr. Duran intends to introduce "observational evidence" regarding Mr. Duran's tendency to think in a certain way and his behavioral characteristics. Specifically, Mr. Duran intends to call witnesses, including expert witness Dr. James Sullivan, to testify about Mr. Duran's tendency to think in a certain way and his behavioral characteristics to rebut the state's evidence of premeditation and *mens rea*.

In *Clark v. Arizona, supra*, the United States Supreme Court defined observational evidence as "testimony from those who observed what Clark did and

1 heard what he said; this category would also include testimony that an expert  
2 witness might give about Clark's tendency to think in a certain way and his  
3 behavioral characteristics..." *Clark*, 548 U.S. at 757. In the Clark case, Clark's  
4 parents testified to observational evidence regarding Clark's statements and  
5 behaviors that occurred days and months before the crime. It is anticipated that  
6 Mr. Duran will call as witnesses his sister and friends to testify similarly.  
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9 In *State v. Christensen, supra*, the Arizona Supreme Court reversed a trial  
10 court's preclusion of expert testimony regarding a defendant's character trait of  
11 acting without reflection or acting impulsively. *Christensen*, 129 Ariz. at 35.  
12 "An expert witness may not testify specifically as to whether a defendant was or  
13 was not acting reflectively at the time of a killing....But it is inconsistent with  
14 fundamental justice to prevent a defendant from offering evidence to dispute the  
15 charge against him. This, of course, includes any of the elements which comprise  
16 the offense." *Christensen*, 129 at 35-36. Mr. Duran anticipates calling expert  
17 witness Dr. James Sullivan and eliciting testimony from Dr. Sullivan consistent  
18 with the *Christensen* holding. Specifically, the defense will introduce evidence  
19 from Dr. Sullivan of Mr. Duran's behavioral tendency evidence to show Mr.  
20 Duran's character traits which will negate premeditation.  
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25 As such, the Defendant does not intend to offer any type of diminished  
26 capacity evidence. He does, however, pursuant to, and within the limits of, *Clark*  
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1 v. *Arizona*, 548 U.S. 735 (2006) and *State v. Christensen*, 129 Ariz. 32, 628 P.2d  
2 580 (1981), intend to introduce “observational evidence” regarding his tendency to  
3 think in a certain way and his behavioral characteristics. This evidence will be  
4 introduced to rebut the state’s evidence of premeditation and *mens rea*.  
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7 Respectfully submitted this 13 day of October, 2021.  
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9  
10 By /S/ Gregory T. Parzych  
11 Gregory T. Parzych

12 Original of the foregoing Pleading  
13 mailed/hand-delivered this 13 day  
14 of October, 2021, to:

15 Clerk of Superior Court – Coconino County  
16 200 N. San Francisco Street  
17 Flagstaff, AZ 86001

18 Copy of the foregoing Pleading  
19 e-mailed this 13 day  
20 of October, 2021, to:

21 The Honorable Dan Slayton

22 Bryan Shea  
23 DÉPUTY COUNTY ATTORNEY

24 Robert Swinford  
25 Arizona Voice for Crime Victims  
26  
27  
28