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August 18, 2025

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT IN RESPONSE TO THE ATTORNEY GENERAL'S AMICUS CURIAE BRIEF

SUPREME COURT OF NEW JERSEY
DOCKET NO. 090329

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition for Certification from a Final Judgement of the
v.	:	Superior Court of New Jersey, Appellate Division.
KADER S. MUSTAFA,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Jessica R. Mayer, P.J.A.D. Hon. Lisa Rose, J.A.D.
	:	Hon. Lisa Perez Friscia, J.A.D.
		DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Kader Mustafa respectfully refers the Court to the Procedural History and Statement of Facts set forth in his briefs previously submitted in this matter.

LEGAL ARGUMENT

POINT I

THE OFFICE OF THE ATTORNEY GENERAL HAS FAILED TO OFFER A COGENT ARGUMENT FOR CREATING AN EXPERT-TESTIMONY REQUIREMENT BEFORE A DEFENDANT MAY ARGUE TO A JURY THAT HE DID NOT HAVE THE REQUISITE MENS REA DUE TO A MENTAL ILLNESS OR DEFECT.

Nothing in the plain language of the diminished-capacity statute (N.J.S.A. 2C:4-2) suggests or requires that a defendant must present an expert before being able to make a diminished-capacity argument to a jury. In its amicus brief arguing such a requirement exists, the Office of the Attorney General (OAG) presents a framework that is incompatible with diminished capacity's origin as a failure-of-proof defense, incompatible with the holding in Humanik v. Beyer, 871 F.2d 432 (3d Cir. 1989), and otherwise fundamentally unworkable and unclear. Accordingly, several issues in the OAG's brief require a brief response.

A. The plain language of N.J.S.A. 2C:4-2 does not enumerate an expert-testimony requirement for diminished capacity.

The OAG's overarching argument that the plain language of N.J.S.A. 2C:4-2 requires expert testimony is difficult to parse. For one, it is objectively untrue: the plain language of the statute clearly has no requirement. Indeed, the absence of such an express requirement, which the Legislature could have readily included, suggests such a requirement is not intended by the statute. See State v. S.B., 230 N.J. 62, 69 (2017) (holding failure to enumerate certain exemptions in criminal statute meant such exemptions could not be read into it because "a court may not rewrite a statute to add language").

Nowhere does the brief really describe how the plain language enumerates a requirement other than to say that a "mental disease or defect is an abnormality," and thus, "the person who would know whether such abnormality exists is the defendant." (Ab13).[1] It may be true (although may well not be true for someone who is very unwell) that a defendant is generally the best authority on the inner workings of her own mind, but such defendants are virtually never psychiatric experts, and so the logical leap does nothing to bolster the OAG's claim. If anything, it emphasizes how lay testimony from people close to a

[1] Ab = Office of the Attorney General's amicus brief
Db = defendant-appellant's appellate brief
Dsb = defendant-appellant's supplemental brief

defendant, including the defendant herself, may be even more valuable for a jury than a cold and unfamiliar expert who examined a defendant a single time.

Moving on, the OAG relies significantly on dicta from State v. Galloway, which states that diminished capacity is only appropriate where "experts in the psychological field believe that that kind of mental deficiency can affect a person's cognitive faculties" and such belief is "sufficiently accepted within the psychiatric community to be found reliable for courtroom use." 133 N.J. 631, 647 (1993). This too is unavailing for several reasons. For one, this language very clearly has its roots in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which our state no longer follows. See State v. Olenowski, 253 N.J. 133, 150-51 (2023) (Olenowski I); cf. Brewington v. State, 98 So. 3d 628, 632 (Fla. Dist. Ct. App. 2012) (ruling against defendant who failed to establish "that battered woman syndrome can negate mens rea for failing to protect a child has been sufficiently tested and generally accepted by the relevant scientific or psychological community," pursuant to Frye). The OAG makes no comment on the fact that our state no longer adheres to that strict standard and instead now follows a different and more generous standard, nor does it say what the standard should be moving forward post-Frye.

Additionally, the OAG has failed to reconcile the extremely high burden its standard is placing on defendants with the holding in Humanik that

defendants cannot bear the burden of establishing diminished capacity by a preponderance of the evidence. Under the OAG's understanding of Galloway, not only must a defendant present an expert before a jury can even consider diminished-capacity arguments, but the defense must specifically present an expert that conclusively testifies that there is a scientific consensus that the specified mental disorder at issue has the capacity to impact the specific mens rea of the offense. (Ab23-24).

The preponderance-of-the-evidence burden that Humanik held to be unconstitutional is the lowest legal burden that exists. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 168-70 (2006). It cannot be that the bar for defendants to argue diminished capacity is both lower than our lowest evidentiary standard and yet also beholden to an expert-requirement standard so exacting it is not seen virtually anywhere else in the law. Indeed, it is impossible to imagine a higher burden than the one the OAG insists exists; it is, counterintuitively, higher even than the bar necessary for the State to convict beyond a reasonable doubt the charges the defendant is attempting to defend against, which requires far less than a conclusive expert.

Yet another issue with the OAG's position on this point is that it appears to improperly conflate legal fiction like mens rea with psychiatric science. "[T]he definition of mental disorder[s] included in [the DSM] [were] developed

to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals." Smith v. Carver Cnty., 931 N.W.2d 390, 397 (Minn. 2019) (quoting Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 25 (5th ed. 2013)). Thus, expert psychiatric opinion on a specific mens rea is an unreasonable ask because it is a legal concept, not a scientific one. In fact, it is exactly because of this distinction that courts generally preclude expert testimony that directly opines on a defendant's mens rea in that way. See United States v. Bennett, 161 F.3d 171, 182-83 (3d Cir. 1998). In other words, while evidence pertaining to a defendant's mens rea generally is liberally permitted, expert testimony specifically opining on the ultimate issue is generally disfavored, not required.

Next, the OAG takes issue with Mr. Mustafa comparing the diminished-capacity defense to the conceptually similar voluntary-intoxication defense, which is also a failure-of-proof defense to a mens rea but does not require an expert. The distinction the OAG draws for why expert testimony is needed for diminished capacity but is not needed for voluntary intoxication, however, is completely untenable. According to the OAG, because there are myriad mental illnesses and defects of immensely varying kinds that may qualify for a diminished-capacity defense, they could only possibly be adequately explained

by an expert. (Ab25). Yet the assessment involved for a voluntary-intoxication defense—"carefully distinguish[ing] between the condition of mind which is merely excited by intoxicating-drink (or drugs) and yet capable of acting with (purpose or knowledge), and the condition in which one's mental faculties are so prostrated as to deprive one of (his/her) will to act and ability to reason," Model Jury Charges (Criminal), "Intoxication Negating an Element of the Offense (N.J.S.A. 2C:2-8(a))" (rev. Oct. 18, 2005)—is, according to the OAG, somehow well within the ken of an ordinary person. (Ab31).

Contrary to the OAG's assertions, most people have no first-hand experience with intoxication so serious that it leaves one completely unable to reason. So too are there innumerable variances in intoxication, e.g., whether a person has been drinking alcohol, taking LSD, injecting heroin, or taking some other substance, and the nuances of all those varied effects; whether the effects are influenced by the person's weight, age, tolerance, or other aspects of their physiology; etc. Certainly, all these variables are outside the ken of ordinary jurors, are technical and arcane, and could only be truly understood with the assistance of an expert, yet we do not have an express expert requirement for intoxication and prefer to leave it to the jury. The distinction between diminished capacity and intoxication in this respect is especially unfounded because our law is less rigorous with admitting testimony about "soft" sciences, like psychology,

and more rigorous with admission for evidence about "hard" sciences, like toxicology. State v. Olenowski, 255 N.J. 529, 598 (2023) (Olenowski II).

Continuing, the OAG appears to lack a consistent position on whether a specific diagnosis is needed or not for presenting a diminished-capacity argument. Early on, the brief asserts firmly that "testimony identifying 'mental disease' or 'mental defect' is a 'diagnosis.'" (Ab20-21). To that end, it argues it is a "self-evident proposition that only an expert witness may provide a diagnosis." (Ab21). Only when that condition is established as being "generally accepted by the psychiatric community" and "that experts in the psychological field believe that that kind of mental deficiency can affect a person's cognitive faculties" can diminished capacity be presented. (Ab23-24) (quoting Galloway, 133 N.J. at 647).

But when confronted with the fact that the model charge for diminished capacity does not require any specific diagnosis, and that caselaw has confirmed this understanding, the OAG turns around and argues that "the name of the disease or defect is not relevant" to the jury's assessment of a diminished-capacity defense, and that the jury need only find that "a defendant suffers from some 'mental disease' or defect." (Ab28-29) (emphasis in original). While this latter expression of the law is accurate, it is impossible to square with the former

assertion that "mental disease" necessitates a "diagnosis" which in turn necessitates an expert.

Belatedly, the OAG concedes that "doctors need not conclude that defendant suffers from a particular condition or disorder, and no DSM Manual diagnosis is necessary to support the defense," (Ab30) (quoting State v. Kotter, 271 N.J. Super. 214, 224 (App. Div. 1994)). Yet it still it refuses to acquiesce and insists that there must be an expert to testify to "some mental disease or defect." (Ab30) (emphasis in original). The OAG does not offer an example of when a psychiatrist has ever opined that a person has a mental illness but declined to offer a probable diagnosis, nor does it explain how a defendant could meet the supposed "general acceptance" requirements it insists exist without a specific diagnosis. Indeed, it is not possible; rather, no diagnosis is necessary, nor is expert testimony. If the absence of a diagnosis makes for a weak diminished-capacity argument, that may simply be fodder for attack by the prosecution during summation; it cannot, as a matter of law, preclude arguments a defendant can make as to the existence of the mens rea.

Finally, the OAG overcomplicates the concept of diminished capacity by asserting that, "[i]t is difficult to conceive how [the] showing of causal linkage [between the mental defect and the mens rea element] can be made successfully without expert testimony in a case involving a mental disease." (Ab32). If

anything, the facts of Mr. Mustafa's case illustrate how uncomplicated that idea can be. Mr. Mustafa was suffering from some type of delusional disorder, and the firing of the gun was blatantly responsive to that disorder because he delusionally believed the car was following him. Indeed, so obvious was this idea that even the State's argument to the jury followed this general theory. While an expert might provide additional insight, it is hardly unfathomable that lay testimony alone could establish the requisite link, as it did so here. To the extent that lay testimony establishes too weak a link, again, the State may simply argue as much in summation.

In short, the plain language of the statute does not enumerate an expert-testimony requirement, and nothing in the arguments advanced by the OAG sufficiently supports such a requirement.

B. The advance-notice requirement of Rule 3:12-1 does not suggest an expert requirement.

Later, in assessing the lengthy "legislative history" of this historic concept, the only thing the OAG can point to in support of its position that presentation of a diminished-capacity defense requires an expert is that Rule 3:12-1 requires a defendant to give advance notice to the State when intending to rely on such an argument. But none of the other defenses enumerated in that rule require an expert (unless this Court ultimately imposes a requirement for

insanity under N.J.S.A. 2C:2-8(d)), so it is not clear where this implication comes from. Indeed, intoxication, which the OAG insists does not require an expert, has the exact same notice requirements. Thus, an advanced-notice requirement does nothing to necessitate inventing an expert-testimony requirement that does not otherwise exist.

C. There is nothing "unreasonable" about allowing defendants to present a diminished-capacity defense without expert testimony.

As to the OAG's argument that "concepts of reasonableness support the requirement of expert testimony," this too is unavailing. The OAG's initial assertion that, "[u]ndoubtedly, the Legislature meant to limit the cases in which the jury should" consider a diminished-capacity defense is problematic for two reasons. One, this is plainly not the intention with respect to the 1990 amendments following the Humanik holding. The Legislature stated that, as amended, the statute now "simply permit[s] introduction of evidence of mental disease or defect if that evidence is relevant to the state of mind required for the offense charged." Sponsor's Statement to S. 2335 2 (L. 1990, c. 63). Such statements evince a broad view of the defense, in line with the history of diminished capacity as mere argument against the applicable mens rea. See State v. Di Paolo, 34 N.J. 279, 295 (1961) ("The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered. . . . Hence

evidence of any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did in fact occur must be accepted.").

Secondly, to the extent that the Legislature did intend to unduly bind a defendant's ability to present a diminished-capacity defense, such intent is the not the be-all-end-all. The state and federal constitutions limit the ability of the Legislature to restrict those arguments, and in fact, improper legislative restraints on the diminished-capacity defense have already been struck down as unconstitutional in Humanik. Thus, legislative intent notwithstanding, neither the courts nor the Legislature can unduly bind a defendant's ability to argue against an essential element of the offense with which he is charged by imposing an improbably high bar for doing so.

Next, the OAG goes on to express concern that scores of murderers will walk free because verdicts will be "based on a jury decision lacking important relevant evidence." (Ab39). It is unclear what the concern is here, because the evidence the OAG asserts is lacking is evidence that would be beneficial to the diminished-capacity defense. There is nothing about the legal interpretations proposed by Mr. Mustafa that would prevent the State from presenting any number of witnesses, including experts, to testify against a diminished-capacity argument, even if the defendant himself presented no such witnesses.

The OAG's additional concern that detached experts are required because lay witnesses "are more likely to be sympathetic, and therefore possibly biased," (Ab40), similarly has no basis in the reality of criminal trials. For one, most such witnesses are likely to be State witnesses, since, like here, if the defendant is presenting diminished capacity without an expert, he might very well present no witnesses of his own at all and instead rely on proofs adduced during the State's case in chief. Additionally, the idea that lay witnesses would all be overly sympathetic to the defendant is especially ridiculous in the context of this case because the lay witness who provided the most relevant testimony, Mr. Mustafa's ex-girlfriend who lived with him in his car at the time, very clearly had an intense animosity against Mr. Mustafa, evidenced both in her trial testimony and in the recorded phone call admitted to the jury.[2]

Thus, the OAG's arguments in this respect too fail to hold water.

D. The OAG seems to ultimately agree that diminished capacity may be argued without an expert.

In the final subsection of its Point I, the OAG perpetuates a misunderstanding of the diminished-capacity statute revealing, at bottom, a

[2] Indeed, so hostile was the call that Mr. Mustafa argued at the trial and on appeal that most of the call should have been excluded from the trial as irrelevant and unduly prejudicial. (Db39-40).

recognition that defendants cannot be unduly prevented from arguing that a mental defect impacted the applicable mens rea.

As discussed throughout this brief and Mr. Mustafa's supplemental brief, (Dsb31-33), there is an extraordinary and untenable tension between the principle that defendants cannot be unduly restricted from arguing the State failed to prove the mens area beyond a reasonable doubt and the improbably high bar the State is insisting exists for arguing a diminished-capacity issue. Because of this, an unusual and incomprehensible third category of mental-health defense arises that is neither insanity nor diminished capacity but some perceived lesser third thing. See, e.g., State v. Sexton, 311 N.J. Super. 70, 88 (App. Div. 1998), aff'd on other grounds, 160 N.J. 93 (1999) (discussing how proffered "[e]vidence of defendant's mental ability" was relevant to the presence or absence of the requisite reckless state of mind," and yet not a diminished-capacity issue); cf. Clark v. Arizona, 548 U.S. 735, 787 (2006) (Kennedy, J., dissenting) (calling the distinction "between evidence being used to show incapacity and evidence being used to show lack of mens rea" "razor thin"). The OAG appears to acknowledge this category and concede no expert is needed to make such arguments generally. (Ab42).

Scholars have noted this problem, arguing that diminished capacity should perhaps not even be an explicitly enumerated category at all because of the

confusion it generates: "[I]t is clear that the mens rea variant of diminished capacity is not a separate defense that deserves to be called 'diminished capacity' or any other name connoting that it is some sort of special, affirmative defense." Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 6 (1984). Doing so creates a conundrum where courts are "convinced of the fundamental fairness and consequent necessity of allowing defendants to attempt to cast doubt on the prosecution's case using evidence of mental abnormality" and yet "place[] illogical limitations on the defendant's ability to do so." Id. at 6-7. Thus, courts conflate diminished capacity with something it is not and improperly burden-shift by treating it like an affirmative defense. Id. at 9.

This Court now has the opportunity to clear up this issue and treat diminished capacity less like the insanity defense and more like intoxication: a mere failure-of-proof defense that does not require an expert and cannot be unduly restricted. Any time there is evidence showing a mental disease or defect may have impacted the commission of an offense, the defense should be permitted to make such an argument and be entitled to the diminished-capacity instruction, in accordance with the plain language of N.J.S.A. 2C:4-2.

E. The OAG makes no mention of what exactly the burden is on the defendant for establishing diminished capacity nor what the appropriate analysis is for instructing on diminished capacity.

Lastly, it is worth mentioning significant omissions in the OAG's lengthy brief. Specifically, it fails to articulate what the burden is on defendants to establish diminished capacity and what the proper test is for assessing whether a trial court is obliged to instruct on diminished capacity.

The OAG makes clear that, despite every indication that a diminished-capacity defense is something for which a defendant should bear no burden, see Palmer v. State, 379 P.3d 981, 987-88 (Alaska Ct. App. 2016) ("The defense of diminished capacity under Alaska law is a failure-of-proof," and thus, "a defendant bears no burden of proof with regard to a claim of diminished capacity."), it nonetheless believes the burden remains on the defendant to establish diminished capacity by some quantum of evidence before a jury can be given the corresponding instruction at a trial.

However, the OAG fails to state what exactly the burden on the defendant is. As has already been discussed, there is no dispute that requiring defendants to establish diminished capacity by a preponderance of the evidence is unconstitutional. Humanik, 871 F.2d at 440-42. But this is the lowest express evidentiary test that exists in our law, and what quantum of evidence is necessary to meet the unspecified burden being imposed by the OAG is not clear. Nor,

similarly, has the OAG expressly stated what test or analysis is necessary for the trial court's evaluation of those proofs.

Mr. Mustafa's arguments provide easy answers to these questions that are unanswerable under the OAG's formulation of the law: a defendant bears no burden for a diminished-capacity issue, and as long as there is a rational basis for a diminished capacity in either the State's or defendant's case, a trial court should instruct on it upon a defendant's request. Cf. State v. Bryant, 288 N.J. Super. 27, 35 (App. Div. 1996). This formulation brings diminished capacity into conformity with similar defenses and eliminates the confusion and unworkability in the OAG's position and certain strands of the caselaw.

Because there can be no expert-testimony requirement, and because there was a rational basis for a diminished-capacity defense in the State's case, Mr. Mustafa's convictions must be reversed and remanded for a new trial.

POINT II

THE FAILURE TO PROVIDE A DIMINISHED-CAPACITY INSTRUCTION UPON A DEFENDANT'S REQUEST, OR OTHERWISE UNDULY RESTRICTING DIMINISHED-CAPACITY ARGUMENTS, ARE ERRORS THAT IMPAIR CONSTITUTIONAL RIGHTS.

In its Point II, the OAG goes beyond opining on the existence or lack of an expert-testimony requirement for diminished capacity and argues that

restricting a defendant's arguments on diminished capacity does not implicate such defendant's constitutional rights at all. This extreme argument has no merit.

Part of the basis for the OAG's arguments on this point is the existence of extreme restrictions placed on diminished-capacity arguments in a minority of states (about 12). While this is not the forum for litigating the propriety of such restrictions, suffice it to say that they are of dubious validity. See Clark, 548 U.S. at 791-95 (Kennedy, J., dissenting) (discussing how unduly restricting diminished-capacity arguments violates defendants' rights); Dora W. Klein, Rehabilitating Mental Disorder Evidence After *Clark v. Arizona*: Of Burdens, Presumptions, and the Right to Raise Reasonable Doubt, 60 Case W. Res. L. Rev. 645, 686 (2010) (arguing extreme restrictions on diminished-capacity arguments violate defendants' trial rights); Morse, 75 J. Crim. L. & Criminology at 7 ("I believe that most, if not all, limitations on the mens rea variant [of diminished capacity] are unconstitutional.").

Regardless, New Jersey is not among the minority of states that disallow diminished-capacity evidence. To the contrary, it has always been enshrined in our modern 2C Criminal Code under N.J.S.A. 2C:4-2, and it has been a common-law principle in our state long before that, see, e.g., State v. Schilling, 95 N.J.L. 145, 148 (E. & A. 1920) (discussing case where jury was instructed if "the evidence shows you that this defendant was so feebleminded that his faculties

were prostrated and rendered him incapable of forming a specific intent to kill with its willful, deliberate, and premeditated character, then, although it is no defense or justification" he could be acquitted of murder). Although a state may be entitled to confer varying levels of statutory privileges, once it does so, those statutory privileges may then produce a constitutionally protectible interest. See Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 12 (1979) (discussing how, while there is no constitutional right to parole, certain state parole laws may provide a constitutionally protectable entitlement). Because our caselaw and Legislature have permitted defendants to invoke diminished-capacity arguments, infringing on that interest similarly interferes with a defendant's due-process and fair-trial rights that attach to it. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

The OAG's arguments here are especially confounding because the United States Court of Appeals for the Third Circuit has already held that undue restrictions on diminished-capacity arguments impinge a defendant's constitutional rights in Humanik. Given that explicit decision, it is unclear how the OAG can now argue that there is no constitutional cap on the limitation of diminished-capacity defenses in our state.

To the contrary, both the federal and state constitutions "guarantee criminal defendants a meaningful opportunity to present a complete defense."

State v. Garron, 177 N.J. 147, 168 (2003) (internal quotation and citations omitted). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" where that evidence "is central to the defendant's claim of innocence." Ibid. (internal quotations and citation omitted); see also Di Paolo, 34 N.J. at 295 ("The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered."). If the ability of defendants to argue that a mental defect prevented them from forming the necessary mens rea is unduly restricted, it violates these core principles. Morse, 75 J. Crim. L. & Criminology at 6-7.

Thus, the imposition of an expert-testimony requirement would violate defendants' constitutional rights to present a complete defense and cannot be permitted.

CONCLUSION

For the foregoing reasons, this Court should hold that there is no expert-testimony requirement to presenting a diminished-capacity defense, the decision of the Appellate Division should be reversed, and Mr. Mustafa's convictions should be reversed and the matter remanded for a new trial.

Respectfully submitted,

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Dated: August 18, 2025