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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090329

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

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The ability of defendants to invoke diminished-capacity arguments flows from the bedrock Due Process principle that it is the State's burden to prove beyond a reasonable doubt a defendant's culpability for each essential element of an alleged offense. Any evidence that bears on a culpable mental state is relevant to the jury's deliberations, and any arguments a defendant has against establishing that mental state should be liberally permitted. In Humanik v. Beyer, 871 F.2d 432 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit held that requiring defendants to prove diminished capacity by a preponderance of the evidence violates these core constitutional principles. Our state responded appropriately, and the Legislature and this Court modified our law to incorporate that holding. Today, we have a model jury instruction that informs the jury about the pertinent principles of this failure-of-proof defense that must be given in cases where there is a basis in the record to support it.

At defendant Kader Mustafa's trial, he proceeded with the intention of raising such an argument. Both defense counsel and the prosecutor discussed in their openings Mr. Mustafa's various mental health problems and that the jury would ultimately be tasked with assessing a diminished-capacity issue. Both parties adduced substantial evidence at the trial about those mental health issues, including testimony about Mr. Mustafa's gang-stalking delusions, his believing

he was being targeted with radiation waves, his wearing a tin-foil hat and foil-lined blanket, and how those problems allegedly caused him to fire a single shot at a car he delusionally believed was following him. Nonetheless, at the conclusion of the trial, the judge refused to instruct the jury on diminished capacity based on a novel requirement: a defendant must call an expert witness before a jury can be instructed on diminished capacity.

There is no statute, case, nor court rule that establishes such a requirement. To the contrary, an expert-testimony prerequisite would conflict with the general principle that such arguments should be liberally permitted. So too would it be completely irreconcilable with Humanik's holding that it is unconstitutional to require defendants to prove diminished capacity. Historically, our cases have always accepted lay testimony in support of diminished-capacity arguments and even placed significant weight on that testimony. In light of this, there is no reason lay testimony cannot be adequate by itself to require the jury to be instructed on diminished capacity, provided there is a rational basis for it in the record. Numerous other states have already reached this common-sense conclusion.

In Mr. Mustafa's case, the parties did not seriously dispute he was suffering from mental health issues at the time of the offense. In fact, the State's argument to the jury that Adderall abuse caused him to become delusional relied

upon exactly this idea. But because the trial court refused to provide the diminished-capacity instruction based on a non-existent expert-testimony requirement, the State was able to have it both ways: to paint Mr. Mustafa's mental state as contributing to his alleged conduct while preventing defense counsel from making a similar diminished-capacity argument to the jury.

There was ample evidence here for a jury to have accepted some part of Mr. Mustafa's diminished-capacity argument, either by believing his delusions reduced his culpability from purposeful conduct to reckless, or by acquitting him of any culpable state of mind altogether. But because the trial court denied the instruction, the jury was precluded from considering this issue at all. Meanwhile, the State was permitted to make identical arguments to convict. The refusal to charge on diminished capacity based on the expert-testimony requirement is thus an error requiring the reversal of Mr. Mustafa's convictions.

However, even if this Court decides to create an expert-testimony requirement or otherwise holds that the evidence at Mr. Mustafa's trial did not merit the instruction, he was still unduly prejudiced by the admission of significant evidence pertaining to those otherwise-irrelevant issues such that a mistrial should have been declared once the trial judge refused to provide the instruction. On this basis, then, Mr. Mustafa's remaining convictions would still need to be reversed.

PROCEDURAL HISTORY

Defendant-petitioner Kader Mustafa respectfully refers this Court to the procedural history set forth in his appellant brief and adds the following:

On January 27, 2025, the Superior Court, Appellate Division, issued an unpublished decision reversing two counts of unlawful possession of a handgun but affirmed the remainder of his convictions. (Pa1-50).[1]

Mr. Mustafa filed his notice of petition for certification as to the remaining convictions on January 28, 2025. (Pa51).

In an order posted on May 16, 2025, this Court granted certification limited to the question of whether expert testimony is required before a jury can be instructed on diminished capacity. (Dsa58).

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[1] Da = defendant's appellate appendix
Pa = defendant's petition appendix
Dsa = defendant's supplemental appendix
1T = motion transcript dated February 9, 2021
2T = motion transcript dated August 20, 2021
3T = trial transcript dated September 27, 2021
4T = trial transcript dated September 28, 2021
5T = trial transcript dated September 29, 2021
6T = trial transcript dated September 30, 2021
7T = trial transcript dated October 4, 2021
8T = trial transcript dated October 5, 2021
9T = trial transcript dated October 7, 2021
10T = trial transcript dated October 12, 2021
11T = sentencing transcript dated May 5, 2022

STATEMENT OF FACTS

Throughout the entirety of the proceedings, all parties were aware that the mental health issues Mr. Mustafa was experiencing at the time of the offense—an apparent delusional episode during which he fired a single bullet out of his car at another driver that had its high beams on—were going to be a focal point of the case and a major issue for the jury to consider.

A. Discussion of mental-health-related issues before the trial.

Before trial, the fact of Mr. Mustafa suffering from mental health issues during the incident came up repeatedly. On January 23, 2019, Mr. Mustafa filed a Rule 3:12-1 notice of intent to raise an affirmative defense of not guilty by reason of insanity ("NGRI"). (Dsa56). On August 20, 2021, in a decision denying Mr. Mustafa's motion to suppress evidence seized from his car, the trial court noted that, when police spoke to Mr. Mustafa's brother the morning of the incident, he "informed the detectives that his brother suffered from psychological problems and had recently been hospitalized for these problems" and that law enforcement "was able to confirm with the crisis [unit] of Monmouth Medical Center that [Mr. Mustafa] had been discharged from there on April 19, 2018," only a couple of weeks before the shooting. (2T49-7 to 13). This information, according to the trial court, was part of the suspicious

circumstances that warranted stopping and seizing Mr. Mustafa the day he was arrested. (2T56-21 to 57-2).

Ultimately, Mr. Mustafa elected not to pursue an affirmative insanity defense at the trial. The formal pretrial memorandum noted, "Insanity Defense Withdrawn," and "No Psychiatric Expert Testimony." (Dsa53). The morning of the first day of trial, Mr. Mustafa officially put on the record his waiver of any insanity defense. (3T10-6 to 13-8). Nonetheless, despite the lack of expert testimony and despite the waiver of an NGRI defense, it was evident from opening statements that Mr. Mustafa's mental health issues would nonetheless be the focus of the case.

B. Discussion of mental health issues during the trial.

During its opening, the State described how Mr. Mustafa "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 prosecutor continued by saying that, when Mr. Mustafa spent much of each day during his homelessness driving around in his car, "he started to believe that other people on the roadway were invading his space, were tailing him, were after him." (3T34-23 to 25). He further relayed how Mr. Mustafa's brother told police that "he had been having some issues. He was in Monmouth Medical Center over the

past weekend." (3T41-2 to 8). He discussed how Mr. 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 16). The prosecutor closed by noting that, in addition to likely considering lesser-included offenses like reckless manslaughter, "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).

Defense counsel's opening was pithier, but he too noted that Mr. Mustafa's life was substantially different "before his mental health problems," and that "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). Again, it was clear that Mr. Mustafa's mental health issues were going to be central to the case, and all parties were anticipating a diminished-capacity instruction at the end of the trial.

During the trial, both parties adduced substantial lay testimony about Mr. Mustafa's mental health issues and erratic behavior. Detective Kevin Condon testified that Mr. Mustafa's brother told him that Mr. Mustafa "had psychological problems, and has recently been to Monmouth Medical Center for treatment[.]" (4T85-19 to 23). There was an objection by the State on hearsay

grounds, but the court overruled it in anticipation of a "stipulation to the admissibility of any psychiatric records." (4T86-6 to 12). Lieutenant Scott Samis then testified that, when he found Mr. Mustafa the morning of his arrest, Mr. Mustafa was wearing

> a hard hat, and a baseball hat. In that hard hat was tin foil material. In between. And then on Mr. Mustafa's body, he had, I would describe it now as, like a runner's blanket. That silver material. And like garbage material. And that was wrapped around him, inside of his clothes.
>
> [(4T102-1 to 8).]

Detective Keith Finkelstein similarly stated that Mr. Mustafa was found with foil wrapped on his head and his body, in addition to noting that "there was aluminum foil wrapped around the antenna of the vehicle[.]" (4T154-8 to 17). The next day, Mr. Mustafa's girlfriend's father testified that when he saw Mr. Mustafa shortly before the incident, Mr. Mustafa had "[e]xtremely lost a lot of weight" from the last time he had seen him. (5T15-5 to 23).

Eventually, Mr. Mustafa's girlfriend at the time, Nicole Fiore, herself testified and discussed at length Mr. Mustafa's delusional behavior. She talked about how Mr. Mustafa became unemployed around 2013 and the two began living out of his car around 2017. (7T63-21 to 64-14). She said that Mr. Mustafa began to see the psychiatrist she had been seeing for her own mental health issues and that the doctor prescribed him Adderall. (7T71-5 to 12). When

defense counsel objected to Ms. Fiore discussing Mr. Mustafa's marijuana use, the prosecutor countered the objection by arguing, "we're going to be able to show, to, to introduce his medical records, to show that he had some kind of mental disorder on the night of the shooting." (7T74-2 to 9).

Later in her testimony, Ms. Fiore discussed Mr. Mustafa's "gang stalking" delusions, wherein he believed "[t]hat people were out to get him, that people were trying to hurt him, harm him, cause an upheaval in his life, or possibly try to kill him." (7T94-8 to 95-4). As part of those delusions, he often believed that "different cars were, you know, out to get him." (7T94-23 to 24). She discussed how Mr. Mustafa would make her take apart her phone so they "couldn't be tracked," and that he made her change her phone number "four or five" times over the course of the relationship.[2] (7T95-6 to 96-5).

Ms. Fiore testified that, on the morning of the incident, Mr. Mustafa was "yelling" during their drive "[a]bout people that were trying to hit him with radiation, and trying to 'fuck with him,' mess with him, following him, recording him." (7T121-11 to 24). Eventually, when the victim's car drove past with its high beams on, Mr. Mustafa began screaming at her, "look at what they were doing; they were high beaming him. And, see what I was talking about, . . . this

[2] The crime scene analyst also testified that a bag of disassembled phones was found in Mr. Mustafa's car. (6T56-10 to 22).

is what he means, this is what's going on." (7T126-17 to 127-1). Mr. Mustafa pulled over to let the car pass him and "was visibly, like, freaking out, like just angry, breathing really heavy, just really, really high anxiety, flipping out, pretty much." (7T127-9 to 12). After the car passed, Mr. Mustafa began following the car, flashing his high beams, and ramming into it. (7T127-12 to 17). Before Mr. Mustafa allegedly fired the single shot, Ms. Fiore said that he told her, "I'm sorry. I'm sorry. I just can't take it. I have to fight back. I'm not dealing with this anymore." (7T129-9 to 11).

During cross-examination, defense counsel built on the mental-illness themes developed by the prosecutor on direct. Ms. Fiore testified that Mr. Mustafa believed people were "following him, and persecuting him, and harassing him in different ways," "shooting laser beams into him," "shooting electromagnetic frequencies into him," "shooting radiation beams into him," and "target[ing him] with concentrated microwaves." (7T187-2 to 21). She discussed how he took "a sling shot and aim[ed] at a drone that he felt was following him [and] coming after him," (7T187-19 to 21); how he "went to the hospital about a week before" the incident, "complaining that his kidneys were failing" "due to these beams," (7T187-22 to 188-3); how he underwent a psychiatric evaluation at Monmouth Medical Center, (7T190-6 to 12); and how "he knew he was being targeted," would often point out various people and cars he

believed were out to get him, but that he believed "various police departments knew about this, and were going to handle it." (7T190-13 to 191-13). She testified that, to protect against the stalking, he would insist on taking apart their phones, covering their car antenna with foil, wearing a tin foil hat (including in public) and wrapping himself in foil. (7T191-14 to 193-9). She further noted his behavior had been deteriorating for months in a way that reminded her of her schizophrenic uncle and was exacerbated by his Adderall use. (7T194-1 to 4, 194-25 to 195-18, 221-6 to 8).

Despite previous discussions during the trial of admitting records from Mr. Mustafa's hospitalizations, no such medical records were admitted. Nor did any medical expert testify with respect to Mr. Mustafa's mental state on the night of the incident.

C. The trial court's refusal to instruct on diminished capacity.

At the end of the final day of testimony, the parties began discussing what instructions to include in the final charge. In discussing whether to instruct on protective purpose as to the charge of possession of a weapon for an unlawful purpose, the trial court noted 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 the guns recovered to protect himself. (8T91-24 to 92-5). The prosecutor countered that the charge would be

"gratuitous" because the jury would already be instructed on diminished capacity. (8T92-6 to 20).

Despite both the trial court and prosecutor ostensibly being on board with instructing the jury on diminished capacity during that discussion, the following morning, the State said it was objecting to the instruction on diminished capacity, and the trial court said it was disinclined to allow the instruction. Defense counsel argued, "it is important that Mr. Mustafa received every available defense to him which would include . . . the defense of lack of the mental state required for guilt and would also include his diminished capacity." (9T10-7 to 13). Testimony "that he was getting worse and worse all the time," that "[h]e was hospitalized for observation," that he was "paranoid," "delusional," "feeling persecuted," and "acting psychotically" all supported giving the charge. (9T10-13 to 21). While "there's no long term permanent diagnosis of let's say paranoid schizophrenic disaffective whatever, it's obvious that in plain English" he was suffering from some kind of mental health problem. (9T10-15 to 21).

In response to a question by the trial court about whether expert testimony was needed for a diminished capacity charge, defense counsel asserted 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). The prosecutor countered that although Mr. Mustafa's "acting bizarrely" was "part of the case," "there's no evidence in the case to support" that Mr. Mustafa had a "mental illness." (9T16-1 to 11).

Despite observing that "the facts underlying the intoxication charge are far less compelling than the defendant's bizarre behavior with respect to any diminished capacity charge," (9T16-12 to 19), the trial court ultimately denied defense counsel's request to include the diminished capacity instruction.[3] After listing all of the evidence that would support the charge, the trial court said the most significant bar was that there was no medical or expert testimony, noting, "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).

Accordingly, in defense counsel's summation, no reference was made to Mr. Mustafa's mental health issues that contributed to the incident. (9T24-4 to 42-20). The prosecutor, on the other hand, took significant advantage of all the mental-health-related evidence to argue a theory that Mr. Mustafa committed the

[3] The trial court did, however, give the "far less compelling" intoxication instruction because it was agreed upon by both parties.

shooting in a psychotic delusional episode brought on by protracted drug abuse. Specifically, the prosecutor argued: that "the demons [Adderall and marijuana use] created inside of [Mr. Mustafa] I submit to you is what led to the tragedy," (9T46-1 to 4); that at the time of the offense he was under the influence of "too much Adderall, too many conspiracy theories," (9T81-1 to 8); and that the offense happened "because of the anger and paranoia" that was created by "the way he used the prescribed drugs," (9T98-1 to 9).

Ultimately, the jury convicted Mr. Mustafa of every count in the indictment after only an hour of deliberations.

D. Mr. Mustafa's motion for a new trial.

After the verdict, Mr. Mustafa moved for a new trial based in part on the trial court's refusal to instruct on diminished capacity. In that motion, defense counsel certified that the trial court had previously told the parties "that the jury would be given a diminished capacity charge," and that he had "no opportunity to prepare" for the charge's refusal. (Dsa49) (emphasis in original). At the motion hearing, defense counsel elaborated that the court "pulled the rug out of the defense on the issue of diminished capacity, which could no longer be used in summation, but your initial ruling was something I relied upon in preparing summation for a diminished capacity defense." (11T7-13 to 8-9).

The prosecutor countered that Mr. Mustafa had an expert report "which he chose not to use based upon strategy," and that the parties had initially agreed to admit certain hospital records under stipulation, but the defense again decided against using them due to a "strategic decision." (11T11-21 to 12-6). The trial court ultimately denied the application as to the diminished-capacity issue by reiterating its conclusion that expert testimony is required to give the charge. (11T29-14 to 31-23). Mr. Mustafa was ultimately sentenced to the functional equivalent of life without the possibility of parole.

LEGAL ARGUMENT

POINT I

EXPERT TESTIMONY IS NOT A BRIGHTLINE REQUIREMENT BEFORE A JURY CAN BE INSTRUCTED ON DIMINISHED CAPACITY.

No statute, no court rule, and no case has ever enumerated a requirement that a defendant must present expert testimony before a jury can consider a diminished-capacity defense. On the contrary, the concept of diminished capacity arises from a long-standing recognition that evidence disputing the mens rea of an offense is always relevant and cannot be excluded. In this vein, in Humanik v. Beyer, 871 F.2d 432 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit expressly held that defendants cannot be required to prove diminished capacity by a preponderance of the evidence without running afoul of the Constitution.

Every other aspect of the law on this issue: the low threshold for providing a requested failure-of-proof instruction; the numerous cases accepting lay testimony in support of a diminished-capacity argument; and the widespread national acceptance of using only lay testimony to advance a diminished-capacity defense; all compel the conclusion that there cannot be a requirement that a defendant present expert testimony before a jury can be instructed on

diminished capacity. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The history of the diminished capacity statute.

Diminished capacity has its roots in a well-established common-law notion that, even where a mental illness might not meet the defined prongs of legal insanity, evidence of a mental disorder affecting the state of mind that is the element of the offense is always relevant and should be liberally permitted. In State v. Di Paolo, this Court firmly established our state's commitment to this principle:

> The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered. The capacity of an individual to premeditate, to deliberate, or to will to execute a homicidal design, or any deficiency in that capacity, may bear upon the question whether he in fact did so act. Hence evidence of any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did in fact occur must be accepted. Such evidence could be excluded only upon the thesis that it is too unreliable for the courtroom, a thesis which would not square with the universal acceptance of medical and lay testimony upon the larger issue whether there was a total lack of criminal responsibility.
>
> [34 N.J. 279, 295 (1961) (emphasis added).]

Even in cases long predating Di Paolo, similar principles are evident. See State v. Close, 106 N.J.L. 321, 324 (E. & A. 1930) (discussing case where

"[e]vidence was offered for the defence . . . in an effort to establish the mental state of the accused at the time of the shooting to prove that the homicide lacked premeditation and deliberation, and therefore the crime was not above second degree murder," although "[i]nsanity was not the defense"); State v. Schilling, 95 N.J.L. 145, 148 (E. & A. 1920) (discussing case where jury was instructed if "the evidence shows you that this defendant was so feebleminded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its willful, deliberate, and premeditated character, then, although it is no defense or justification" he could be acquitted of murder).

When New Jersey created its modern Title 2C Criminal Code in 1978, it codified the above principles in N.J.S.A. 2C:4-2, which, as enacted, stated:

> a. 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.
>
> b. Whenever evidence is admitted under subsection a. of this section, the prosecution may thereafter offer evidence in rebuttal.
>
> [L.1978, c. 95, § 2C:4-2, eff. Sept. 1, 1979.]

The statute did not make clear, however, what the burden was for establishing diminished capacity. Thus, in 1981, N.J.S.A. 2C:4-2 was amended to expressly make diminished capacity an affirmative defense where a defendant was required to establish the existence of such a disorder by a preponderance of

the evidence, in addition to adding a presumption that a defendant does not have any such disorder:

> 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. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.
>
> [L.1981, c. 290, § 8, eff. Sept. 24, 1981]

The intention was to make the statute "consistent with the law governing the insanity defense." Sponsor's Statement to S. 1537 31 (L. 1981, c. 290); see also Statement to Senate Comm. Substitute for S. 1537 3 (Jan. 2, 1981) (stating the 1981 amendment "clarifies that other types of mental disease or defect not constituting insanity (i.e. amnesia) are also affirmative defenses which must be proved by the defendant by a preponderance of the evidence.").

A few years later, in State v. Breakiron, 108 N.J. 591 (1987), this Court considered the constitutionality of the burden-shifting amendment. Despite recognizing that diminished capacity was not initially conceived by the Code as an affirmative defense, this Court nonetheless held that the burden on the defendant was permissible because it "does not mean that the defendant must disprove that the act was knowing or purposeful. It means only what it says, that

the defendant must show that he or she suffered from a mental disease or defect that is relevant to the mental state of the offense." Id. at 611. According to the Breakiron Court, because "the presence or absence of mental disease or defect is not an essential element of the crime as defined by the Legislature," it would not be unconstitutional to place the onus on the defendant in that respect. Id. at 613.

The argument was revisited shortly thereafter in State v. Zola, 112 N.J. 384 (1988). Although upholding Breakiron, it expressed greater concern about the jury misconstruing the statute in a way that would amount to unconstitutional burden-shifting. Id. at 401-02. Accordingly, the Zola Court recommended modifying the diminished-capacity model charge to add clarifying language, but it otherwise found no issue with the burdens imposed by the statue. Id. at 402-03.

In Humanik v. Beyer, however, the Third Circuit Court of Appeals reached a contrary conclusion. There, the Humanik Court evaluated the reasonings of Breakiron and Zola and concluded that they did not comport with the constitutionally-imposed burden on the State to prove every element beyond a reasonable doubt. 871 F.2d 432 (3d Cir. 1989); see also In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the

accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

According to the Third Circuit, while the mental defect described in the diminished-capacity statute is not an element of any offense, "the only relevance of that fact 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." Humanik, 871 F.2d at 411. In other words, the onus cannot be on the defendant to meet a burden of production before the jury can be permitted to consider a particular argument as to whether the State has proven the necessary mental state beyond a reasonable doubt. Id. at 440-41. "If 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." Id. at 443. While the error in that case was focused largely on the corresponding jury instruction, the Third Circuit went on to opine that "[t]he problem, as we see it, is inherent in the statute even as it has been construed in Breakiron and Zola," and thus, could not be cured by any properly tailored charge. Id. at 442.

In short, the Third Circuit held that a defendant cannot be forced to meet a threshold of production for diminished capacity, and that a jury is always entitled to consider whether any evidence of mental disease or defect presented

at a trial raises a reasonable doubt as to the existence of the essential mental state. Id. at 443. Because the 1981 version of the diminished-capacity statute said otherwise, it was unconstitutional.

In 1990, the Legislature responded by amending the statute to remove the burden on the defendant to establish mental disease or defect by a preponderance of the evidence.[4] L.1990, c. 63, § 1, eff. July 7, 1990. The statute as amended now "simply permit[s] introduction of evidence of mental disease or defect if that evidence is relevant to the state of mind required for the offense charged." Sponsor's Statement to S. 2335 2 (L. 1990, c. 63). In State v. Moore, 122 N.J. 420 (1991), this Court recognized both the Humanik abrogation of Breakiron and the Legislature's subsequent amendment.

Despite the fluctuations in law, the overarching principle remains that "diminished capacity refers to evidence that can negate the presence of an essential mental element of the crime" and is something that a jury considers "in relation to the State's burden to prove the essential elements of the crime." State v. Delibero, 149 N.J. 90, 98 (1997). Diminished capacity may be invoked to argue a reduced degree of offense by establishing a lesser mens rea, State v. Moore, 113 N.J. 239, 288-89 (1988), or it may result in complete acquittal if the

[4] However, the Legislature left in place the presumption that all defendants are presumed not to have any mental disease or defect.

State fails to prove any culpable mental state, State v. Nataluk, 316 N.J. Super. 336, 343 (App. Div. 1998) ("If there is reasonable doubt as to whether defendant's mental condition permitted him to form the requisite knowledge or purpose which constitutes an essential element of the crime, the defendant is entitled to an acquittal.").

B. There cannot be an expert-testimony requirement for instructing juries on diminished capacity.

Post-Humanik and the 1990 amendment, the question remains, "What quantum of evidence is necessary for instructing a jury on diminished capacity?" A synthesis of the relevant principles compels the conclusion that the bar cannot be high, and that it certainly cannot involve a requirement that defendants establish diminished capacity through expert testimony.

i. Our courts have always accepted lay testimony in support of a diminished-capacity defense.

First, it is important to note that, despite the many changes in the development of the diminished-capacity statute, our courts have always accepted lay testimony in support of such a defense. Over sixty years ago, this Court discussed how the diminished-capacity doctrine comported "with the universal acceptance of medical and lay testimony" that is relevant to disputing the mens rea of an offense. Di Paolo, 34 N.J. at 295 (emphasis added). Similarly,

in State v. Humanik (the Appellate Decision case preceding and ultimately overruled by the seminal Third Circuit case), our Appellate Division described diminished capacity as "referring to psychiatric or other evidence contesting the State's thesis that the accused acted with the mental state required to be proven in order to convict." 199 N.J. Super. 283, 294 (App. Div. 1985); accord Breakiron, 108 N.J. at 610.

Accordingly, there are numerous instances of our courts giving significant weight to non-expert lay testimony in finding a trial court was obligated to instruct a jury on diminished capacity. For instance, in State v. Moore, the defendant argued that the trial court erred in failing to instruct the jury on diminished capacity where the proofs in support of the asserted insanity defense also supported that charge. 113 N.J. at 281-84. Ultimately, this Court concluded that the record adequately supported a potential diminished-capacity defense, and that it was reversible error both to not instruct the jury on that defense and to not instruct the jury on aggravated and reckless manslaughter in relation to the diminished-capacity issue. Id. at 287-88.

As to the proofs that this Court believed were sufficient to support diminished capacity, while there were several experts who testified, much of the focus was on the lay testimony that supported the charge. Id. at 284-86. One such piece of evidence was "a letter that Moore's aunt sent to a

neurologist/psychiatrist" in which she "observe[d]" that the "defendant exhibited characteristics of 'split personality.'" Id. at 284. This Court found it significant that, "[a]lthough not a trained psychologist, defendant's aunt attributed defendant's radically changing disposition to some form of psychological disorder." Ibid.

Similar testimony this Court found supportive of the diminished-capacity charge included: the testimony of "a representative of Caldwell College, where defendant completed one year of study," who said that "defendant's teachers had noted in her records that she appeared to have personal problems"; a friend and roommate's testimony about Moore's tumultuous relationship with people who ultimately turned out to be figments of her imagination, after which Moore "was thinner, had lost a lot of hair, and had a cast on her leg"; testimony she had become "a hard, cold woman"; and multiple statements by lay witnesses about "black-out spells" defendant suffered. Id. at 284-86.

Similarly, in State v. Juinta, an appellate panel held that, although there was no request below, the trial court erred in failing to instruct on diminished capacity that was adequately established by insanity-defense proofs, including lay testimony. 224 N.J. Super. 711, 719-25 (App. Div. 1988). Specifically, there was significant lay testimony by the defendant's mother that supported the diminished capacity defense, including: "that defendant was unable to speak in

a manner that was intelligible to strangers until after his fourth birthday"; that his "kindergarten teacher felt that he had some sort of disability"; that he was evaluated by the school's study team, which "concluded that defendant had some type of neurological impairment, and because of this, he was placed in a 'neurological impaired school'"; that doctors told her defendant suffered from "auditory conceptual problems" and was "borderline retarded"; in addition to similar testimony about his difficult life suffering from cognitive disabilities. Id. at 714-16.

Additionally, in State v. Oglesby, this Court likewise found substantial lay testimony by the defendant's siblings warranted a diminished-capacity charge, including: that he was "violent, self-destructive, and suffered from hallucinations"; that after taking a walk he "disappeared for seven or eight hours, and returned in a confused state, claiming that he had talked to Jesus and Mary"; that he had "been hospitalized several times for mental illness in the 1970s and 80s"; and that he believed his car was "inhabited by a phantom named 'Boyaz'"; in addition to "other forms of bizarre conduct." 122 N.J. 522, 526, 531 (1991).

In short, while many diminished-capacity cases involve experts, it is clear that our courts have not only routinely accepted lay testimony in support of a diminished capacity defense but give it considerable weight and have found it

to be reversible error to not instruct on diminished capacity in cases with substantial lay testimony.

ii. The rational-basis test is the appropriate analysis for assessing whether a trial court is obligated to give a requested diminished-capacity charge.

Next, the applicable standard for assessing whether a trial court should instruct a jury on diminished capacity upon a defendant's request must be the rational-basis test. This is the standard regularly used for assessing whether the evidence warrants instructing a jury on similar defenses like voluntary intoxication (which, like diminished capacity, is a failure-of-proof defense related to mens rea) and self-defense. See State v. Bauman, 298 N.J. Super. 176, 194 (App. Div. 1997) ("A jury charge on voluntary intoxication is required" when "there exists a rational basis for the conclusion that defendant's faculties were so prostrated that he or she was incapable of forming the requisite intent."); State v. Bryant, 288 N.J. Super. 27, 35 (App. Div. 1996) ("The trial court must charge the jury on self-defense and defense of another if there exists evidence in either the State's or the defendant's case sufficient to provide a 'rational basis' for their applicability."). Likewise, this Court has repeatedly used the rational-basis test in assessing whether the jury should have been instructed on a lesser-included offense related to a diminished-capacity argument. See State v. Bey, 161 N.J. 233, 285-89 (1999); State v. Rose, 112 N.J. 454, 479-85 (1988).

The rational-basis test has been termed a "low threshold," State v. Carrero, 229 N.J. 118 (2017), where little more than a "scintilla" of evidence in support of the charge is all that is necessary, State v. Crisantos, 102 N.J. 265, 278 (1986). Evaluation of the facts of a case under this standard must be in "a light most favorable to the defendant," considering "all inferences that logic and common sense will allow." State v. Mauricio, 117 N.J. 402, 412, 417 (1990) (citations and internal quotations omitted). Refusing to provide the instruction, on the other hand, is only appropriate when there is no "room for dispute" as to whether a mental defect might have impacted the defendant's state of mind when committing the offense. Id. at 415 (1990) (citations and internal quotations omitted).

It is not possible to square the low threshold posed by the rational-basis test with a requirement that a defendant virtually prove diminished capacity through expert testimony before it can be even considered by a jury. If little more than a "scintilla" of evidence is all that is needed to provide such a charge, conclusive expert testimony cannot be a prerequisite under this standard. Likewise, if lay testimony is accepted as supportive of diminished capacity, there is no reason such testimony by itself should, as a rule, be insufficient to meet the meager rational-basis threshold.

iii. An expert-testimony requirement cannot be squared with Humanik's holding that placing the burden of production on the defendant to establish diminished capacity by a preponderance of the evidence is unconstitutional.

Perhaps most critically, there is no logical way to reconcile the Third Circuit's holding in Humanik that placing the burden of production for diminished capacity on defendants is unconstitutional—a holding that has been accepted and recognized in our own courts—with a requirement that defendants must establish diminished capacity through expert testimony before the issue may even be submitted to a jury. Not only would an expert-testimony requirement be an express burden on the defendant to establish diminished capacity, but it would also be an extremely high one.

Humanik did note in the end of the opinion that "a defendant must come forward with evidence about the existence of such a disease or defect which a reasonable juror could credit," and that the court had "no doubt that such a requirement is constitutionally permissible." 871 F.2d at 443. However, this language is better understood as simply a requirement that there must exist some evidence in the trial record to support the diminished-capacity charge. In other words, while there of course must be some basis in the record for a judge to instruct on diminished capacity, there is no need for that evidence to necessarily come from the defendant. Cf. Bryant, 288 N.J. Super. at 35 ("The trial court

must charge the jury on self-defense and defense of another if there exists evidence in either the State's or the defendant's case sufficient to provide a 'rational basis' for their applicability." (Emphasis added)). Thus, if there is adequate evidence in the State's case in chief to meet the rational-basis threshold for a diminished-capacity charge, the trial court is obligated to instruct on it upon a defendant's request, notwithstanding the fact that the defendant put forward no defensive proofs at all. This understanding is consistent with the failure-of-proof function of diminished-capacity arguments. See Palmer v. State, 379 P.3d 981, 987-88 (Alaska Ct. App. 2016) ("The defense of diminished capacity under Alaska law is a failure-of-proof," and thus, "a defendant bears no burden of proof with regard to a claim of diminished capacity.").

Additionally, it is worth discussing some language in our cases that seems to implicitly, and inappropriately, place a burden on the defense for diminished capacity. Specifically, there is dicta in cases that says juries are only to consider diminished capacity "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," State v. Galloway, 133 N.J. 631, 643 (1993); accord State v. Baum, 224 N.J. 147, 160-61 (2016) (also citing N.J.R.E. 702); and that a diminished-capacity instruction is only appropriate "if the record shows 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; accord State v. Bey, 161 N.J. 233, 288 (1999).

For several reasons, there is no reason to afford this dicta such significant weight as to invent an expert-testimony requirement for diminished capacity that is untenable and does not elsewhere exist. As an initial matter, Galloway's dicta regarding widespread support in the psychiatric community mirrors the "general acceptance" requirement for expert testimony under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which our state has since abandoned. See State v. Olenowski, 253 N.J. 133, 150-51 (2023) (discussing critiques of general-acceptance requirement at length in rejecting continued adherence to Frye standard). Thus, there is no reason to extrapolate a bar to diminished-capacity argument founded on an evidentiary test that is not even used in this state anymore.

Moreover, those requirements expressed in Galloway's dicta are in unreconcilable tension with the general principle that any evidence relevant to a defendant's mens rea must be accepted, and as such are causing confusion in our caselaw. A defendant's mental state is always a material issue, and defendants cannot be unduly restricted from making arguments that the State has not established that element. See Di Paolo, 34 N.J. at 295. But because that principle is at odds with language in Galloway that is unduly restrictive of

diminished capacity, it has caused an amorphous third category of mental-health-related defense that is neither NGRI nor diminished capacity, but some perceived lesser standard. See Cannel, New Jersey Criminal Code Annotated, cmt. 2 on N.J.S.A. 2C:4-2 (2025) ("Note that even where a defendant mounts neither a diminished capacity nor an insanity defense, evidence of the defendant's mental condition may be admissible as relevant to the requisite mental element of an offense.").

For instance, in State v. Sexton, a cognitively impaired child shot his friend with a gun that he did not believe was loaded. 311 N.J. Super. 70, 88 (App. Div. 1998), aff'd on other grounds, 160 N.J. 93 (1999). Although the defense indicated they were not pursuing a diminished-capacity argument, they sought to introduce lay testimony by the defendant's mother that the defendant had "limited mental ability and his status as a special education student." Ibid. The trial court had barred the testimony as a "back door" to a diminished-capacity argument. Ibid. The Appellate Division, however, found that the trial court should have allowed the testimony, holding, "[e]vidence of defendant's mental ability" was "relevant to the presence or absence of the requisite reckless state of mind." Ibid. Therefore, the defendant should have been permitted to offer "relevant experts and/or appropriate school personnel, who may be able to fairly describe defendant's mental ability." Ibid.

It should be obvious that "evidence of [a] defendant's mental ability" that is relevant to "the presence or absence of the requisite" mens rea is both crucially relevant evidence that cannot be excluded and precisely a diminished-capacity issue. The confusion, it seems, comes from trying to circumvent perceived heightened barriers for presenting diminished capacity to a jury by inventing a third category that is intended as a lower threshold but, in reality, is exactly what diminished capacity is already supposed to be. Thus, the cleanest solution is to flatten any such distinction, allow diminished capacity its intended expression, and require diminished capacity to be charged in any case where mental-health evidence at the trial, whether lay, expert, or both, supplies a rational basis for concluding the defendant did not have the requisite mens rea for the offense.

iv. Diminished capacity covers a broader range of mental-health disorders than NGRI.

Further antagonistic to the idea that there must be an expert in diminished-capacity cases is the fact that diminished capacity is intended to cover a broad range of psychological issues beyond what is encompassed by NGRI. Although this Court in Galloway expressed dicta that Mr. Mustafa has disagreed with, the case was nonetheless significant in its expansion of the kinds of disorders that may qualify as a diminished-capacity defense. In that case, this Court made clear that "all mental deficiencies, including conditions that cause a loss of emotional

control, may satisfy the diminished-capacity defense," and that the labelling of a psychological problem as a "disorder" rather than "disease" or "defect" did not take it outside the scope of diminished capacity. Galloway, 133 N.J. at 642, 647. Thus, for diminished capacity, "the diagnosis [does] not control" and "'[f]orms of psychopathology other than clinically-defined mental diseases or defects may affect the mental process and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense' within the meaning of N.J.S.A. 2C:4-2." State v. Kotter, 271 N.J. Super. 214, 222 (App. Div. 1994) (quoting Galloway, 133 N.J. at 643).

Relatedly, it is notable that the model jury charge for diminished capacity suggests that a distinct diagnosis is not necessary in every case. Model Jury Charges (Criminal), "Evidence of Mental Disease or Defect (N.J.S.A. 2C:4-2)" (rev. June 5, 2006). Instead, the parties may simply use the general language of "mental disease or defect" in lieu of incorporating any specific diagnosis into the charge. Ibid. If no specific diagnosis is needed, and the intent is that the defense applies broadly to any psychological issue that would impact mens rea, such principles only further reinforce that there cannot be a hardline rule for requiring expert testimony before instructing the jury on diminished capacity.

v. Many jurisdictions do not have a brightline rule requiring expert testimony in cases where a defendant is arguing diminished capacity.

Finally, although not dispositive, it is worth noting that many, if not most, states do not have a brightline rule requiring expert testimony before submitting the question of diminished capacity to a jury. Several states have said outright that there is no such requirement. State v. MacFarland, 275 A.3d 110, 134 (Vt. 2021) (holding that the relevant court rule "does not require expert testimony to present a diminished capacity defense"); State v. Bharrat, 20 A.3d 9, 19 (Conn. App. Ct. 2011) ("We do not hold that a defendant need present expert testimony to demonstrate the existence of a mental impairment, as lay testimony concerning such impairment is admissible.").

Cases from other states seem to hold implicitly that there is no such requirement by approving of trials where diminished capacity is presented without an expert. People v. Madej, 685 N.E.2d 908, 924-26 (Ill. 1997) (trial counsel not ineffective for presenting only lay testimony in support of diminished capacity); State v. Buck, 510 N.W.2d 850, 852-53 (Iowa 1994) (finding no error in allowing State to present expert testimony where defendant advanced insanity and diminished capacity only through lay witnesses); Graham v. State, 717 S.W.2d 203, 204 (Ark. 1986) (holding defendant's mother and grandmother were "qualified to express an opinion as to the appellant's mental

condition" in sole support of diminished capacity defense); State v. Bales, 410 P.3d 1088, 1096-97 (Or. Ct. App. 2017) (defendant not required to give advance notice where diminished capacity is advanced only through lay witnesses).

Other states appear to implicitly reach a similar conclusion by holding that lay testimony may sufficiently outweigh expert testimony in consideration of whether a defendant had a diminished capacity. State v. Sanders, 587 P.2d 893, 899 (Kan. 1978) ("Although the medical experts are unanimous in their diagnosis of defendant, this court does not treat medical testimony as conclusive . . . The testimony of nonexpert witnesses who observed the actions of the accused immediately before, during and after the shooting, may be considered by the jury along with testimony from expert witnesses."); Commonwealth v. Davis, 479 A.2d 1077, 1080-81 (Pa. Super. Ct. 1984) (defense expert on diminished capacity could be sufficiently rebutted by mere lay testimony).

Accordingly, there is no overall consensus that expert testimony is necessary for a diminished capacity defense, and, to the contrary, the trends tend towards the opposite.

vi. The synthesis of the above principles compels the conclusion that there can be no brightline rule requiring expert testimony before a jury can be instructed on diminished capacity.

In short, a review of the above law demonstrates that there can be no expert-testimony requirement for presenting a diminished-capacity defense.

There is no way to reconcile such a requirement with Humanik's holding that it is unconstitutional to place the burden on a defendant to prove diminished capacity. Our courts, like many others, already well accept lay testimony in support of a diminished capacity defense, and there is no reason such testimony cannot by itself meet the low rational-basis threshold that is used to evaluate whether to grant a defendant's request to instruct on diminished capacity. No court rule, no statute, and no case has ever imposed this requirement; there is nothing in our model charge that suggests such a requirement; and there is nothing resembling a national consensus for having the requirement.

Thus, this Court should clarify that if any testimony in the State's or defendant's case, whether it be expert or lay, provides a rational basis for instructing on diminished capacity, such an instruction must be provided upon a defendant's request. Any perceived weakness in the defense may simply be used as fodder for the State in arguing against it, but it should not as a matter of law preclude the instruction from being given. Courts should err on the side of allowing defendants to raise all issues approaching a tenable defense and leave it to juries to decide what is meritorious and what is not.

POINT II

THE MISHANDLING OF THE DIMINISHED-CAPACITY ISSUE AT THE TRIAL REQUIRES THE REVERSAL OF MR. MUSTAFA'S CONVICTIONS.

Understanding that there cannot be any expert-testimony requirement for instructing a jury on diminished capacity, it must also follow that the failure to instruct on diminished capacity in Mr. Mustafa's trial was erroneous, and that such error requires the reversal of his convictions. However, even if this Court does hold that expert testimony is required or otherwise believes the evidence did not warrant the instruction here, Mr. Mustafa was still deprived of a fair trial by allowing the jury to hear otherwise irrelevant and extremely prejudicial evidence concerning his mental health issues and allowing the State to argue a delusional-episode theory of the case to convict. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The evidence at Mr. Mustafa's trial was sufficient to allow for a diminished-capacity instruction, and it was reversible error not to provide it.

First, the lay testimony presented in the State's case in chief supplied a sufficient rational basis for Mr. Mustafa's requested diminished-capacity charge. As discussed at length in the Statement of Facts, there was significant testimony elicited about Mr. Mustafa's mental health problems leading up to the incident,

including: gang-stalking delusions wherein he believed he was being followed and targeted; delusions that these enemies were beaming radiation into his body; testimony from numerous witnesses about a hospitalization related to those delusions because he thought his kidneys were being destroyed; that he had lost an extreme amount of weight; that he would regularly wrap himself in tin foil and wear a foil-lined hat; that the antenna of his car was likewise covered in tin foil; that he and Ms. Fiore would regularly dissemble their cell phones and change numbers to avoid being tracked; Ms. Fiore's testimony that his behavior was similar to a schizophrenic relative; and Ms. Fiore's testimony that the shooting was specifically a product of this delusional behavior.

Such testimony fits well within the boundaries of what numerous other cases in our state have considered proper lay testimony in support of a diminished-capacity defense. Oglesby, 122 N.J. at 526, 531 (holding litany of lay testimony about "forms of bizarre conduct" required diminished-capacity instruction, including testimony about defendant's belief that his car was "inhabited by a phantom named 'Boyaz'"); Moore, 113, N.J. at 284-86 (considering, among other lay testimony, aunt's lay opinion that defendant's behavior was indicative of mental health problems, "[a]lthough not a trained psychologist"); Juinta, 224 N.J. Super. at 714-16 (lay testimony by defendant's

mother about his cognitive disabilities required diminished-capacity instruction).

Taking every inference favorable to Mr. Mustafa from the above evidence, and considering all of that evidence in a light most favorable to the instruction, it certainly provided a rational basis for concluding that a mental health disorder impacted Mr. Mustafa's mental state at the time of the shooting. See Mauricio, 117 N.J. at 412, 417.

It is also important to note that, while the State opposed the diminished-capacity instruction because it erroneously believed that it required an expert testifying as to a specific diagnosis, the State nonetheless obviously believed that there was a rational basis for concluding that Mr. Mustafa's mental health issues impacted his mental state on the night of the offense because that was the State's entire theory of the case. In both its opening and closing, the State heavily emphasized that it believed Mr. Mustafa committed the shooting in a delusional episode brought about by protracted Adderall and marijuana use. But a mental illness spurred by heavy drug use (as opposed to being merely under the influence) is still a valid mental illness both diagnostically and within the context of diminished capacity. See Pirtle v. Morgan, 313 F.3d 1160, 1169 (9th Cir. 2002) (finding defense counsel ineffective for failing to request diminished-capacity instruction where evidence at the trial supported argument "that [the

defendant] was incapable of premeditating the murders because of a mental disorder caused by chronic drug use."); Drug Abuse and Mental Illness, National Drug Intelligence Center, United States Department of Justice (archived Jan. 1, 2006) (discussing how, in some cases, "mental disorders are caused by drug abuse"). If the evidence was adequate for the State to advance such a theory in order to convict, it must have likewise been enough to support the defense's argument of diminished capacity.

Indeed, even the trial court noted that "the facts underlying the intoxication charge are far less compelling than the defendant's bizarre behavior with respect to any diminished capacity charge," despite going on to give the meagerly supported intoxication charge (which was agreed upon by the parties) but not the diminished capacity charge. (9T16-12 to 19).

In short, there was ample basis for a reasonable juror to have found that Mr. Mustafa's mens rea was impacted by mental illness on the night of the incident. Having so found, there were would have then been two possible paths to acquittal: the jurors may have found that the mental illness only mitigated the mental state for the murder offense such that Mr. Mustafa still formed the requisite mens rea necessary for reckless or aggravated manslaughter, or the jury may have acquitted Mr. Mustafa of all his offenses entirely. Accordingly, the

failure to appropriately charge the jury on diminished capacity requires the reversal of his remaining convictions.

B. Even if the case did not warrant a diminished-capacity instruction, the admission of a litany of otherwise irrelevant but substantially prejudicial evidence pertaining to Mr. Mustafa's mental health issues nonetheless requires the reversal of his convictions.

Lastly, even if this Court holds that presenting a diminished-capacity defense requires expert testimony or otherwise believes a diminished-capacity instruction was not warranted here, Mr. Mustafa's convictions must still be reversed because the refusal to instruct on diminished capacity after the parties had adduced substantial lay testimony about Mr. Mustafa's mental health issues should have resulted in a mistrial.

As discussed throughout this brief, there was significant testimony adduced at the trial about Mr. Mustafa's delusional behavior and troubled life leading up to the shooting. But if the question of whether Mr. Mustafa had a mental health problem that impacted his mental state on the night of the shooting was not an issue for the jury to consider, then all of that evidence had no material relation to the case and was only substantially prejudicial. See Tori DeAngelis, Mental illness and violence: Debunking myths, addressing realities, Monitor on Psychology, American Psychological Association (Apr. 1, 2021) (discussing how "people often believe that people with mental illness are largely responsible

for incidents of mass violence and that people with mental illness are responsible for a large share of community violence.").

No limiting instruction was given for that evidence at the end of the case, nor is it likely any such instruction could have ameliorated the prejudice of such significant evidence. Instead, the State was permitted to explicitly capitalize on that harmful evidence to convict Mr. Mustafa while he was barred entirely from meaningfully discussing the mental health issues in the defense summation. Accordingly, whatever this Court holds with respect to diminished capacity, the treatment of that issue here requires the reversal of Mr. Mustafa's remaining convictions.

CONCLUSION

For the reasons expressed herein, Mr. Mustafa's convictions must be vacated and the matter remanded for a new trial.

Respectfully submitted,

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