Supreme Court of New Jersey
DOCKET NO. 090329

STATE OF NEW JERSEY,	CRIMINAL ACTION
Plaintiff-Respondent,	On Certification Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division.
v.	
KADER S. MUSTAFA,	Sat Below:
Defendant-Petitioner.	Hon. Jessica R. Mayer, P.J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa A. Puglisi, J.A.D.

BRIEF ON BEHALF OF AMICUS CURIAE
THE ATTORNEY GENERAL OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
AMICUS CURIAE
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

THOMAS R. CLARK – ATTY NO. 031591987
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX 086
TRENTON, NEW JERSEY 08625
clarkt@njdcj.org

(609) 376-2400

OF COUNSEL AND ON THE BRIEF

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PRELIMINARY STATEMENT

As this Court and others have observed, criminal law proceeds on the thesis that nearly all people "are invested with free will and capable of choosing between right and wrong." They must be deterred from criminal conduct, for the "protection of society." Some people, though, who are sane in a legal sense, suffer from a medical condition that prevents the State from proving they acted consciously to violate specific criminal laws. Identifying such individuals, who may escape any criminal punishment for their actions, can be a difficult task. As this case shows, that conclusion should be reached following a careful and searching examination, so that the guilty are not allowed to escape criminal liability and deserved punishment.

According to the well-respected Cleveland Clinic, there are more than 200 types of identified mental disorders, which include numerous disorders, both named and non-specific. Certain conditions exhibit varying degrees of intensity. The only disorders that impact the criminal justice system, however, are those that have potentially affected the individual's mental functioning to the degree of allowing the factfinder to harbor reasonable doubt whether the person acted with the necessary mens rea. For that reason, New Jersey imposes on a defendant seeking to have the factfinder consider her claim of "diminished capacity" the initial burden of producing relevant evidence, without shifting to

the defendant the burden of proving she is not guilty of the charged crime.

The disorder must be identified as one having the capacity to prevent or interfere with formation of the relevant mens rea and must be shown to have possibly done so. Because neither the identification of such disorder, nor evidencing its actual effect on a defendant's mental functioning at the time of the crime's commission, is within the ken of the average person, expert medical testimony is required to meet defendant's burden of production on these issues. This Court and the Appellate Division have ruled that a defendant's failure to produce expert testimony to satisfy either of these preconditions to relevancy is fatal to a claim the trial judge erred in refusing to instruct the jury to specifically weigh the matter of a mental disease or defect affecting the defendant's mental state. Instead, the jury is guided by the ordinary and usual burden placed on the State to prove mens rea beyond a reasonable doubt.

Defendant in this case affirmatively refused to present an insanity defense to the jury. He also failed to meet his burden of production on the issue of diminished capacity, despite having been treated at two hospitals whose medical records would have revealed whether defendant possibly suffered from diminished capacity if it was the case. Instead, defendant urged the judge to give the jury the Model Jury Charge on diminished capacity based solely on the very limited lay testimony introduced at trial. He argued that the jury should

weigh the unexplained evidence of his eccentric behavior without any guidance on assessing that lay testimony in terms of the crimes charged, especially any guidance from the prosecutor's cross-examination of any testifying medical experts. The trial judge correctly held that defendant was not entitled to the jury instruction, in the absence of any expert medical testimony regarding any alleged medical disease or defect defendant may have suffered from when he killed the victim.

This Court should affirm that expert testimony is necessary for a jury to be instructed on diminished capacity, as the Legislature intended, and as this Court and the Appellate Division have repeatedly recognized.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Counterstatement of Procedural History and Counterstatement of Facts set forth in the State's brief to the Appellate Division, as well as that information set forth in the Appellate Division's opinion. The Attorney General would note certain particularly germane facts of procedural history and the crimes.[1]

A. Defendant's mental health issues.

On the first trial day, the judge confirmed with defendant personally that

[1] For transcript references, the Attorney General adopts the numbering convention of the State's Appellate Division brief.

he waived the affirmative defense of insanity, as he was lawfully permitted to do. (3T10-7 to 13-8). State v. Gorthy, 226 N.J. 516, 520-22 (2016) (holding that a defendant found to be competent has unilateral authority to decide whether to assert insanity defense, however "unwise" others may judge that decision to be). That waiver had previously been made a part of the Pretrial Memorandum executed at the Pretrial Conference. (3T11-16 to 12-2).

As the trial evidence revealed, defendant's mental functioning arose as an issue on the day after he shot the victim, killing her, during a highway encounter. When police arrested defendant and his girlfriend for the murder, both had been asleep in defendant's car. At the time, defendant was wearing tin foil between a baseball cap and a hard hat. (4T73-8 to 74-3; 4T99-5 to 19; 4T130-19 to 131-5). Defendant was wrapped in what defense counsel contended was a Mylar jacket, to keep radiation from his body. (4T131-6 to 132-22). The antenna of his car was wrapped in tin foil, too. (4T154-8 to 10). Defendant's brother had told one police officer that defendant "had psychological problems," and had "recently been to Monmouth Medical Center for treatment." (4T85-19 to 23).

Nicole Fiore, defendant's girlfriend, testified to statements defendant made to her indicating he may have suffered from paranoia. (7T187-25; 7T189-20 to 190-5; 7T190-13 to 193-9). She also testified that defendant told her he had undergone a psychiatric evaluation at a hospital, after which he was

released. (7T190-6 to 12). She indicated that defendant's stated purpose for placing foil on the car antenna was to deflect radiation. (7T191-23 to 192-4). She saw him disassemble phones to prevent disclosing his whereabouts to unidentified other persons. (7T191-14 to 22). She also told police that defendant acted like her schizophrenic uncle. (7T194-25 to 195-18).

On the other hand, other trial evidence undercut any claim of diminished capacity. Nicole Fiore's father testified that he met defendant about twenty times during the five-year period his daughter dated defendant. (5T6-1 to 7). Defendant shared dinner with the Fiore family, and visited them on holidays. (5T6-8 to 11). During that entire time, Mr. Fiore "never had a problem with him," even when he knew that defendant and his daughter were "[b]asically living" in defendant's car in 2017 and 2018. (5T16-2 to 4; 5T16-8 to 23).

Mr. Fiore, a licensed gun owner himself, testified to meeting defendant on April 19, 2018, less than one month before the murder. At that time, defendant showed a loaded gun to Mr. Fiore, and discussed having been to a shooting range that day. (5T6-12 to 7-13; 5T7-23 to 8-10). Fiore allowed his daughter to go to a shooting range with defendant at least once. (5T11-6 to 12). The gun that defendant showed Mr. Fiore was the murder weapon—which police found hours after the murder, hidden behind the liner of the trunk of defendant's car wrapped inside a tee shirt containing five bullets and evidence the sixth bullet had been

discharged. (5T18-2 to 15; 5T99-12 to 100-1; 5T102-10 to 25; 5T108-13 to 20; 5T109-11 to 111-4). That is, the murder weapon was not inside the "brown leather, [or] brown suede" case that defendant had shown Mr. Fiore weeks earlier. (5T6-20 to 7-2; 5T17-5 to 21; 5T102-10 to 25; 5T113-6 to 20).

Mr. Fiore next saw defendant at Fiore's house, on May 1, 2018, two days before the murder. Defendant was respectful and friendly. (5T15-5 to 16-1).

The jury also heard a recording of a telephone call between defendant and Nicole Fiore, made after their arrests, and lasting approximately fifteen minutes. (7T151-15 to 19; 7T152-9 to 168-25). During the call, defendant stated many different things to Nicole that arguably were suggestions meant to help his defense, including: (1) that his bullet was not the one that killed the victim, because a second shot had been fired, possibly by the victim's boyfriend, who was in the car with her (7T153-22 to 154-1); (2) that Nicole heard the second shot, a suggestion she rejected (7T154-3 to 6); (3) that the murder victim, and her boyfriend, were "gang members," who were following defendant and Nicole as they drove in defendant's car, and were "planning to probably shoot" defendant or Nicole, and thus he was "scared for [his] life" (7T163-25 to 164-7); and (4) that the murder was "an accident," as he meant "to scare them" when he shot out his car window (7T166-9 to 15). Defendant also told Nicole that if she stuck by him through the case, he would marry her. (7T160-5 to 7). Most

importantly, perhaps, the jury heard defendant speak on the recording at some length on a significant matter to a trusted person, thereby giving the jurors critical information about his rationality.

After the prosecution rested, defendant chose not to testify. (8T58-4 to 61-6). Defense counsel then questioned defendant, confirming that he had considered, but rejected, calling his brother as a witness, and instead wished to rest without presenting any witnesses. (8T61-8 to 24).

A brief discussion then took place concerning "mental disease or defect," in relation to the jury instruction for murder, aggravated manslaughter, or reckless manslaughter. (8T100-24 to 101-16). It remained an unresolved issue when it was discussed at length two days later during another pre-charge conference. (9T4-17 to 23; 9T9-20 to 16-11). Defense counsel conceded that the record contained no evidence that defendant had been diagnosed as suffering from a "permanent mental illness" recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM). (9T11-18 to 19) (emphasis added). The trial judge ruled that in the absence of any "medical or expert testimony," adding an instruction on "mental disease or defect" to the model charge on homicide "would serve to confuse this jury," citing several reported cases, as well as one unreported case, so he rejected it. (9T18-22 to 22-6).[2]

[2] The judge instructed the jury on defendant's voluntary intoxication, which

B. Presentation of evidence relevant to defendant's mental health at sentencing.

At sentencing, the judge first heard and denied defendant's motion for a new trial, which was based in part on the judge's refusal to instruct the jury on diminished capacity. (11T3-16 to 31-25). Counsel noted that defendant "had been hospitalized for psychotic episodes in the past." (11T7-21 to 23) (emphasis added).[3] Denying the motion, the judge noted that defendant presented "no medical evidence, expert testimony or any evidence whatsoever indicating that the defendant suffered from a mental illness." (11T29-18 to 21). The judge concluded that defendant did not meet his "initial burden to introduce evidence of mental disease or defect, tending to show that he was incapable of forming the requisite intent." (11T30-21 to 24).

Only then did defendant offer one hundred fifty-five pages of medical records from two hospitals. (11T46-23 to 47-1). While the record is unclear, defendant had been "held for psychiatric observation" in at least one. (11T46-23 to 47-1). Counsel conceded that defendant had been released from the hospital before the murder. (11T47-1 to 3; see PSR at 12 (item #6)).

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both parties requested. (9T16-12 to 19; 9T148-11 to 152-10).

[3] Trial counsel was admitted to the Bar in 1975. See Middlesex County Bar Ass'n, <https:// www.mcbalaw. com/page/CriminalAward2016> (last visited July 15, 2025).

C. Appellate Proceedings.

On appeal, defendant asserted the judge's ruling on the diminished capacity jury charge deprived him of his constitutional right to a fair trial, and that no expert testimony was necessary to be entitled to it. State v. Mustafa, No. A-1038-22, 2025 N.J. Super. Unpub. LEXIS 136, at *19 (App. Div. Jan. 27, 2025) (per curiam), certif. granted, 260 N.J. 469 (May 16, 2025). The panel rejected that argument, affirming the trial court's decision that giving the jury charge required expert medical testimony. Id. at *19-*27. The panel explained that defendant did not offer any "evidence accepted within the psychiatric community of a mental disease or defect," and also did not provide "expert testimony opining his odd behaviors impeded his ability to form the mens rea necessary to convict him of purposely shooting at" the victim. Id. at *24.

Defendant filed a petition for certification, which this Court granted on May 16, 2025. The question presented was limited to "whether expert testimony is necessary for a jury to be instructed on diminished capacity." State v. Mustafa, 260 N.J. 469, 469-70 (2025).

LEGAL ARGUMENT

POINT I

EXPERT TESTIMONY IS REQUIRED BEFORE A JURY MAY BE INSTRUCTED ON DIMINISHED CAPACITY.[4]

The model jury charge for "diminished capacity" tells jurors that evidence "alleging that the defendant suffered from a mental disease or defect [or a specifically named disorder] has been produced." Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" at 1 (rev. June 5, 2006) (brackets added). Jurors are further told they must "determine whether, despite the evidence of mental disease or defect," the State has "proven beyond a reasonable doubt that the defendant acted" with the required mental state associated with the crime charged. Id. at 2. The question before this Court is: Whether a defendant is entitled to that jury instruction without producing any expert testimony.

As shown below, the answer to that question should be: No—evidencing a "mental disease" or a "defect" that is "relevant to prove that the defendant did

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[4] Because the terms "mental disease" and "defect" are not defined in the Criminal Code, see discussion infra pp. 12-13, it is conceivable that a relevant physical defect might be so patently obvious that the trial judge, in her discretion, may conclude that expert testimony is not necessary. See discussion of Ruffin v. State, 270 S.W.3d 586, 593-94 (Tex. Crim. App. 2008), infra n. 6. But such circumstances are so rare that this brief does not concern them.

not have a state of mind which is an element of the offense," N.J.S.A. 2C:4-2, requires the production of relevant and reliable expert testimony, to satisfy two preconditions to relevancy. Only an expert can identify that defendant had a "mental disease" or "defect" with the capacity to preclude her from possessing the relevant mens rea, and only an expert can testify to the necessary causal link between such disease or defect and the defendant's state of mind at the time the crime was committed, which makes such condition relevant.

To answer the Court's question, the relevant statute, N.J.S.A. 2C:4-2, must be construed. "The object of statutory interpretation is to effectuate the intent of the Legislature, as evidenced by the plain language of the statute, its legislative history and underlying policy, and concepts of reasonableness." State v. Courtney, 243 N.J. 77, 85 (2020). Consideration of those factors compels the conclusion that expert testimony is required to earn the right to have the jury instructed on diminished capacity.

A. The Statute's Plain Language Mandates Use of Expert Medical Testimony.

The Court first must ask whether the statute "admits of a plain-meaning interpretation." State v. Hodde, 181 N.J. 375, 379 (2004). If the language is "susceptible to only one interpretation," then it should be applied as written, without "resort to extrinsic interpretive aids." Ibid. (internal quotation omitted).

N.J.S.A. 2C:4-2 provides, in relevant part, that

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense.

The statute includes a presumption that the defendant had no mental disease or defect.[5] State v. Zola, 112 N.J. 384, 401 (1988) (citing State v. Breakiron, 108 N.J. 591, 607 (1987)), cert. denied, 489 U.S. 1022 (1989); N.J.S.A. 2C:4-2.

The New Jersey Criminal Code does not define either of those terms. Breakiron, 108 N.J. at 618 n.10. However, dictionaries define each as an abnormality. In re Belfi v. Gene B., 193 N.Y.S.3d 11, 17 n.3 (N.Y. App. Div. 2023) (synonym for defect is abnormality) (quoting Merriam-Webster Online Dictionary), leave to appeal denied, 226 N.E.3d 355 (N.Y. 2024); Texas State Bd. of Exam'rs of Marriage & Family Therapists v. Texas Med. Ass'n, 511 S.W.3d 28, 38 (Tex. 2017) (defining disease as a "condition of abnormal vital

[5] A mental defect can include a condition like epilepsy, which is not considered a mental illness. Epilepsy Foundation, "Epilepsy and Psychological Disorders" (Nov. 15, 2016) <http: //www.epilepsy. com/stories/epilepsy-and-psychological-disorders> (last visited July 9, 2025). See State v. Washington, 223 N.J. Super. 367, 369-76 (App. Div.) (reversing murder conviction when evidence of defendant's epileptic seizure on date of homicide required jury to be presented with lesser included offenses that had lesser mens rea requirement), certif. denied, 111 N.J. 612 (1988). Another is intellectual disability, once commonly called "mental retardation." Hall v. Florida, 572 U.S. 701, 704-05 (2014). E.g., State v. Harris, 181 N.J. 391, 430 (2004) (defendant presented claims of both "mental retardation and mental illness" in proceeding seeking to bar his execution), cert. denied, 545 U.S. 1145 (2005). And as noted above, a defect can also be physical.

function") (quoting Mosby's Medical Dictionary (8th ed. 2009)).

Because a mental disease or defect is an abnormality, the person who would know whether such abnormality exists is the defendant, who, in turn, bears the burden of producing evidence that such condition exists. Placing the burden of production on the party that does not bear the ultimate burden of persuasion is not uncommon, especially when, as here, the information involved is peculiarly within the possession of that party. State v. Lee, 96 N.J. 156, 160 (1984) (analyzing N.J.S.A. 2C:39-3(e), where defendant has burden to evidence lawful purpose for possession of certain weapons, but State retains burden to prove possession with unlawful purpose); State v. Hock, 54 N.J. 526, 536-37 (1969) (holding that once State shows permit is necessary to possess type of gun, defendant has burden to produce permit, while State retains burden to prove unlawful possession), cert. denied, 399 U.S. 930 (1970); State v. Romano, 355 N.J. Super. 21, 35-36 (App. Div. 2002) (explaining interplay of burdens on "common-law defense of necessity"); State v. Wright, 410 N.J. Super. 142, 155 (Law Div. 2008) (ruling that once State makes prima facie case that bail offer should be rejected, defendant's "greater access to evidence" justifies placing burden of production of legitimacy of bail source on defendant). See generally Campbell v. United States, 365 U.S. 85, 96 (1961) (noting that "the ordinary rule, based on considerations of fairness, does not place the burden upon a

litigant of establishing facts peculiarly within the knowledge of his adversary"). Since a defendant has knowledge of his mental disorder, including medical records protected from discovery by law, placement of the burden of production on a defendant is entirely appropriate.

But that is not enough. The statute conditions the relevancy of such abnormality by limiting it to the issue whether the defendant had the mental state required to commit the charged crime(s). "Not every mental condition qualifies under N.J.S.A. 2C:4-2 as a 'disease or defect which would negate a state of mind which is an element of the offense.'" State v. Nataluk, 316 N.J. Super. 336, 344 (App. Div. 1998). A jury instruction on diminished capacity is warranted only when "defendant has presented evidence of a mental disease or defect that interferes with cognitive ability sufficient to prevent or interfere with the formation of the requisite intent or mens rea." State v. Galloway, 133 N.J. 631, 647 (1993); see Breakiron, 108 N.J. at 618 (holding that diminished capacity standard must be "applied carefully by courts," as its relevance is limited to "the question of whether the defendant had the requisite mental state to commit the crime"); N.J.S.A. 2C:4-2.

The Code reflects this Court's decision in State v. Sikora, 44 N.J. 453 (1965). Sikora, convicted of murder, did not assert insanity as an affirmative defense, but still called a psychiatrist to testify concerning whether he had the

mental state to commit the crime. Id. at 455, 461. The psychiatrist testified in substance that no mens rea existed if Sikora's conduct "was probably produced by unconscious rather than conscious motivations." Id. at 461-63.

Sikora appealed to this Court, which ordered a remand for "further testimonial examination of the doctor." Id. at 465-66. At the hearing, the doctor testified that although Sikora "understood and could differentiate between right and wrong," he was subjected to various pressures causing him to succumb to "the predetermined influence of his unconscious," so that his criminal acts did not result from "a voluntary exercise of his free will." Id. at 466-69.

Following the remand, this Court rejected the argument that evidence of unconscious influences was relevant. "Criminal responsibility must be judged at the level of the conscious." Id. at 470; see id. at 472. If Sikora could "think[], plan[] and execute[]" his criminal scheme consciously, then any "unconscious influences" were not relevant. Id. at 470. Otherwise, "[c]riminal responsibility, as society now knows it, would vanish from the scene." Id. at 471.

Sikora's holding that courts should "admit only those types of psychiatric evidence which accept the basic view of man upon which our criminal law is built, i.e., that man has a free will, capable of choosing right from wrong, if he can see it," was adopted by the Legislature when it adopted the Code, with the advice of the New Jersey Criminal Law Revision Commission. 2 The New Jersey

Penal Code: Commentary § 2C:4-2, cmt. 1 at 99 (Criminal Law Revision Comm'n 1971) [hereinafter "Law Rev. Comm'n Commentary"]; see Breakiron, 108 N.J. at 604-10. Sikora remains good law. State v. Singleton, 211 N.J. 157, 160 (2012) (noting that New Jersey adheres to proposition that a defendant with mental capacity to distinguish between right and wrong "is legally responsible for his criminal conduct") (citing Sikora).

This Court requires a defendant seeking such a jury charge to produce evidence satisfying two elements. State v. Baum, 224 N.J. 147, 160 (2016). First, the defendant must show that "experts in the psychological field believe" defendant's "kind of mental deficiency" can prevent or interfere with formation of the necessary mental state. Galloway, 133 N.J. at 647 (emphasis added), cited with approval in State v. Melendez, 423 N.J. Super. 1, 32 (App. Div. 2011), certif. denied, 210 N.J. 28 (2012); see Baum, 224 N.J. at 160. Second, defendant must show, by evidence in the record, that "'the claimed deficiency did affect the defendant's cognitive capacity to form' the required mental state." Galloway, 133 N.J. at 647, quoted in Melendez, 423 N. J. Super. at 32; see Baum, 224 N.J. at 160; State v. Reyes, 140 N.J. 344, 364 (1995) (citing Galloway for proposition that "a connection is necessary between" defendant's mental disease or defect and "the defendant's ability to form the required mental state for the crime charged"). Only then is the judge "required to give a

diminished capacity charge to the jury." Baum, 224 N.J. at 161; cf. State v. Phelps, 96 N.J. 500, 513-16 (1984) (explaining application of predecessor to N.J.R.E. 104(a) to the co-conspirator exception to hearsay rule).

Consequently, a defendant's failure to satisfy either element is fatal to her request for a diminished capacity jury instruction. See State v. Rivera, 205 N.J. 472, 491 (2011) (observing that defendant's expert never provided "competent psychiatric testimony supporting" diminished capacity defense); Reyes, 140 N.J. at 362, 365 (holding that defendant's expert never diagnosed defendant as "suffering from some type of underlying mental disease or disorder"); Melendez, 432 N.J. Super. at 31-33 (holding that no jury instruction on diminished capacity was warranted, as defendant's expert never related testimony on defendant's "history of mental illness and emotional trauma" to defendant's "mental state at the time he killed his wife").[6]

[6] However, Galloway's rule requiring expert testimony on the "mental disease or defect" may not apply only in the rare event that a relevant physical defect is so patently obvious that lay witnesses can evidence it. In Ruffin v. State, 270 S.W.3d 586 (Tex. Crim. App. 2008), for example, the Court hypothesized about a scenario in which a blind person was charged with aggravated assault against a uniformed police officer (the equivalent of N.J.S.A. 2C:12-1(b)(5)) whom the defendant mistook for a trespasser. Id. at 593-94 (dictum). "Evidence of the defendant's blindness would, of course, be relevant and admissible to rebut the State's assertion that the defendant intended to shoot at a police officer," and could come from either a lay witness or from an expert. Id. at 594 (dictum); cf. Jones v. Superior Court, 372 P.2d 919, 920, 922 (Cal. 1962) (holding that prosecution is entitled to discovery of defense reports, medical records, and witnesses' names in support of claimed impotence in defense of rape charge).

Once the defendant makes those two showings, of course, the State retains the burden of persuasion to prove beyond a reasonable doubt that defendant had the necessary state of mind at the time of the offense. Humanik v. Beyer, 871 F.2d 432, 434, 443 (3d Cir.) (holding that requiring defendant to introduce evidence of mental disease or defect that "a reasonable juror could credit" is "constitutionally permissible," but requiring defendant to prove such condition by preponderance of evidence is not, and finding such burden of production satisfied by defendant's reliance "on the opinion of two experts"), cert. denied, 493 U.S. 812 (1989); Reyes, 140 N.J. at 356-57 (explaining how this Court and the Legislature reacted to the decision in Humanik); Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" (rev. June 5, 2006).

Here, defendant did not satisfy his burden of production on either element. He failed to evidence a mental disease or defect that psychiatrists would opine had the capacity to interfere with his cognitive ability, and he failed to produce evidence that any mental disease or defect impaired his cognitive ability when he shot the victim. Thus, his demand for the jury charge was properly denied.

1. A Medical Expert Is Necessary to Produce Evidence That Defendant's Mental Condition Had the Capacity To Prevent Possession of the Required Mental State.

N.J.S.A. 2C:4-2 "concerns a wide range of mental conditions, so long as the condition is one that interferes with the formation of the mental state required for conviction of the offense." Cannel, New Jersey Criminal Code Annotated, cmt. 2 to N.J.S.A 2C:4-2 at 162 (2024); see Law Rev. Comm'n Commentary, § 2C:4-1 at 98 cmt. 9 (stating intention that term "defect" "should include congenital and traumatic mental conditions as well as disease").[7] For trial judges to perform the critical gatekeeping role this Court has assigned to them, they must first conclude that the evidence of the "mental disease" or "defect" is "reliable for courtroom use," that is, "sufficiently accepted within the psychiatric community." Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643); see Phelps, 96 N.J. at 515 (noting that having judge "rather than the jury evaluate reliability before admitting or rejecting evidence recognizes the judge's skill and experience"). No lay witness can knowledgeably testify to acceptance within "the psychiatric community." Baum, 224 N.J. at 161 (quoting Galloway, 133 N.J. at 643).

[7] The Law Revision Commission proposed that "defect" be included in the proposed N.J.S.A. 2C:4-1 (insanity defense), as well as N.J.S.A. 2C:4-2. 1 The New Jersey Penal Code: Report and Penal Code §§ 2C:4-1 and 2C:4-2, at 35 (Criminal Law Revision Comm'n 1971). The Legislature removed the term from N.J.S.A. 2C:4-1, but left it in N.J.S.A. 2C:4-2.

To identify a "disease" is to "diagnose" it. Webster's Third New International Dictionary 622 (2002), quoted in Texas State Bd. of Exam'rs of Marriage & Family Therapists, 511 S.W.3d at 35 (collecting other, similar definitions). In New Jersey, a person is deemed to practice medicine if they diagnose any human disease. N.J.S.A. 45:9-18, cited in State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 96 (App. Div. 2021); see State v. Arrington, 480 N.J. Super. 428, 441 (App. Div. 2024) (noting that "laypersons generally are not qualified to make diagnoses of diseases"), certif. granted, 260 N.J. 208 (2025).

This Court has recognized more than once that testimony identifying "mental disease" or "mental defect" is a "diagnosis." In State v. Pitts, 116 N.J. 580 (1989), this Court three times described testimony of Pitts's psychiatric expert on his "mood disorder" as a "diagnosis" of his "mental condition." Id. at 607-09; see also State v. Moore, 122 N.J. 420, 425-27, 430-37 (1991) (noting "diagnosis" from Moore's psychiatrist that required reversal of conviction for failure to give the jury instruction on diminished capacity).

Later, in Galloway, this Court characterized the relevant evidence in both Moore and Pitts as diagnoses. 133 N.J. at 644-45. Galloway held that "the determination that a condition constitutes a mental disease or defect is one to be made in each case by the jury after the court has determined that the evidence of the condition in question is relevant and sufficiently accepted within the

psychiatric community to be found reliable for courtroom use." Id. at 643 (emphasis added). The Galloway Court further held that the testimony of a psychiatrist and a psychologist about defendant's "primary diagnosis" and his "secondary diagnosis" rendered the withdrawal of the diminished capacity jury instruction from the jury's consideration reversible error. Id. at 647-50.

The self-evident proposition that only an expert witness may provide a diagnosis flows logically from the truism that while "jurors may draw rational inferences from the evidence, they are not permitted to speculate or connect the dots on mere surmise." State v. Fortin, 189 N.J. 579, 596 (2007). "New Jersey courts have required expert testimony to explain complex matters that would fall beyond the ken of the ordinary juror." Ibid. (emphasis added); see State v. J.T., 455 N.J. Super. 176, 214-15 (App. Div.) (holding that psychiatric testimony was "necessary" to assist the jury to determine if defendant met the definition of insanity in N.J.S.A. 2C:4-1, because "psychiatry, as a field of medicine, is beyond the ken of the average juror"), certif. denied, 235 N.J. 466, certif. denied, 235 N.J. 467 (2018); Mullarney v. Board of Review, 343 N.J. Super. 401, 408 (App. Div. 2001) (holding argument that Mullarney suffered from mental illness that rendered him incapable of realizing his conduct jeopardized his licensure and employment was "so esoteric that a fact-finder of common judgment and experience cannot form a valid judgment on the contention without the

assistance of expert testimony"); State v. Jones, 308 N.J. Super. 174, 183-85 (App. Div.) (ruling judge properly precluded counsel's proposed closing argument point, which sought to raise an inference without any supporting expert testimony, because the contention required support of expert testimony), certif. denied, 156 N.J. 380 (1998). As the United States Supreme Court has noted, lay witnesses "can merely describe symptoms they believe might be relevant to the defendant's mental state," while psychiatrists can "ideally assist lay jurors" to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake v. Oklahoma, 470 U.S. 68, 80-81 (1985).

Indeed, this Court and others have rejected the testimony of experts if claimed mental conditions were not generally accepted within the psychiatric community. See State v. J.L.G., 234 N.J. 265, 271-72, 301-03 (2018) (applying Frye analysis,[8] finding four of five behaviors classified as "Child Sexual Abuse Accommodation Syndrome" were not sufficiently reliable to be admitted in evidence, based in part on lack of acceptance by American Psychiatric Association (APA)); accord, United States v. Fishman, 743 F. Supp. 713, 715-20 (N.D. Cal. 1990) (after taking proffers from forensic psychologist and social

[8] Frye v. United States, 293 F. 1013, 1013-14 (D.C. Cir. 1923).

psychologist, and applying Frye analysis, holding that "influence techniques, or brainwashing," was not generally accepted within witnesses' fields, in part because of lack of acceptance by APA); In re New York v. Ralph P., 39 N.Y.S.3d 643, 644, 646, 684 (N.Y. Sup. Ct. 2016) (applying Frye analysis, and accepting evidence from six expert psychiatrists or psychologists, finding "hebephilia," not generally accepted by "sex offender psychiatric community"); Harris v. State, 424 S.W.3d 599, 600-02, 605-08 & nn. 2, 9 (Tex. Ct. App. 2013) (applying Daubert analysis,[9] holding trial judge properly excluded testimony from two defense experts on "repressed memory" as not shown to be sufficiently reliable), review refused, No. PD-1184-13, 2014 Tex. Crim. App. LEXIS 45 (Tex. Crim. App. Jan. 15, 2014).

Even when a condition is generally accepted by the psychiatric community, though, the court's gatekeeping function is only beginning. The "variety and forms of mental disease are legion," but "[n]ot every mental disease or defect has relevance to the mental states prescribed by the Code." Breakiron, 108 N.J. at 618 n.10[10]; see United States v. Williams, 1 F. Supp. 3d 1124, 1137

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[9] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-95 (1993).

[10] "Legion" is an entirely apt adjective. The well-respected Cleveland Clinic states that there "are more than 200 types of mental health disorders," with some of the most common including anxiety disorders, mood disorders, eating disorders, disruptive behavior disorders, personality disorders, and psychotic disorders. Cleveland Clinic, "Mental Disorders," at 5

n.13 (D. Haw. 2014) (discussing cautionary statement on forensic use of the DSM – 5th ed., due to the "imperfect fit" between concerns of the law and clinical diagnosis). A defendant must additionally show "that experts in the psychological field believe that that kind of mental deficiency can affect a person's cognitive faculties." Galloway, 133 N.J. at 647. No lay person is qualified to opine how a mental disease or defect can affect an individual's capacity to act recklessly, knowingly, or with purpose, as Galloway requires.

For example, in Pitts, the defendant, convicted of murdering two people, argued that the trial judge erred by failing sua sponte to instruct the jury on diminished capacity. 116 N.J. at 585, 607. This Court found no plain error, as Pitts's expert gave no testimony that Pitts's "particular mental disorders were generally acknowledged among psychiatrists to be capable of affecting one's ability to possess the state of mind required by the Code for murder," or that Pitts's "state of mind when he stabbed the victims was caused by his mental disorders." Id. at 609-610.

Similarly, in State v. Russo, 243 N.J. Super. 383 (App. Div. 1990), certif. denied, 126 N.J. 322 (1991), Russo asserted a diminished capacity defense to a murder charge that arose from his robbery of a gas station. Id. at 389-90.

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https: //my.clevelandclinic. org/health/diseases/22295-mental-health-disorders (last visited July 9, 2025). It is estimated that about one in every eight people "around the world lives with one of these disorders." Id. at 4.

Russo's two experts testified at a Rule 8 hearing (the precursor to N.J.R.E. 104) to his "depression" and "depressive disorder, [and] personality disorder." Id. at 393-96. The exclusion of their testimony from trial was upheld because neither witness testified that those conditions "were generally acknowledged among psychiatrists to be capable of affecting one's ability to possess the state of mind required by the Code for murder." Ibid. (quoting Pitts, 116 N.J. at 610).

One reason for this requirement is that some mental disorders, if not all, have differing degrees of incapacitation. For example, an intellectual disability will fall into one of "four distinct categories:" "mild," "moderate," "severe," and "profound." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.9 (1985). Individuals so afflicted "range from those whose disability is not immediately evident to those who must be constantly cared for." Id. at 442. A person with a mild or moderate intellectual disability may nevertheless possess the capacity to form the required state of mind to be convicted. See United States v. Litzky, 18 F.4th 1296, 1300-01, 1303 (11th Cir. 2021) (ruling that testimony of expert properly precluded because testimony of defendant's "mild[] intellectual[] disab[ility]" failed to link condition to likelihood defendant did not form intent to "produce or otherwise agree to produce child pornography") (brackets in original); Pierson v. State, 73 N.E.3d 737, 738, 739, 740-41 (Ind. Ct. App.) (holding that person with mild intellectual disability

properly found guilty of neglect, which requires proof defendant acted "knowingly or intentionally"), transfer denied, 88 N.E.3d 1079 (Ind. 2017); see also Atkins v. Virginia, 536 U.S. 304, 318 (2002) (noting that those with intellectual disabilities "frequently know the difference between right and wrong"). On the other hand, persons suffering more severe intellectual disability may be entitled to the jury charge. Rivera, 205 N.J. at 487 (quoting State v. Delibero, 149 N.J. 90, 98 (1997)); see State v. Harris, 181 N.J. at 430 (noting that defendant presented claims of both "mental retardation and mental illness" in proceeding seeking to bar his execution).

Other cases provide support on this point. In both Moore and Rivera, the crucial psychiatric testimony concerned a "brief reactive psychosis" the defendant suffered at the time of the homicide. 122 N.J. at 436; see 205 N.J. at 480-81 ("brief psychotic disorder"). In Moore, entitlement to the jury instruction was held to have been made, while Rivera held that the length of time the defendant suffered from the condition was too short to qualify as a disorder. Compare 122 N.J. at 428-30, 436-37 (noting time leading to murder lasted about thirty minutes; no discussion of minimum time under disorder) with 205 N.J. at 480-82, 491-92 (finding no plain error where defendant's condition failed to meet DSM's minimum time period for diagnosis). The expert in Moore also testified that "there is always a continuum" with mental diseases. 122 N.J.

at 436.

Similarly, in Galloway, this Court held that a mental condition "resulting in a rage and loss of control" does not constitute diminished capacity if it "does not affect cognitive capacity sufficient to preclude the necessary mental state." 133 N.J. at 646-47. Meaning such a condition can become so severe that giving the jury charge is warranted. Id. at 647; Model Jury Charge (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" at 1 n.1 (rev. June 5, 2006) (noting that "conditions that cause a loss of emotional control[] may satisfy the diminished capacity defense"). But still the defendant must produce evidence of the underlying mental disease or defect. See State v. Jordan, 19 A.3d 241, 247-48 (Conn. App. Ct.) (holding that trial court properly denied request for diminished capacity jury charge, as no case had held that "rage, unconnected to any underlying mental disease or defect, falls within the doctrine of diminished capacity"), appeal denied, 23 A.3d 1248 (Conn. 2011).

A lay witness cannot provide testimony that Pitts and Russo both held is needed to meet a defendant's burden of production that her mental condition had the capacity to prevent her from acting with the necessary mental state.[11] And

[11] Diminished capacity can be asserted when the mens rea is recklessness, unlike voluntary intoxication. State v. Juinta, 224 N.J. Super. 711, 721-25 (App. Div.), certif. denied, 113 N.J. 339 (1988).

no lay witness can testify to the capacity of a person with a "mild" intellectual disability to form the relevant mens rea.[12] Nor can a lay witness opine knowledgably whether a psychotic episode lasted twenty-four hours, or whether a rage became so severe that it affected a defendant's mental functioning. Plainly, the more complex the question regarding whether symptoms affected a defendant's "mental functioning" enough to render her "incapable of acting with the required state of mind," Model Jury Charge (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" at 1 (rev. June 5, 2006), the more vital expert testimony becomes; simply, stand-alone lay testimony is inadequate.

Defendant has contended that the language of the Model Jury Charge on Diminished Capacity—of not requiring the mental disease or defect to be identified—compels the conclusion that no expert testimony is required for the jury instruction to be given. That contention misapprehends the division of responsibility between the trial court, acting as gatekeeper, and the jury, as the factfinder on guilt. Before letting the jury weigh such evidence, the trial judge must conclude that the jury can rely on the evidence to draw a reasonable inference concerning defendant's mental state at the time of the crime. But once

[12] The APA test for "intellectual disability" includes three diagnostic criteria, and stresses both "clinical judgment" and "a comprehensive view that considers multiple sources of information." Williams, 1 F. Supp. 3d at 1138-39. Williams discusses the three criteria at length. Id. at 1140-48.

the jury is given that issue to determine, the name of the disease or defect is not relevant to their task. Nevertheless, expert testimony is required to confirm that a defendant suffers from some "mental disease" or defect.

The DSM is "a recognized authority published by" the APA. State v. King, 387 N.J. Super. 522, 532 (App. Div. 2006). Yet it is not considered "science" by psychiatrists and psychologists. In re Detention of Williams, 264 P.3d 570, 571-72 & n.7 (Wash. Ct. App. 2011). Psychiatry itself is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate diagnosis to be attached to given behavior and symptoms." Ake, 470 U.S. at 81; see State v. Clowney, 299 N.J. Super. 1, 19 (App. Div.) (noting that psychiatry "is not an exact science"), certif. denied, 151 N.J. 77 (1997); accord, Harrison v. State, 644 N.E.2d 1243, 1253 (Ind. 1995) (noting that psychiatry "is an extremely uncertain field dealing with the mysteries of the human mind where expert opinions can be expected to and do differ widely"). Thus, for example, while the fourth edition of the DSM lists seven specific "paraphilic disorders," meaning disorders of "sexual arousal or sexual interest," and cautions that "hundreds of different paraphilias exist," the fifth edition lists eight specific paraphilic disorders, and notes that "[m]any dozens of distinct paraphilias have been identified and named," and any could become "disorders." Compare In re New York v. Jason C., 26 N.Y.S.3d 423,

428 (N.Y. Sup. Ct. 2016) with In re Detention of Williams, 264 P.3d at 570, 572 n.5. Indeed, the DSM itself cautions that it should be considered "a guideline for medical and health professionals, not a checklist for judges." Smith v. Carver County, 931 N.W.2d 390, 397-98; (Minn. 2019); see State v. Silman, 663 So. 2d 27, 34 (La. 1995) (quoting 4th edition of DSM). For these reasons, "doctors need not conclude that defendant suffers from a particular condition or disorder, and no DSM Manual diagnosis is necessary to support the defense," but still there must be evidence of some mental disease or defect. State v. Kotter, 271 N.J. Super. 214, 224 (App. Div.), certif. denied, 137 N.J. 313 (1994).

These expressions of caution on use of psychiatric testimony do not support defendant's position that expert testimony is unnecessary. Just the opposite. They point to the complexity of the issue, which only increases the necessity of expert testimony to establish both the existence and the relevancy of the disease or defect. See Clowney, 299 N.J. Super. at 19 (premise for admissibility of expert testimony and opinion is "its esoteric, abstruse, and especial nature," and is "particularly justified" where expert opinion concerns "a defendant's mental capacity as of a particular moment in the past").

That complexity distinguishes the diminished capacity argument from voluntary intoxication, which defendant claims is analogous, and supports his position no expert testimony is required. This Court has listed some factors

"pertinent to" evidencing intoxication of such "an extremely high level" so as to "prostrat[e]" a defendant's ability to form the necessary mental state of purpose or knowing conduct. State v. Cameron, 104 N.J. 42, 53-56 (1986). With the exception of "any tests to determine blood-alcohol content," each of those factors is plainly fact testimony both fully available to lay witnesses, and within the ken of jurors. See id. at 56; see also State v. Bealor, 187 N.J. 574, 588-89 (2006) ("Expert proofs are not a necessary prerequisite for a conviction for driving while under the influence of alcohol").

To the extent a lay opinion on intoxication may be offered, this Court long ago recognized that an "ordinary citizen is qualified to advance an opinion in a court proceeding that a person was intoxicated because of consumption of alcohol. The symptoms of that condition have become such common knowledge that the testimony is admissible." State v. Smith, 58 N.J. 202, 213 (1971). In regard to properly evidencing a claim, though, voluntary intoxication is not at all "conceptually similar" to diminished capacity, as defendant has argued. See State v. R.T., 411 N.J. Super. 35, 61-62 (App. Div. 2009) (Espinosa, J.S.C., dissenting) (merely stating that diminished capacity and intoxication are each considered a "'failure of proof' defense," without discussing how either is evidenced), aff'd mem. by an equally divided court, 205 N.J. 493 (2011).

2. Expert Testimony Is Required to Establish the Causal Link Between the Mental Condition and the Commission of the Offense.

A defendant who presents expert testimony to satisfy the first prong of conditional relevancy must also produce evidence that the condition affected her at the time the crime(s) were committed. It is difficult to conceive how this showing of causal linkage can be made successfully without expert testimony in a case involving a mental disease, mental defect, or non-obvious physical defect.

In Galloway, for example, in holding that the defendant was entitled to a jury instruction on diminished capacity, this Court pointed to expert testimony concerning Galloway's mental condition "at the time of the occurrence" of the crime. 133 N.J. at 647-48. This Court concluded the expert testimony, which must be viewed in the light most favorable to defendant, offered "at least the suggestion that" Galloway's "faculties were sufficiently affected to preclude him from engaging in purposeful or knowing conduct when he" shook a three-month-old infant to the point of injury and eventual death. Id. at 637, 649.

Similarly, in Moore, this Court held that the diagnosis of a psychiatric witness that Moore suffered a "brief reactive psychosis" when he committed two murders, although "thin," met Moore's burden of production. 122 N.J. at 427, 436-37. See also Melendez, 423 N.J. Super. at 31-33 (ruling there was no plain error in not instructing jury on diminished capacity when defendant's expert

failed to connect Melendez's "history of mental illness and emotional trauma" to Melendez's "mental state at the time he killed his wife").

Likewise, in State v. Bauman, 298 N.J. Super. 176 (App. Div.), certif. denied, 150 N.J. 25 (1997), Bauman was charged with numerous crimes resulting from a three-day crime spree. Id. at 181-85. At trial, Bauman presented testimony from two "board certified" psychiatrists, who each opined that defendant had the ability to understand "the nature and quality of his acts," even though he then suffered from mental disease. Id. at 190-91.[13] For that reason, the trial judge did not commit plain error in failing to give the jurors the diminished capacity instruction, as Bauman did not carry his burden to produce evidence his "alleged mental disease related to his ability to form the requisite criminal mental states that are elements of the offenses with which he was charged." Id. at 193, 198-99; accord, Litzky, 18 F.4th at 1300-01, 1303 (ruling that expert's testimony failed to "link" defendant's defect to her state of mind at time of alleged crimes); Carter v. Mitchell, 443 F.3d 517, 520, 528-30 (6th Cir. 2006) (affirming dismissal of petition for writ of habeas corpus because defense expert failed to show "temporal relationship" between defendant's

[13] The defense experts disagreed as to the nature of the mental disease. Compare 298 N.J. Super. at 190 (Bauman was a psychotic experiencing a "manic episode") with id. at 191 (Bauman suffered from "a mental disease state in the form of cocaine abuse and dependence").

"possible brain damage" and his crime), cert. denied, 549 U.S. 1127 (2007); People v. Panah, 107 P.3d 790, 848-49 & n.33 (Cal. 2005) (holding that testimony of medical professional as to defendant's state of mind "more than 24 hours after" time of offense did not create basis to give instruction on diminished capacity), cert. denied, 546 U.S. 1216 (2006); Bryant v. State, 881 A.2d 669, 687 (Md. Ct. Spec. App. 2005) (holding discretion not abused when judge excluded testimony of defense expert who "indicated that, even with the [impulse] disorder, appellant was still sometimes able to control his impulses and he would be capable of planning a crime," making disorder's effect on defendant's mens rea "speculative"), aff'd, 900 A.2d 227 (Md. 2006); cf. United States v. Prescott, 920 F.2d 139, 145-46 (2d Cir. 1990) (noting that under United States Sentencing Guidelines, downward departure for diminished capacity requires showing of both "reduced mental capacity" and "a causal link between that reduced capacity and the commission of the charged offense").

State v. Nataluk is illuminating. While the panel found plain error in failing to give the diminished capacity charge—because one expert provided evidence of the causal link between defendant's "mental defect or deficiency" and his criminal conduct—the trial judge properly excluded testimony of a second expert, who failed to establish that causal link. The second expert's testimony about Nataluk's mental state "did not relate to the date of the criminal

incident," but instead related to his mental state two years later, and thus was "irrelevant." 316 N.J. Super. at 345-48.

3. Relevant Lay Testimony Is Admissible to Support the Testimony of the Expert.

Once the foundation of expert medical testimony is presented, of course, a defendant may present whatever anecdotal lay testimony the trial court decides is relevant, probative, and non-cumulative to inform, corroborate, and bolster the expert's testimony, including the defendant's own testimony, pursuant to N.J.R.E. 403. "Lay testimony concerning the phenomena upon which a diagnosis or mental health opinion is based is already fully admissible on the mens rea issue, because lay witnesses are competent to testify about the defendant's thoughts, feelings, and actions that bear on mens rea. It is precisely thoughts, feelings, and actions that mental health experts use to formulate diagnoses and opinions." Stephen J. Morse, Criminal Law: Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 12 & n.36 (1984); see Singleton, 211 N.J. at 162 (noting that in addition to his expert in forensic psychology, defendant presented testimony from five family members, and a friend, plus his own, "to provide insight into his mental illness").

Since the statute's literal words are clear, this should be "the starting and ending point of the [Court's] analysis." In re Plan for the Abolition of the Council on Affordable Housing, 214 N.J. 444, 468 (2013). But only in this context is lay

evidence admissible. Expert testimony is still a threshold requirement that a criminal defendant must produce to be entitled to a diminished-capacity charge.

B. The Legislative History of N.J.S.A. 2C:4-2 and a Related Statute Confirm That Expert Medical Testimony Is Necessary.

If the words of N.J.S.A. 2C:4-2 are "unclear or ambiguous, or if the Legislature's intention is otherwise uncertain, resort may be had to extrinsic aids" to assist this Court to implement the "Legislature's will." State ex rel. K.O., 217 N.J. 83, 92 (2014). But such resort must maintain the overarching "duty" of this Court, "to discern and implement the legislative intent" behind the statute. Id. at 93. Statutes must be "construed in concert with other legislative pronouncements on the same subject matter so as to give full effect to each constituent part of an overall legislative scheme." Hodde, 181 N.J. at 379. Here, extrinsic aids confirm the Legislature's intent to require expert medical testimony to entitle a defendant to the diminished capacity jury charge.

Any defendant intending to make a mental disease or defect an issue must serve notice on the State before the Initial Case Disposition Conference. N.J.S.A. 2C:4-3(a); see R. 3:12-1; see also Gorthy, 226 N.J. at 533 (noting that these obligations confirm that the issue "must be affirmatively invoked by the defendant if it is to play a role at trial"). Advance notice is necessary since the State may need time to unearth additional evidence necessary to disprove the claim beyond a reasonable doubt, such as by hiring its own medical expert. See

State v. Harper, 229 N.J. 228, 241-42 (2017) (discussing the "settled procedures" that apply to all defenses listed in Rule 3:12-1, and the various remedies available for failure to deliver necessary pretrial notice); State v. Bradshaw, 195 N.J. 493, 507-08 (2008) (holding that consideration of proper sanction for breach of notice-of-alibi violation should include whether court should declare continuance or mistrial to permit State to investigate).

The Appellate Division has held that enforcement of the notice requirement does not offend due process, including the principle of fundamental fairness under our State Constitution. State v. Burnett, 198 N.J. Super. 53, 57-58 (App. Div. 1984), certif. denied, 101 N.J. 269 (1985), cited with approval in Arrington, 480 N.J. Super. at 453 (Jacobs, J., concurring). "The salutary purpose" of the statute and rule "is to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated without requiring a substantial continuance." Burnett, 198 N.J. Super. at 57-58; accord, Williams v. Florida, 399 U.S. 78, 80-86 (1970) (rejecting argument that State's notice-of-alibi rule compelled defendant to be witness against himself, or otherwise violated right to due process, and noting defendant's concession the State would be entitled to continuance at trial if surprised by alibi witness).

"The purpose of construction is to bring the operation of the statute within the apparent intention of the Legislature." Nagy v. Ford Motor Co., 6 N.J. 341,

350 (1951). "This task is often assisted by interpreting a statute consistently with the overall statutory scheme in which it is found." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 554 (2009); see State ex rel. K.O., 217 N.J. at 95 (noting that it "is a guiding principle in achieving the goal of fulfilling the legislative intent underlying a statute that a provision be considered in light of its surrounding statutory provisions"). The Legislature's requirement that a defendant seeking to invoke N.J.S.A. 2C:4-2 must give the State advance notice is consistent with the understanding that evidencing whether a "mental disease" or "defect" exists will necessitate expert testimony.

C. Concepts of Reasonableness Support the Requirement of Expert Testimony to Meet Defendant's Burden of Production.

Undoubtedly, the Legislature meant to limit the cases in which the jury should weigh whether a "mental illness or defect" affected a defendant's "mental functioning" to the point of rendering her "incapable of acting with the required state of mind." Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" at 1 (rev. June 5, 2006); see Singleton, 211 N.J. at 160. It would be wholly antithetical to the Legislature's expressed intent to allow a defendant to offer lay testimony concerning "mental disease or defect" without tethering it to expert medical testimony. Defendants unable to procure an expert opinion to their liking would instead simply put forward witnesses to say perhaps that they acted in "crazy" ways or would testify themselves to that

effect. The jury would have very little guidance, even if the State presented expert testimony of its own, especially since the jury would be instructed that it had the power to reject expert testimony. Model Jury Charges (Criminal), "Expert Testimony" at 1 (rev. Nov. 10, 2003). The facts of a case, such as this one, might be so incomprehensible that the jury – or even a single juror – concludes that the defendant must have been acting without the proper mental functioning to have committed the charged crimes.

Moreover, a judgment "of not guilty because of the defendant's diminished capacity" results "in a defendant being set free." Delibero, 149 N.J. at 105. A ruling that no expert testimony is necessary to get the jury charge is very likely to encourage more defendants – especially more charged with the most brutal, vicious crimes of violence – to interject the issue into their cases. Diminished capacity could be used to prevent conviction even for offenses involving reckless conduct, including reckless manslaughter. Baum, 224 N.J. at 156; Zola, 112 N.J. at 407-08 (citing Juinta). A murderer might go completely unpunished based on a jury decision lacking important relevant evidence. If the person suffers from a disorder making her dangerous, the community could be placed at great risk. Clark v. Arizona, 548 U.S. 735, 778 n.45 (2006).

"Evidence of mental disease . . . can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease

is very different, into doubting that he has the capacity to form mens rea, whereas that doubt may not be justified." Id. at 776. The risk of misleading a jury likely would increase dramatically if a defendant were permitted to proceed without evidencing a "professionally recognized" mental disease or defect. See id. at 800 (Kennedy, J., dissenting) (noting that psychiatric testimony would seem more reliable than lay testimony on "unexplained and uncategorized tendencies").

Lay witnesses called to support the position, even those with good intentions, are more likely to be sympathetic, and therefore possibly biased, than an independent expert. See In re Made in Detroit, Inc., 299 B.R. 170, 180 (Bankr. E.D. Mich. 2003). Many lay witnesses are likely to be family members. Singleton, 211 N.J. at 162; see State v. Paredes, 775 N.W.2d 554, 571 (Iowa 2009) (noting that credibility of defendant's sister was questionable in part because of her "potential motive to exonerate her brother"); Commonwealth v. Williams, 732 A.2d 1167, 1187-88, 1190-91 (Pa. 1999) (remanding case for "findings connected with the credibility of Williams' [sic] proffered mental health evidence," from family members, "several acquaintances," and a doctor).

Here, the jury heard defendant make various suggestions to his girlfriend regarding his defense. It is reasonable to assume that he may have tried to influence her testimony on his mental functioning if he thought that her

testimony would have greater significance on that subject.

This Court should also consider that the State's cross-examination of a defendant's expert can be critical to assessing whether diminished capacity existed at the time the crime occurred. Reyes, 140 N.J. at 363-65 (noting that prosecutor showed both that bases for expert's opinion were "unsubstantiated and unreliable," and that expert conceded defendant knew the nature and quality of his act); Clowney, 299 N.J. Super. at 17-20 (noting that cross-examination of defense expert concentrated "on defendant's capacity to have the required state of mind" for various charged crimes); State v. Carroll, 242 N.J. Super. 549, 558-61 (App. Div. 1990) (discussing how cross-examination of defense expert showed that defendant was not entitled to jury instruction on diminished capacity), certif. denied, 127 N.J. 326 (1991). Lay witnesses, especially family members discussing long ago events, may have no relevant testimony on defendant's mental state at the time the crime occurred, which is the question the jury must weigh. See Williams, 732 A.2d at 1187-88 (describing family members offering testimony on defendant's childhood and mental health treatment during teenage years—long before the crime occurred).

"[A] defendant's state of mind at the crucial moment can be elusive no matter how conscientious the enquiry." Clark, 548 U.S. at 776. To merit a charge that the jury should specifically weigh whether a "mental disease or

defect" affected the defendant so severely that the jury should harbor reasonable doubt whether the defendant is guilty, expert testimony should be required, because that will produce reliable and just verdicts. The stakes demand it.

D. Denying a Defendant an Unsupported Jury Charge on Diminished Capacity Does Not Deny a Complete Defense.

A defendant unable to present expert medical testimony on diminished capacity is not precluded from offering relevant lay and expert testimony for the purpose of challenging the State's effort to prove she had the requisite mens rea for the charged crime(s). Such evidence may be presented, subject to the trial judge's usual authority under N.J.R.E. 403. State v. Sexton, 311 N.J. Super. 70, 73, 75, 88 (App. Div. 1998) (ruling that on retrial for reckless manslaughter, trial judge should consider admission of testimony concerning "mental ability" of teenaged defendant placed "in a special education class"); Kotter, 271 N.J. Super. at 218-26 & n.7 (noting that psychologist properly was precluded from testifying to diminished capacity regarding charged crime, but was permitted to testify to assist defendant to challenge the requisite mens rea, subject to usual limitations under N.J.R.E. 403).

Here, in summation, defendant was able to assert a failure-of-proof defense by arguing there was reasonable doubt based on the facts that: (1) his car was never identified as the one involved (9T25-4 to 29-22); (2) the victim's boyfriend was not credible when he claimed to have mistakenly identified the

car as a Malibu before changing the description on his own to an Impala (9T28-10 to 29-14); (3) defendant's girlfriend was more likely to have shot the victim (9T29-23 to 33-25); (4) the investigation of the crime scene was incompetent, and a police witness testified falsely about the investigation (9T34-3 to 35-18); (5) the failure of arresting officers to wear, and activate, body-worn cameras was purposeful, to hide evidence from the jury, and to allow police to lie about where certain evidence was found (9T36-1 to 37-12); (6) the testimony of defendant's girlfriend should be rejected because she got immunity (9T37-14 to 25); and (7) in the recorded call, defendant said things only because he was in love with his girlfriend, and wanted to protect her (9T38-1 to 39-6).

Defense counsel further argued that the State failed to prove the mental state necessary for either murder or aggravated manslaughter. (9T39-12 to 41-4).[14] With regard to the former, counsel pointed out that the State could not prove a purpose to kill because whoever fired the shot "was not trying to hit anybody. . . . It's an impossible shot, near impossible. But they were trying to scare them away, make sure they didn't come back, just throw a pot shot up there as a warning, like a shot across the bow." (9T39-12 to 40-10). As to the latter, counsel argued the evidence failed to prove the circumstances of the shot

[14] Defendant conceded the facts established reckless manslaughter, but urged that the identity of the shooter was not proven beyond a reasonable doubt. (9T41-4 to 11; see 9T29-23 to 30-1).

made death probable. (9T40-11 to 41-4).

It is thus clear, based on both the plain meaning and the Legislature's intent, that N.J.S.A. 2C:4-2 requires expert medical testimony to raise a diminished capacity defense. Such a requirement does not bar a defendant unable to present such testimony from having a complete defense to the charges.

POINT II

REQUIRING EXPERT MEDICAL TESTIMONY TO SUPPORT THE JURY CHARGE ON DIMINISHED CAPACITY DOES NOT RAISE A CONSTITUTIONAL ISSUE.

A defendant's right to argue diminished capacity is not recognized in all fifty States. Metrish v. Lancaster, 569 U.S. 351, 366-67 (2013); see Clark, 548 U.S. at 800 (noting that thirteen States then "still impose[d] significant restrictions on the use of mental-illness evidence to negate mens rea") (Kennedy, J., dissenting). In Metrish, the Supreme Court found no federal due process violation when Michigan retroactively applied a decision that rejected the diminished-capacity defense as not allowed by the "controlling [State] statute." 569 U.S. at 354, 367-68. In Clark, the Supreme Court held that Arizona did not violate due process by eliminating "defense evidence of mental illness and incapacity" on the issue of mens rea. 548 U.S. at 742; see id. at 769-79 (explaining why Arizona could make its decision without violating due process), cited with approval in Litzky, 18 F.4th at 1305 (explaining that the "categorical exclusion of expert opinion evidence 'from consideration on the element of mens rea' didn't violate the accused's right to present a defense"). New Jersey's requirement of medical expert testimony to earn the jury charge on diminished capacity raises no concern under the Due Process Clause of the federal Constitution.

Nor does the requirement that a defendant provide expert medical evidence to entitle herself to the jury charge on diminished capacity violate concepts of fundamental fairness that exist under our State Constitution's guarantee of due process. See State v. Melvin, 248 N.J. 321, 347-49 (2021) (explaining doctrine). This Court has applied the doctrine of fundamental fairness "'sparingly' and only where the 'interests involved are especially compelling'; if a defendant would be subject '"to oppression, harassment, or egregious deprivation,"' it is [to] be applied." State v. Saavedra, 222 N.J. 39, 67 (2015) (internal citation omitted). Enforcement of considered legislative choice falls far short of the limited circumstances in which the doctrine has been applied. Compare Melvin, 248 N.J. at 349-52 (applying fundamental fairness doctrine to hold that sentencing court's use of acquitted conduct was an impermissible "absurdity" that "nullified" the jury's verdicts) and State v. Njango, 247 N.J. 533, 537 (2021) (applying doctrine to require that excess prison time served be used to reduce post-incarceration period of parole supervision) with State v. Ramseur, 106 N.J. 123, 267, 270 n.62, 318 n.81 (1987) (ruling that it is not violative of fundamental fairness to reject argument of a defendant who asserts diminished-capacity defense, and foregoes insanity defense that nonetheless was included in jury instructions, that he should go last in closing arguments during penalty phase of capital prosecution).

Invocation of Sixth Amendment rights does not lead to a contrary result. Obviously, "the fundamental right of an accused to present a defense is protected not only by the Federal Constitution but also by Article I, paragraph 1 of the New Jersey Constitution." State v. Jenewicz, 193 N.J. 440, 451 (2008) (per curiam). Nevertheless, that right "is not absolute." Ibid. Most particularly, a defendant "does not have an unfettered right to offer [evidence] that is incompetent . . . or otherwise inadmissible under standard rules of evidence." Ibid. (ellipsis added) (quoting Montana v. Egelhoff, 518 U.S. 37, 42 (1996)); accord, State v. Davis, 1 A.3d 76, 94 (Conn. 2010) (ruling that evidence properly precluded as irrelevant does not raise a Sixth Amendment issue under either right of confrontation, or right to present defense); State v. Jones, 375 P.3d 279, 282 (Idaho 2016) (holding that right to present complete defense does not include right to present irrelevant evidence).

Cases focused on the constitutional right of confrontation, which is part of the guarantee of a "complete defense," State v. Budis, 125 N.J. 519, 531 (1991) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)), have recognized the same point—that the constitutional right is not unfettered. "States may exclude evidence helpful to the defense if exclusion serves the interests of fairness and reliability." Budis, 125 N.J. at 531-32 (citing Crane, 476 U.S. at 690). Thus, cross-examination may be curtailed for "confusion of the issues" or

because it is only "marginally relevant," among other grounds. Id. at 532 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)); see State v. Crisafi, 128 N.J. 499, 509-12 (1992) (explaining that defendant seeking to represent herself must be informed by judge of obligation to abide by "the relevant rules of criminal procedure and evidence"); Budis, 125 N.J. at 540 (placing restrictions on cross-examination of victim of alleged aggravated sexual assault).

A defendant's right to a "complete" defense does not include "entitlement to the luck of a lawless decisionmaker." Strickland v. Washington, 466 U.S. 668, 694-95 (1984); see United States v. Frazier, 387 F.3d 1244, 1272 (11th Cir. 2004) (en banc) (recognizing that "a court may constitutionally enforce evidentiary rules to limit the evidence an accused" "may present in order to ensure that only reliable opinion evidence is presented at trial"), cert. denied, 544 U.S. 1063 (2005); Leach v. Kolb, 911 F.2d 1249, 1256-57 (7th Cir.) (holding that "when a defendant fails to present sufficient evidence to sustain his assigned burden of proof under state law, he clearly has no right to have the insanity question submitted to the jury in the hope that they will acquit him based on sympathy, caprice, or compromise"), cert. denied, 498 U.S. 972 (1990). The rationale of Leach applies to a defendant who fails to produce sufficient evidence to sustain her burden of production on the issue of diminished capacity.

In sum, the State may enforce the law's requirement that a defendant seeking the jury charge on diminished capacity satisfy the burden of production she suffered a mental disease or defect with the capacity to interfere with her formation of mens rea, which disorder existed at the time of the crime(s), supported by expert medical testimony diagnosing such mental disease or defect, without offending either the Federal or the State Constitution.

CONCLUSION

The Attorney General urges this Court to rule that a defendant is not entitled to a jury charge on diminished capacity without presenting expert medical testimony identifying the incapacitating mental disease or defect, and relating it to the time and commission of the criminal act(s).

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
AMICUS CURIAE

BY: /s/ *Thomas R. Clark*
Thomas R. Clark
Deputy Attorney General
clarkt@njdcj.org

THOMAS R. CLARK
ATTORNEY NO. 031591987
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

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