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SUPREME COURT OF NEW JERSEY
Docket No. 090329

STATE OF NEW JERSEY, *Plaintiff-Respondent*, *v*. **KADER S. MUSTAFA,** *Defendant-Petitioner*.	ON GRANT OF PETITION FOR CERTIFICATION FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-1038-22 CRIMINAL ACTION Sat below: Hon. Jessica R. Mayer, J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa A. Puglisi, J.A.D.

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Association of Criminal Defense Lawyers of New Jersey (the "ACDL-NJ" or "*Amicus"*) is a nonprofit voluntary professional association, established in 1984. The ACDL-NJ serves as "the primary organized voice for the criminal defense bar in New Jersey."[1] The ACDL-NJ aims to, among other things, "respond to the continuing problems confronting criminal defense lawyers when they honestly, ethically, but zealously represent their clients; to protect and insure compliance with those individual rights guaranteed by the New Jersey and United States Constitutions; and to encourage cooperation among criminal defense lawyers engaged in the furtherance of those objectives."[2]

The ACDL-NJ has a significant interest in this case because it implicates the bedrock principles of the criminal justice system: that the State must prove beyond a reasonable doubt that an individual, in fact, committed the crimes with which he is charged, and that a criminal defendant's Due Process right to present a defense and thus to dispute such charges is fully protected and meaningfully guaranteed. In this case, the question presented—whether a criminal defendant may advance a diminished capacity defense under N.J.S.A. 2C:4-2 without

[1] *The ACDL-NJ's History and Mission,* ACDL-NJ, https://www.acdlnj.org/about (last accessed August 4, 2025).
[2] *Id.*

expert testimony—requires the analysis of statutes, rules of evidence, and constitutional provisions, on all of which the ACDL-NJ is uniquely positioned to provide insight, as it has in "nearly every significant criminal case in the New Jersey Supreme Court and the New Jersey Appellate Division,"[3] including many which, like this one, involve issues regarding a defendant's right to present a defense. Indeed, the ACDL-NJ was granted leave to file a brief *amicus curiae*, and to present oral argument, in *State v. Arrington*, Docket No. 090216, presenting the related case of whether expert testimony may be required of a defendant in an insanity case. *See also State v. Ross,* 256 N.J. 390 (2024) (addressing the question of whether, in the context of a defendant's right to conduct an investigation in order to mount an effective defense, prosecutors can obtain evidence procured through the defense investigation); *State v. Burney,* 255 N.J. 1 (2023) (addressing, under due process principles and the New Jersey Rules of Evidence, whether the expert testimony regarding the coverage range of a cell phone tower was admissible); *State v. Higgs,* 253 N.J. 333 (2023) (addressing whether, in the context of a defendant's confrontation and due process rights, evidence about past investigations into a police officer and prior convictions of defendant were admissible under N.J.R.E. 609); *State v.*

[3] *Amicus Representation,* ACDL-NJ, https://www.acdlnj.org/what-acdl-nj-does/amicus (last accessed August 4, 2025).

Lodzinski, 249 N.J. 116 (2021) (explicating constitutional requirement that courts consider *all* of the evidence in assessing whether the defendant has raised a reasonable doubt on a motion for judgment of acquittal*); State v. Fowler*, 239 N.J. 171 (2019) (addressing the low threshold of evidence warranting an appropriate jury instruction, given a defendant's right to have a jury consider any legally recognized defense theory).

In line with its mission, the ACDL-NJ seeks to ensure that defendants' core due process rights are vindicated by guaranteeing that they can defend against criminal charges, demanding that the State prove guilt beyond a reasonable doubt, with or without expert evidence on the essential element of criminal intent—here, in the context of whether the defendant lacked such intent on the basis of diminished capacity. For the reasons set forth below, *Amicus* respectfully submits that defendants should not be denied their request to present a defense of diminished capacity, on which the jury should accordingly be instructed, simply because they did not adduce *expert* testimony on the subject at trial. And, because the Appellate Division, affirming the trial court, erroneously adopted such an expert testimony requirement, the Court should reverse the decision below and remand for a new trial at which the jury is properly instructed on diminished capacity, including that it could and should have considered all the relevant evidence presented at trial.

PRELIMINARY STATEMENT

This case implicates a fundamental guarantee that underlies the criminal justice system: that the State must prove beyond a reasonable doubt that the defendant committed the crime with which he or she is charged. In this case, the Appellate Division erroneously adopted a novel rule that in order for the defense to raise a reasonable doubt as to the defendant's state of mind while committing the act—by arguing that he lacked the required state of mind because he suffered from diminished capacity—the defendant *must* call an expert witness to testify at trial. Without this expert, the Appellate Division ruled, a jury should be altogether precluded from even considering whether the substantial evidence of mental disease or defect, like that raised at the trial of this matter, created a reasonable doubt as to whether Mustafa had the requisite state of mind to be found guilty of the charged offense—here, for first degree murder, which requires that the defendant "purposely" or "knowingly" "cause[d] death or serious bodily injury resulting in death[.]" N.J.S.A. 2C:11-3(a), (b). In doing so, the Appellate Division affirmed the judgment of conviction, notwithstanding the trial court's refusal to instruct the jury on diminished capacity, even as the State used the same evidence of Mustafa's mental condition in support of its own theory of the case. This is not only unjust and inequitable, but it also is not, and cannot be, the law, for three reasons, all explicated in further detail below.

First, defendants have a fundamental right to dispute that they had the requisite *mens rea* for the charged offense, including by asserting a diminished capacity defense. It is the constitutional premise of the criminal justice system that the State must prove, beyond a reasonable doubt, that the accused individual in fact committed the offense with which he is charged. Diminished capacity is a defense that bears upon the question of whether that criminal defendant had the requisite state of mind to be found guilty of that offense with which they are being charged. Diminished capacity is thus a "failure-of-proof" defense similar to other defenses, including, for example, voluntary intoxication, where the defendant relies upon relevant evidence to dispute that the State has proved beyond a reasonable doubt that the defendant possessed the state of mind required for the charged offense. In this case, where there was abundant evidence of record regarding the defendant's mental disease or defect, it was wholly inappropriate to entirely deny, just before summation, the defense request for the jury to be instructed on diminished capacity. In doing so, the trial court erroneously violated Mustafa's fundamental right—flowing from the constitutional principles of due process and a fair trial—to dispute that he had the *mens rea* for the charged offense. This cannot stand, and the Appellate Division's decision, affirming the trial court, should be reversed.

Second, the rulings of the trial court and the Appellate Division are particularly flawed given that it is extremely uncommon in our system of justice for courts to *mandate* expert testimony as a necessary precondition to presenting any party's theory at trial. Indeed, in both the civil and criminal contexts, courts require expert testimony only where truly specialized knowledge is required to establish industry-specific standards of care, or where the issues involved are so complex and lie outside the common knowledge of the average juror that expert testimony is necessary to assist a juror's understanding of the evidence or determination of a fact in issue. In this case, and as set forth below, the jury's factual determination with regard to diminished capacity—going as it does to the usual determination of *mens rea*—did not require such specialized knowledge. Thus, it was inappropriate for the trial court to mandate expert testimony during trial as a condition of instructing the jury on diminished capacity at all.

Third, and likewise, all parties—but especially criminal defendants—are entitled to a jury instruction on the basis of relevant evidence, with the weight of that evidence, as always, to be determined by the jury. Put another way, courts should not, particularly given the fundamental Due Process rights at stake, provide the necessary jury instruction only where the party at issue provides the *best evidence* in a criminal case; instead, they should allow the jury to properly

consider whether evidence already presented at trial raises a reasonable doubt as to the defendant's state of mind, including whether the defendant had diminished capacity, thus negating the requisite state of mind for the charged offense. Trial courts, as always, should leave it to the jury to determine the weight of that evidence, with appropriate instructions.

For these reasons, as set forth in further detail below, *Amicus* ACDL-NJ respectfully submits that this Court should reverse the decision below and remand for a new trial at which the jury is properly instructed on, and the defense is permitted to argue, diminished capacity.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Amicus adopts the procedural history and statement of facts set forth in Defendant-Petitioner's Petition for Certification and Supplemental Brief, and here highlights only those aspects of the procedural history and facts that are particularly pertinent to this brief.

On May 3, 2018, defendant Kader S. Mustafa was experiencing an apparent delusional episode during which he fired a single bullet out of his car at another driver that had its high beams on. (7T128-11 to 16).[4] At trial, both the

[4] Pa = defendant's petition appendix
Dsa = defendant's supplemental appendix
Dsb = defendant's supplemental brief
3T = trial transcript dated September 27, 2021
4T = trial transcript dated September 28, 2021

State and the defense focused on defendant Mustafa's mental condition, including whether he suffered from a mental disease or defect. The State, in its opening, attributed Mustafa's actions to the fact that he "believed that he was being 'gang stalked.' . . . That people were shooting lasers at him. That electromagnetic fields were invading the space in his car, the roads that he traveled. He had been seeing a psychiatrist . . . .". (3T34-4 to 9). The State further described that Mustafa was ultimately found sleeping in his car "wearing a, like almost kind of like an emergency blanket, but it's a tin foil plastic item that's wrapped around his torso. He was wearing a baseball hat with aluminum foil in the baseball hat and a hard hat." (3T45-11 to 6). Similarly, defense counsel noted that Mustafa's "state of mind and mental health" would be an issue for the jury to consider at the end of the case. (3T50-19 to 21, 54-13 to 15). Indeed, the State made clear in its opening statement that "[the jury] may end up considering some mental health defense of a diminished capacity because I've talked to [the jury] about some of the issues that were going on with the defendant during the weeks before this horrible event." (3T49-9 to 13).

7T = trial transcript dated October 4, 2021
8T = trial transcript dated October 5, 2021
9T = trial transcript dated October 7, 2021
11T = sentencing transcript dated May 5, 2022

Accordingly, the trial court, the State, and defense counsel were all on notice and preparing for an argument, and then a jury instruction, on diminished capacity. That instruction would have said that the jury should "consider and weigh all of the evidence of defendant's mental state, including that offered as evidence of mental disease or defect . . . . in determining whether or not the State has proven beyond a reasonable doubt . . . . that [defendant] acted with the requisite state of mind forming any element of the offenses charged in the indictment." *Model Jury Charges (Criminal),* "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" (rev. June 5, 2006) at 1 (brackets omitted). However, following the final day of testimony, the State raised an objection to providing such an instruction, arguing that although Mustafa's "acting bizarrely" was "part of the case," "there's no evidence in the case to support" that Mustafa had a "mental illness." (9T16-1 to 11). Defense counsel responded, arguing that even without psychiatric testimony, "there still is evidence there of a diminished capacity because of his bizarre behavior, all his statements, his psychotic behaviors, delusional complex, his persecution complex, all these things are blatant and obvious in the evidence." (9T12-5 to 12). Nonetheless, the trial court ultimately denied defense counsel's request for a diminished capacity instruction, holding that there had been no medical or expert testimony during

trial. (9T18-22 to 22-1).[5] Accordingly, defense counsel's summation included no reference to Mustafa's mental disease or defect, or how it contributed to his actions. (9T24-4 to 42-20). The State, however, continued to press its argument based upon Mustafa's mental disease or defect, *i.e.*, that Mustafa committed the offense "because of the anger and paranoia" created by "the way he used the prescribed drugs[.]" (9T98-1 to 9). Deprived of the diminished capacity jury instruction he had been anticipating throughout trial, Mustafa was convicted of first-degree murder under N.J.S.A. 2C:11-3(a)(1) after only an hour of deliberations. On May 5, 2022, the trial court heard and denied Mustafa's motion for a new trial, (11T3-23 to 31-25), and went on to sentence Mustafa to an aggregate sentence of life in prison, plus ten years for the other offenses of which he was convicted. (11T61-25 to 65-13).

Mustafa appealed; over two years later, on January 27, 2025, the Appellate Division issued an unpublished opinion affirming his conviction for first-degree murder. (Pa1-50). Specifically, the Appellate Division held that a defendant advancing a diminished capacity defense at trial must provide expert testimony in support of that defense. (Pa28).

[5] The trial court also held that a diminished capacity charge might confuse the jurors into thinking Mustafa was asserting an insanity defense, and that the murder charge adequately instructed the jury about the requisite *mens rea*. (9T18-22 to 22-1).

On May 16, 2025, this Court granted Mustafa's Petition for Certification on the question of whether expert testimony is required before a jury can be instructed on diminished capacity under N.J.S.A. 2C:4-2 (Dsa58). For the reasons set forth below, *Amicus* ACDL-NJ respectfully submits that they should be able to do so.

ARGUMENT

I. DEFENDANTS HAVE A FUNDAMENTAL RIGHT TO DISPUTE THAT THEY HAD THE REQUISITE *MENS REA* FOR THE OFFENSE, INCLUDING BY ASSERTING A DIMINISHED CAPACITY DEFENSE.

"It is well settled that due process requires the State to prove each element of a charged crime beyond a reasonable doubt." *State v. Hill,* 199 N.J. 545, 558 (2009). This is a requirement under the due process guarantees of both the New Jersey and federal constitutions. *See State v. Fair,* 256 N.J. 213, 232 (2024); *State v. Berry,* 254 N.J. 129, 146 (2023); *State v. Medina,* 147 N.J. 43, 49 (1996); *State v. Anderson,* 127 N.J. 1911, 200-01 (1992); *see also United States v. Gaudin,* 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana,* 508 U.S. 275, 277-78 (1993); *In re Winship,* 397 U.S. 358, 364 (1970); *United States v. Pine,* 609 F.2d 106, 107 (3d Cir. 1979). In particular, a criminal defendant has a fundamental right to "challenge the constitutional sufficiency of the evidence against him[,]" Wayne R. LaFave, *et al., Criminal Procedure* § 24.6(b) (6th ed., Dec. 2019 update), including by raising a reasonable doubt as to "whether the State could

prove that [the defendant] had the requisite *mens rea* to be convicted of [the offense]."*Hill,* 199 N.J. at 567. This includes the right of defendants to assert a diminished capacity defense when appropriate. That is, because "diminished capacity refers to evidence that can negate the presence of an essential mental element of the crime," it must be considered by the jury "in relation to the State's burden to prove the essential elements of the crime." *State v. Delibero,* 149 N.J. 90, 98 (1997); *see also State v. Moore,* 122 N.J. 420, 426-27 (1991).

This rule of law is embodied in the New Jersey Criminal Code, which provides: "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. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense." N.J.S.A. 2C:4-2. Previously, the statute required defendants to establish mental disease or defect by a preponderance of the evidence. The Legislature amended the statute to remove this burden, in response to the seminal Third Circuit decision in *Humanik v. Beyer,* 871 F.2d 432 (3d Cir. 1989), which established that the imposition of such a burden of proof on a defendant was unconstitutional. *See L.*1990, *c.* 63, § 1, eff. July 7, 1990. As the Court of Appeals held, "[i]f the defendant's evidence on mental disease or defect is sufficient to raise a

reasonable doubt about the existence of the requisite intent, it cannot constitutionally be ignored." *Humanik,* 871 F.2d. at 443. Thus, the statute now reflects the principle that diminished capacity is a "failure-of-proof" defense—that is, a way for defendants to raise a reasonable doubt as to the existence of the *mens rea* required for a conviction on the specific charged offense. *See State v. Reyes,* 140 N.J. 344, 354 (1995) ("Diminished capacity is a 'failure of proof' defense: evidence of defendant's mental illness or defect serves to negate the mens rea element of the crime."). Thus, as with all other failure-of-proof defenses, the jury must be charged with regard to diminished capacity whenever there is a rational basis in the record to do so. *See State v. Mauricio,* 117 N.J. 402, 418-19 (1990) (" . . . After considering at length . . . when a trial court should instruct a jury on intoxication, we concluded that a jury issue arises . . . if there exists a rational basis for the conclusion that defendant's faculties were so prostrated that he or she was incapable of forming an intent to commit the crime." (quotation marks omitted)); *see also State v. Crisantos,* 102 N.J. 265, 278 (1986) (". . . a scintilla of evidence is all that is necessary to warrant a . . . charge when requested by the defendant." (citation and quotation marks omitted)).

In this case, there was much more than a scintilla of evidence or rational basis in the record to believe that Mustafa was suffering from a mental disease

or defect that negated the presence of an essential mental element of the crime. Indeed, evidence of Mustafa's mental disease or defect was a key theme in his trial. *See* Dsb38-39. Specifically, both the prosecutor and defense counsel elicited substantial evidence with regard to Mustafa's recent hospitalizations for psychological treatment (4T86-19 to 23, 87-5 to 9); that Mustafa was found wrapped in foil with a tin foil hat, which he would wear often, (4T102-1 to 8, 117-2 to 11, 130-19 to 132-3, 154-14 to 17; 7T191-23 to 192-19); and that he exhibited paranoid-delusional behavior. (7T186-20 to 187-25, 190-6 to 196-1). Indeed, there was such an incontrovertible basis in the record that the defendant suffered from diminished capacity that the prosecutor concluded his opening by saying: "You may also end up considering some mental health defense of a diminished capacity because I've talked to you about some of the issues that were going on with the defendant during the weeks before this horrible event[.]" (3T49-9 to 13). In fact, the State utilized that very evidence in its case-in-chief, arguing that "the demons [that Adderall and marijuana use] created inside of [Mustafa] I submit to you is what led to the tragedy," (9T46-1 to 4); and that the shooting happened "because of the anger and paranoia" that was created by "the way he used the prescribed drugs." (9T98-1 to 9).

The trial court, however—even as it permitted this argument by the prosecution—refused to allow the defense to argue diminished capacity, ruling

that it could not do so without having introduced "medical or expert testimony," since "all of the cases that address when the diminished capacity charge is mandated, all have their genesis in expert testimony, either by the defense or both by the State and the defense." (9T18-22 to 22-1). And it did so after allowing substantial evidence of the defendant's mental disease or defect at trial without ever indicating that the defense would not be able to argue the impact of that evidence on whether the prosecution had proven that Mustafa had the requisite mental state for purposeful murder. And it also did so even as it allowed the prosecution to argue, from the evidence of record, that Mustafa was led by "demons" (9T46-1 to 4) and acted out of "anger and paranoia." (9T98-1 to 9).

In so ruling, the court was not just being unfair, and far less than even-handed. The court's ruling also denied Mustafa the right to meaningfully defend against the accusations brought against him, in clear violation of his rights to Due Process and to a fair trial. *See State v. Chambers,* 252 N.J. 561, 582 (2023) ("Under both the Federal and the New Jersey Constitutions, criminal defendants . . . have the right to a meaningful opportunity to present a complete defense." (citing *State v. Budis,* 125 N.J. 519, 531 (1991); *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)); *see also Nevada v. Jackson,* 596 U.S. 505, 509 (2013). *See also Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment of in the

Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). Indeed, in *Budis*, this Court made clear the importance of this right to the ultimate purpose of trial, which is "the ultimate integrity of the factfinding process . . . ". 125 N.J. at 532.

The Appellate Division agreed that the denial of the diminished capacity charge was justified on the basis that there was no medical or expert testimony at trial. *See* 9T18-22 to 22-1; Pa25. Specifically, the Appellate Division held that denying that charge, and thus precluding the defense from arguing that Mustafa's mental disease or defect negated the state of mind necessary for purposeful murder, was appropriate because the "[d]efendant failed to proffer any evidence accepted within the psychiatric community of a mental disease or defect[,]" and that "[d]efendant provided no expert testimony opining his odd behaviors impeded his ability to form the mens rea necessary to convict him of purposely shooting at Calhoun." (Pa25).

But this ruling finds no basis in the statute, rules, or caselaw. As the defendant argues, no statute or rule specifically makes expert testimony an absolute requirement before a defendant can assert diminished capacity; no court had, before the Appellate Division's decision in this case, ever held that such a requirement exists, *see* Dsb16-17; indeed, by contrast to other provisions of law,

no specific language in N.J.S.A 2C:4-2 or in the Rules of Evidence requires expert testimony in order for a defendant to advance a diminished capacity defense. *See, e.g., State v. Wilson,* 227 N.J. 534 (2017) (holding that a map commissioned pursuant to State's controlled substances statute was inadmissible because it was not authenticated as the statute mandated); *State v. Perry,* 225 N.J. 222 (2016) (holding that the trial court's exclusion of certain evidence did not deprive the defendant of his right to present a defense because it was inadmissible under the provisions of the State's Rape Shield Law); *State v. J.D.,* 211 N.J. 344 (2012) (same, affirming inadmissibility of evidence under the provisions of State's Rape Shield Law); *State v. Miller,* 170 N.J. 417 (2002) (ruling on admissibility of laboratory certificates pursuant to statutory provisions on evidentiary use of certificates prepared by State Forensic Laboratories).

The Appellate Division cited New Jersey Rule of Evidence (N.J.R.E.) 702, dicta in *State v. Galloway,* 133 N.J. 631 (1993), and *State v. Baum*, 224 N.J. 147 (2016), as well as the recent Appellate Division decision in *State v. Arrington,* ____ N.J. Super. ____ (App. Div. 2024),[6] and N.J.S.A. 2C:4-2, in support of its

[6] *Arrington* is also before the Court and, as noted, the undersigned counsel, on behalf of a*micus* ACDL-NJ, has filed a brief *amicus curiae*, and been permitted oral argument. in that case as well. *State v. Arrington*, Docket No. 02016, Order Granting Leave to ACDL-NJ to Participate as *Amicus Curiae* (Jun. 27, 2025).

conclusion that "we read N.J.S.A. 2C:4-2 as requiring evidence of a mental disease or a mental defect bearing on the presence or absence of a defendant's cognitive ability to form the mental state necessary to purposefully kill someone . . . . Applying the same reasoning as the *Arrington* court, expert testimony was required for defendant to establish he suffered from a mental disease or mental defect for diminished capacity instruction." (Pa24; Pa27-28). But, in fact, all four of these legal bases upon which the Appellate Division relied in reaching this conclusion not only fail to expressly impose this requirement, but actually are to the contrary.

First, N.J.R.E. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education *may* testify thereto in the form of an opinion or otherwise." But that Rule, by its express terms, *permits,* but does not *require,* expert testimony which may assist the trier of fact in understanding an issue that may require scientific or specialized knowledge. *See also State v. J.R.,* 227 N.J. 393, 409 (2017) ("That [New Jersey] Rule [of Evidence 702] *permits* a qualified expert to offer an opinion [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." (citation omitted) (emphasis added)); *State v. Cain,* 224 N.J.

410, 420 (2016) ("Under *N.J.R.E.* 702, expert testimony is *permissible* if scientific, technical, or other specialized knowledge will assist the trier of fact . . ." (emphasis added)). In other words, the Appellate Division ignored that N.J.R.E. 702 governs the question of whether and when expert testimony *may be admitted* but has nothing at all to say about when it *must be introduced*.

In doing so, it also ignored the effect of other Rules that govern the introduction of non-expert testimony. Those Rules require, of course, that such evidence be relevant. *See* N.J.R.E. 401, *et seq.*. But they specifically allow, for example, lay opinion testimony, *see* N.J.R.E. 701 ("If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception and (b) will assist in understanding the witness' testimony or determining a fact in issue"); *State v. Sanchez,* 247 N.J. 450, 466 (2021), and even for the admission of certain types of hearsay, such as medical, including psychiatric, evidence. *See* N.J.R.E. 803(c)(4); *In re Commitment of M.M.,* 384 N.J. Super. 313 (App. Div. 2006) (holding that hospital reports which include statements made by the patient for purposes of treatment are admissible pursuant to N.J.R.E. 803(c)(4)). All of these types of evidence, if admitted, may, demonstrate—even if not conclusively—that the defendant suffers from diminished capacity such that "defendant did not have a state of mind which is an element of the offense."

N.J.S.A. 2C:4-2. That there may be better (although still not conclusive) expert evidence does not establish that this evidence—perhaps of what others observed of him, or of what medical records might say—cannot provide a basis for a diminished capacity jury instruction. *See infra* at 27-28 (discussing *State v. Bealor,* 187 N.J. 574 (2006)).

To the contrary, as this Court has warned, trial courts should admit expert testimony only where such testimony is "both needed and appropriate, even if no party objects to the testimony." *State v. Gonzalez,* 249 N.J. 612, 634 (2022) (citation omitted). And in fact, expert testimony that relates to straightforward facts "encroache[s] on the jury's responsibility to decide dispute facts and determine whether the State has proven the charges against a defendant." *State v Sowell,* 213 N.J. 89, 107 (2013). To this extent, an absolute rule requiring expert testimony would subvert the essential function of the jury as the factfinder in our system of justice. Thus viewed, the Appellate Division decision not only renders relevant, admissible evidence meaningless and thereby eviscerates a defendant's Due Process present a defense, but it also threatens to undermine the role of the factfinder, all contrary—as opposed to in support of—Rule 702, upon which the lower courts relied.

Second, the Appellate Division's reliance upon dicta in *Galloway* and *Baum,* stating that a diminished capacity jury instruction is warranted if "the

evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found to be reliable for courtroom use[,]" is untenable. This dicta cannot be reconciled with the Third Circuit's holding in *Humanik v. Beyer* that requiring defendants to prove diminished capacity by a preponderance of the evidence is unconstitutional because "the only relevance of that fact [of mental disease or defect] is that it is probative with respect to the ultimate issue posed by the state of mind element of the offense charged, i.e., whether the requisite purpose or intent was present at the time of the crime." 871 F.2d at 441. Indeed, the actual holdings of both *Galloway* and *Baum,* dicta aside, stand for the proposition that defendant Mustafa unequivocally should have been granted his request for a jury instruction on diminished capacity. *Galloway,* 133 N.J. 631, 648-49 (1993) ("[O]nly when the evidence is viewed in the light most favorable to the defendant, and still no suggestion appears that the defendant's faculties had been so affected as to render the defendant incapable of purposeful and knowing conduct, may the trial court deny the diminished-capacity defense"); *Baum,* 224 N.J. at 165-66 (affirming conviction where evidence of diminished capacity was admitted and was subject to a charge which stated, *inter alia*, that "you must give defendant the benefit of any reasonable doubt about whether his mental functioning was such as to render him incapable of acting with the required state of mind or about whether he did

in fact act with the required state of mind"). Here, as stated previously, *see supra* at 13-14, all parties clearly agreed that the record was replete with evidence that Mustafa's mental disease or defect impacted his state of mind while committing the act.

Third, *Amicus* submits that the Appellate Division similarly erred in adopting the novel expert testimony requirement in *Arrington* for advancing an insanity defense. As the ACDL-NJ argued in its brief *amicus curiae* in *Arrington,* expert testimony should not be required in order to assert an insanity defense: first, defendants have a fundamental constitutional right to present a defense which cannot be lightly infringed; second, it is extremely uncommon for courts to mandate expert testimony at trial and categorically bar lay testimony; third, any relevant evidence should be admitted, with its weight, as always, to be determined by the jury. And those arguments apply *a fortiori* here: whereas insanity is an affirmative defense, as to which a defendant bears at least some burden of showing, by a preponderance of the evidence, that the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act or that what he/she was doing wrong, here, the State alone bears the burden of demonstrating that a defendant possesses the required *mens rea*¸ and therefore that he did not act as a result of diminished capacity. *See Humanik,* 871 F.2d at 443; *see generally State v.*

Harris, 141 N.J. 525, 551 (1995) (" . . . imposing any burden of proof on a defendant violate[s] federal due-process requirements by creating a "filter" that impermissibly relieve[s] the State of its obligation to prove beyond a reasonable doubt every element of a crime.") Accordingly, as the Third Circuit held in *Humanik*, and this Court has reaffirmed since, *see, e.g., State v. Milne,* 178 N.J. 486 (2004); *State v. Delibero,* 149 N.J. 90 (1997); *State v. Harris,* 141 N.J. 525 (1995); *State v. Reyes,* 140 N.J. 344 (1995); *State v. Galloway,* 133 N.J. 631 (1993); *State v. Moore,* 122 N.J. 420 (1991), it is constitutionally impermissible to preclude a defendant from arguing diminished capacity because he did not bear a burden of adducing evidence—let alone, as here, a particular type of evidence.

Finally, as stated previously, *see supra* at 16-17, N.J.S.A. 2C:4-2 itself provides no legal basis for the Appellate Division's erroneous conclusion. Nowhere in that statute is there a stated requirement for expert testimony, and it runs afoul of constitutional principles for the Appellate Division to inject such a novel requirement into the language of the statute. This is by contrast, for example, to other statutes, including that regarding a defendant's competency, which does at least raise the issue of experts, albeit even then, not mandatorily. *See* N.J.S.A. 2C:4-5 ("Whenever there is reason to doubt the defendant's fitness to proceed, the court may on motion by the prosecutor, the defendant or on its

own motion, appoint at least one qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant."). *See also infra* at 25-26 (discussing cases where experts may be required).

The decision of the Appellate Division, poorly supported as it accordingly is, should be reversed.

II. COURTS RARELY MANDATE EXPERT TESTIMONY AND CATEGORICALLY BAR LAY TESTIMONY DURING TRIAL.

The discussion above is supported by a truism: while federal and state evidentiary rules prescribe when expert testimony may be *admissible* during trial in order to assist a trier of fact, *see, e.g.,* N.J.R.E. 702, those evidentiary rules generally do not outline the circumstances under which expert testimony is *required* in order for a party to take a position on and litigate the matter at issue. Indeed, in both civil and criminal cases, courts rarely deem expert testimony absolutely necessary in order for a party to set forth its position. *See generally* Edward J. Imwinkelried, *A Minimalist Approach to the Presentation of Expert Testimony,* 31 Stetson L. Rev. 105, 109-10 (2001) ("Attorneys should not assume that it is necessary or even desirable to present expert testimony . . . . To be sure, in some cases expert testimony is mandatory. In most instances, a medical malpractice plaintiff has no choice but to offer expert testimony . . . . However, in other cases, there is no legal necessity for expert testimony, and the attorney must decide whether the presentation of expert testimony would be

desirable as a matter of tactics."). In civil cases, for example, where the same constitutional rights—and the liberty of one of the parties—are usually not at stake, New Jersey courts generally only mandate expert testimony in that narrow class of cases in which, for example, a standard of care must be described so that a juror may assess whether it has been met. *See Davis v. Brickman Landscaping, Ltd.,* 219 N.J. 395, 407 (2014) ("Cases requiring the plaintiff to advance expert testimony establishing an accepted standard of care include the ordinary dental or medical malpractice case." (citations and quotation marks omitted)). *See also Cowley v. Virtual Health System,* 242 N.J. 1, 21 (2020) (holding that expert testimony is necessary to establish the standard of care for overnight nurses' monitoring of patients); *Nicholas v. Mynster,* 2013 N.J. 463 (2013) (affirming the need for specialized expert testimony to establish the standard of care with respect to the specific medical specialty at issue); *Rosenberg v. Cahill,* 99 N.J. 318, 327 (1985) (holding that expert testimony is necessary to establish the applicable duty of care with respect to the proper chiropractic practices involved in that case). In cases involving specialized industries, courts may also (but do not always) require experts to establish causation, *see, e.g., Wiggins v. Hackensack Merdiain Health,* 259 N.J. 562, 583 (2025) (outlining that a medical malpractice plaintiff must present expert testimony establishing that the deviation from the applicable standard of care

proximately caused the injury). Additionally, courts may (but again do not always) require experts in order to calculate certain damages, *see, e.g., Smart Smr v. Borough of Fair Lawn Bd. Of Adjustment,* 152 N.J. 309, 336 (1998) (holding that proof of an adverse effect on property value will generally require expert testimony); *Clark v. Nenna,* 465 N.J. Super. 505, 513 (App. Div. 2020) (holding that expert testimony is generally needed to determine emotional distress damages).

In criminal cases, New Jersey courts have mandated expert testimony only in the very few cases where it is necessary to explain "complex matters that would fall beyond the ken of the ordinary juror." *State v. Fortin,* 189 N.J. 579, 596 (2007). Most often, that requirement is one that is imposed upon the prosecution. *See, e.g., id.* (" . . . when the signature-like aspect of a crime [such as bite-marks, in this case] would not be apparent to the trier of fact, expert testimony may be necessary to explain the significance of the evidence."). But with regard to requiring defense experts, those circumstances are particularly rare; more often, the caselaw includes the reversal of convictions for the failure to *allow* expert evidence. *See, e.g., State v. Jenewicz,* 193 N.J. 440 (2008) (holding that the trial court erred in precluding an expert's testimony about cocaine addiction); *State v. Stubblefield,* 450 N.J. Super. 337 (App. Div. 2017)

(holding that trial court erred in precluding a defense expert's testimony about her assessment of the victim).

By contrast, and more applicable here, in *State v. Bealor,* 187 N.J. 574 (2006), this Court expressly disavowed an Appellate Division rule that would have mandated expert testimony to show marijuana intoxication for purposes of the driving while intoxicated statute. *Id.* at 591. This Court rejected such an absolute rule, holding that lay opinion testimony is admissible, *id.* at 590, and that requiring expert testimony "impermissibly impinges on the traditional role of the fact-finder and is explicitly disavowed." *Id.* at 591. Thus, while expert testimony is the "preferred" method of proof, *id.* at 592, it is clear that from *Bealor* that it ought not lightly be made mandatory, even where it does not, as here, infringe upon the right to present a defense, as discussed above. Here, however, the Appellate Division held that expert testimony was not merely "preferred," *id*. at 592, but required, a holding that is not only extreme but also one that takes no account of the constitutional rights at stake.

In any event, in this case, the defense did not seek to establish a standard of care in a specialized field. Nor was the jury being asked to determine an issue for which specialized knowledge of complex matters was absolutely required. To the contrary, N.J.S.A. 2C:4-2 sets forth the failure-of-proof defense of diminished capacity which caselaw and core constitutional principles have

established should involve a low threshold of production on the defendant's part, requiring only that the defense present some evidence of mental disease or defect impacting the defendant's state of mind, after which the State remains obligated to prove the required mental state beyond a reasonable doubt. *Humanik,* 871 F.2d*; see also Delibero,* 149 N.J. at 92 (1997); *State v. Harris,* 141 N.J. at 551; *State v. Reyes,* 140 N.J. at 354.

This is so because—as in *Bealor*, in which the jury is not asked to opine on what substance rendered a driver intoxicated, only that he was so impaired—the jury is not, in a diminished capacity case, asked to render a specific scientific diagnosis but is instead required to determine only whether the defendant suffered from diminished capacity. *See Model Jury Charges (Criminal),* "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" (rev. June 5, 2006) at 1 (indicating that evidence of a specifically, medically diagnosed mental disease or defect is not necessary in order for the jury to consider evidence presented indicating a mental disease or defect that would have impacted the defendant's state of mind while committing the act). And this question of fact—whether the defendant acted with the requisite state of mind for the charged offense—is a quintessential one in every criminal case. *See generally* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation,* 2018 U. Ill. L. Rev. 1255, 1260 (2018) (providing overview of types of factual

determinations jurors are generally tasked with in criminal trials, including routine determinations about *mens rea*). And as is the case with regard to New Jersey jury instructions in general, juries are instructed to consider all of the evidence in making this determination:

> In considering the State's burden of proof, which is to prove every element of the charged offense(s) beyond a reasonable doubt, you must consider and weigh all of the evidence of defendant's mental state, including that offered as evidence of mental disease or defect [***OR*** *insanity*] **[*OR: [Insert Specific Mental Disease or Defect Alleged]***], in determining whether or not the State has proven beyond a reasonable doubt:
>
> > that [*Insert Defendant's Name*] acted [*purposely/knowingly/recklessly*], which is (are) (an) element(s) of [*Insert Specific Offenses to Which Defense Applies*].
> >
> > (**OR** that *{Insert Defendant's Name}* acted with the requisite state of mind forming any element of the offenses charged in the indictment).
>
> [*Model Jury Charges (Criminal),* "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" at 1].

Thus, and significantly, New Jersey courts have long recognized the particular value of lay testimony in determining this question of fact. *See* Dsb 21; *see, e.g., State v. Moore*, 113 N.J. 239, 285-86 (1988) (court considering extensive lay testimony as part of the evidence requiring an instruction on diminished capacity, including a letter from a relative suggesting the defendant had characteristics of "split personality"; testimony that her teachers noted her

"personal problems"; testimony that she began suffering blackout spells; and other lay testimony about bizarre and concerning behavior); *State v. Juinta,* 224 N.J. Super. 711, 714 (App. Div. 1988) (lay testimony by defendant's mother about mental defect evidence requiring diminished capacity instruction).[7]

In sum, not only was it inappropriate and unconstitutional for the Appellate Division to adopt this novel expert testimony requirement for a diminished capacity defense, but the decision also did not comport with long-established practices with regard to judicial acceptance of lay testimony.

III. DEFENDANTS ARE ENTITLED TO A JURY INSTRUCTION ON DIMINISHED CAPACITY BASED ON ANY RELEVANT EVIDENCE, WITH THE WEIGHT OF SUCH EVIDENCE TO BE DETERMINED BY THE JURY.

Jury consideration of whether the defendant suffered from diminished capacity based upon lay testimony, including evidence of the kind that was presented during the trial of this matter, is consistent with long-held principles

[7] Indeed, as scholars have noted, expert testimony is not necessarily even helpful to jurors in terms of assessing diminished capacity, insofar as they result in trials devolving into confusing "battles of the experts." *See generally* Note, *The Legal Standard for Determining Criminal Insanity: A Need for Reform,* 20 Drake J. Rev. 353, 358 (1971) (" . . . one problem which is consistent throughout all of these "battles [of the experts]" is that the testimony confuses rather than helps the jury. Consequently, the determination by a jury that a defendant is either sane or insane is as often a result of a favorable impression from one or the other expert witnesses as it is a result of the facts to which each testified."); Stephen J. Morse, *Undiminished Confusion in Diminished Capacity,* 75 J. Crim. L. & Criminology 1, 53 (1984) (suggesting that medical diagnoses in diminished capacity cases are unnecessary and may serve to further confuse the jury during a distracting "battle of the experts").

of criminal law. Under these principles, in order for a party to present its position, the law does not require a party to set forth the *best* evidence in support of its position; the law only requires a party to meet the burden (whether of production or of proof) imposed upon it in the case at issue. With respect to diminished capacity, that means that the defense must present some evidence of mental disease or defect impacting the defendant's state of mind, after which the question becomes the usual one of whether the State has proved the mental element of an offense beyond a reasonable doubt. *See Humanik,* 871 F.2d. at 443; *Kontakis v. Beyer,* 19 F.3d 110, 114 (3d Cir. 1994); *Delibero,* 149 N.J. at 98; *Moore,* 122 N.J. at 426-27.

In this regard, the caselaw, rather than mandating that expert testimony be adduced in support of such a defense, makes clear that, instead, the jury should be instructed as long as relevant evidence exists in the record to raise such a reasonable doubt. The Third Circuit held in *Humanik* that this should involve a low burden of production on the defendant's part, similar to other failure-of-proof defenses such as voluntary intoxication, pursuant to which the defense need only show "a rational basis for the conclusion that defendant's faculties were so prostrated that he or she was incapable of forming the requisite intent" in order for the issue to go to the jury. *State v. Bauman,* 298 N.J. Super. 176, 194 (App. Div. 1997). *See State v. Bowens,* 108 N.J. 622, 640 (1987) (holding

that the "evidence presented an at least rational basis for convicting defendant of reckless or aggravated manslaughter" (citation and quotation marks omitted)); *State v. Crisantos (Arriagas),* 102 N.J. 265, 278 (1986) ("When the lesser-included offense charge is requested by a defendant, as in this case, the trial court is obligated, in view of defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied."). And in deciding whether the defense has met its burden of production with respect to evidence of mental disease or defect negating the requisite state of mind for the charged offense, "the trial court must view the evidence in the light most favorable to the defendant." *State v. A.L.A.,* 251 N.J. 580, 695 (2022) (citations omitted) (discussing affirmative defense of reasonable corporal punishment). But here, the trial court and the Appellate Division improperly created a much higher threshold as a bar for instructing the jury on diminished capacity, running afoul of not only this caselaw but also of the core due process principles that underpin it.

As in most cases, then, courts should admit evidence of diminished capacity, leaving it to the jury to assess its weight. Indeed, "[t]he admissibility of any evidence cannot be dependent on whether that evidence is "definitive," a concept that speaks to the weight of the evidence and not its admissibility." *Brenman v. Demello,* 191 N.J. 18, 34 (2007); *see also State v. Buckley,* 216 N.J.

249, 261 (2013) (holding that evidence need not be dispositive or even strongly probative in order to be admitted); *State v. Noel,* 157 N.J. 141, 147 (1999) (same, affirming as to admissibility and holding that challenge to the evidence went to weight, not admissibility); *State v. Koedatich,* 112 N.J. 225, 316 (1988) (upholding trial court's treatment of evidentiary issue as one of weight rather than admissibility). That weight can, of course, be hotly disputed, *see Brenman,* 191 N.J. at 21 (2007) (disagreements among experts "address the weight to be given to [evidence], not their admissibility"); *State v. Campbell,* 436 N.J. Super. 264, 271 (App. Div. 2014) (affirming that a party can dispute the strength of evidence after a court admits it), but that does not go to its admissibility. Indeed, in this case, the evidence at issue, regarding the defendant's mental condition, was admitted and was permitted to be used by the prosecution to argue its theory of the case, but could not be used by the defense to argue diminished capacity. For the reasons set forth above, this was error, elevating the trial court to the role of the factfinder, who weighed the evidence already admitted into the record, allowing it for some purposes but finding it insufficient for others. As set forth above, this is not consistent with the law, or with the Constitution.

Finally, the Appellate Division ruling raises a practical, procedural issue that should weigh in the decision—and especially the opinion—of this Court. If the law is that diminished capacity always requires that an expert be provided,

it would be extraordinarily unfair to retroactively impose that requirement on the defendant here. Clearly, from the record of this case, the defense, as well as—for most of the case—the prosecution and the trial court, proceeded based upon the mutual understanding that the defendant would be able to argue, and the Court would provide a jury instruction on, diminished capacity at the close of trial. *See* 8T91-24 to 92-5 (trial court noting that it was "within the realm of possibility that a juror could believe that due to the defendant's diminished capacity" he had an honest belief that he needed to possess guns to protect himself); 8T92-6 to 20 (prosecutor arguing that an instruction on protective purpose as to the charge of possession of a weapon for an unlawful purpose charge would be "gratuitous" because the jury would already be instructed on diminished capacity). The court then reversed course just before summation and ruled that it would not instruct the jury on diminished capacity without expert testimony. (9T18-22 to 22-1). The result was a fundamentally unfair trial, and one that raises at least the specter of an ineffective assistance of counsel claim should this process be allowed. *See, e.g., Showers v. Beard,* 635 F.3d 625 (3d Cir. 2011) (holding defense counsel ineffective for failure to call an expert witness and granting *habeas* relief on this basis); *see also State v. Hess,* 207 N.J. 123 (2011) (holding that counsel was ineffective for failing to provide mitigating evidence showing that defendant was suffering from battered women's

syndrome at sentencing); *State v. Savage,* 120 N.J. 594 (1990) (holding that counsel was ineffective for failing to investigate and consider a psychiatric defense when there were several indications of mental health problems in the record). Thus, even if the Court were to affirm the decision of the Appellate Division decision, this case would be consigned to a petition for Post-Conviction Relief in which a new trial will be the absolutely necessary result. But in the first instance, a new rule requiring expert testimony should only be applied prospectively, and at worst, the conviction in this case should be reversed and the matter remanded for further proceedings, and appropriate process, consistent with that new rule. *See, e.g.*, *NL Industries, Inc. v. State,* 228 N.J. 280, 295 (2017) (" . . . a new law is treated as presumptively prospective in application unless there is an unequivocal expression of contrary legislative intent." (citation and quotation marks omitted)); *State v. Dock,* 205 N.J. 237, 254 (2011) (with regard to retroactive application, courts should consider "more generally . . . what is just and consonant with public policy in the particular situation presented.").

CONCLUSION

Under long-established constitutional principles, no individual may be convicted unless the State has proven, beyond a reasonable doubt, every element of the crime of which that defendant was accused. Where there exists evidence

negating the mental element of the offense, the jury, as the factfinder in our system of justice, is entitled to consider all such evidence as it relates to the State's obligation to prove the requisite state of mind beyond a reasonable doubt. In this case, the holdings of the trial court and the Appellate Division that expert testimony was required—and other evidence was *per se* insufficient—and that the jury ought not, without such evidence, be instructed on diminished capacity, imposed a constitutionally improper burden on the defense, in violation of the seminal decision in *Humanik v. Beyer*, and the most fundamental principles of our system of criminal justice, imposing the burden of proof with regard to the element of *mens rea* on the prosecution. Worse, in this case, the last-minute decision of the trial court disallowing the defendant's core trial argument, even as it allowed the State to invoke the same evidence, was obviously, and terribly, unfair. For these reasons, as set forth in greater detail above, *Amicus Curiae* the ACDL-NJ respectfully accordingly submits that this Court should uphold the most fundamental principles of the United States and New Jersey constitutions, and reverse the erroneous decision below.

Respectfully submitted,

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