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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-59-24 *State v. Kader S. Mustafa* (090329)
Appellate Division Docket No.: A-1038-22

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief in the above-captioned case on behalf of amicus curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ").

TABLE OF CONTENTS

PRELIMINARY STATEMENT

The doctrine of diminished capacity gives expression to the bedrock premise that wrongdoing must be conscious to be criminal. A diminished capacity defense empowers a defendant to introduce evidence of "mental disease or defect" to prove that he lacked a state of mind that constitutes an element of the charged offense. N.J.S.A. 2C:4-2. Juries have long examined evidence of this kind to determine if a defendant with an "evil-doing hand" also possessed a "evil-meaning mind," sufficient to comprise the compound concept of criminal conduct. *Morissette v. United States*, 342 U.S. 246, 251-52 (1952).

The Appellate Division in this case has rewritten the rules of that traditional inquiry, imposing a categorical condition: only with the aid of an expert may the jury consider evidence of diminished capacity to negate the mens rea element of a crime. This condition flouts history and the Constitution.

As an initial matter, the text of the diminished capacity statute exposes an imperfect fit between the questions bearing on criminal responsibility and the information a medical expert may supply. Both the terms "disease" and "defect" in the diminished capacity statute have deep and early roots in

common law, far predating modern psychiatry. In subordinating lay testimony, the Appellate Division distorts the historic diminished capacity standard.

Foreclosing exclusive reliance on lay testimony to establish diminished capacity also undermines the constitutional right to present a complete defense. Absent any justification, the court here functionally invalidated competent, reliable evidence, shielding the State's case from the crucible of adversarial testing. Worse, by withholding a diminished capacity instruction, it neutered the evidence's exculpatory value but preserved its prejudicial impact.

Moreover, the Appellate Division's decision establishes a per se exclusion of lay-only testimony in the diminished capacity context. The court did not merely affirm that the proffered lay testimony was insufficient to warrant a diminished capacity instruction in the present case. It effectively rejected the sufficiency of all future lay testimony on diminished capacity. Prospective categorical exclusions of this kind are incompatible with due process.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies upon the statement of facts and procedural history contained in the Defendant's brief filed in this Court on June 25, 2025.

ARGUMENT

I. The statutory underpinnings, history, and purpose of the diminished capacity doctrine demonstrate that expert testimony is not necessary in all cases.

In general, expert testimony is necessary only when "a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion" absent the expert's aid. *Wyatt by Caldwell v. Wyatt*, 217 N.J. Super. 580, 591 (App. Div. 1987). And in those instances, the rule of evidence governing expert testimony is framed permissively, allowing, but not requiring, expert testimony "[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 . . . ." N.J.R.E. 702.

The diminished capacity statute also takes an expansive approach. Under that statute, all relevant evidence is admissible to show that a defendant suffered from a disease or defect that prevented him from forming the requisite mens rea. N.J.S.A. 2C:4-2 (evidence is admissible "whenever it is relevant" to the defense). The decision below thus effectively prohibits jurors from considering admissible evidence—that is, relevant lay testimony unaccompanied by expert opinion.

This wrong turn results from the fundamental misunderstanding that diminished capacity rests on a medical diagnosis. But it has never operated this

way. It is, instead, "a legal colloquialism," *State v. Breakiron*, 108 N.J. 591, 610 (1987), that effectuates moral theories of criminal accountability and culpability.

Severed from the appropriate context, the terms mental "disease" and "defect" in the diminished capacity statute may resemble medical classifications, but the doctrine's history confirms that they refer to more flexible concepts. Diminished capacity shares a lineage with the insanity defense. *See* Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 Pace L. Rev. 455, 467 (2008). When in 1842 the House of Lords announced the M'Naghten test—the same insanity standard that endures, unchanged, in New Jersey today—it used the words "defect" and "disease." *See State v. Arrington*, 480 N.J. Super. 428, 432 (App. Div. 2024); N.J.S.A. 2C:4-1 ("A person is not criminally responsible for conduct if . . . he was laboring under such a *defect* of reason, from *disease* of the mind as not to know the nature and quality of the act he was doing, or [that] what he was doing was wrong.") (emphasis added). But "[t]his test was applied by jurors decades before the advent of psychiatric expertise." *Arrington*, 480 N.J. Super. at 448 (Jacobs, J., concurring). And by the time the House of Lords articulated it, its "essential concept and phraseology" were "already ancient and thoroughly embedded in

the law." *Kahler v. Kansas*, 589 U.S. 271, 310 (2020) (quoting Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1258 (1966)). Thus, imposing modern medical definitions on the test's language is "anachronistic." *Arrington*, 480 N.J. Super. at 449 (Jacobs, J., concurring).

The diminished capacity doctrine evolved from the M'Naghten canon. Indeed, it "emerged in large measure to ameliorate the relatively narrow concept of insanity under the *M'Naghten* test . . . ." *Muench v. Israel*, 715 F.2d 1124, 1143 (7th Cir. 1983). "In short, the doctrine emerged from experience as an attempt to fashion a rational and coherent method for society to treat with compassion those among us who operate in the twilight of rationality." *Id.* In other words, diminished capacity is an old and broad theory.

To attempt to map the "disease or defect" language of the diminished capacity statute onto clinical classifications is not only inconsistent with the history and purpose of the doctrine, but also unworkable. This challenge is traceable to the foundational question: "What is a disease or defect of the mind?" *State v. Lucas*, 30 N.J. 37, 85 (1959). Medicine does not offer an answer. "[C]lassifications" used "in the approach to the treatment of the sick" do not supply the "pivotal fact upon which criminal liability would depend."

Id. Even if "psychiatrists were asked to fix a line, most would resort to an ethical or social concept, the truth of which they could not expertly demonstrate." *Id.*

The psychiatry community itself has cautioned against conflating medical and legal concepts. The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders, or "DSM-5," warns of the "risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 25 (5th ed. 2013). These dangers arise because of the gap "between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." *Id.*

The U.S. Supreme Court has noted similar hazards.

> Even when a category of mental disease is broadly accepted and the assignment of a defendant's behavior to that category is uncontroversial, the classification may suggest something very significant about a defendant's capacity, when in fact the classification tells us little or nothing about the ability of the defendant to form *mens rea* . . . .
>
> [*Clark v. Arizona*, 548 U.S. 735, 775 (2006).]

In short, "most expert testimony does not speak to the criminal law's conception of intent." Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 833 (1977). Unlike "observation evidence," including lay "testimony from those who observed what [a defendant] did and heard what he said" at the time of the alleged crime, "capacity evidence" offered by experts is "fraught with multiple perils" because "the law's categories that set the terms of the capacity judgment are not the categories of psychology that govern the expert's professional thinking." *Clark*, 548 U.S. at 757, 776-77. Thus, expert testimony on mens rea, which necessarily involves "a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility," has potential to "confuse the jury." *Id.* at 777.

This is not to suggest that expert testimony will never assist jurors in assessing diminished capacity, but only that it does not belong on a pedestal. It is not so uniquely informative and reliable that it should be a mandatory prerequisite to a diminished capacity instruction. And it should not outrank lay testimony. The Appellate Division's view that lay testimony can never be considered on its own in support of diminished capacity ignores the doctrine's textual, historical, and functional independence from psychiatric frameworks.

II. Requiring a defendant to call an expert witness in order to secure a diminished capacity instruction is unconstitutional.

The New Jersey and Federal Constitutions guarantee the "meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); *see also State v. Chambers*, 252 N.J. 561, 582 (2023); *State v. Garron*, 177 N.J. 147, 168 (2003); *State v. Budis*, 125 N.J. 519, 531 (1991). This right derives from the Compulsory Process Clauses in the United States and New Jersey Constitutions, which give the accused in a criminal prosecution the right to call "witnesses in his favor," *U.S. Const.* amend. VI; *N.J. Const.* art. I, ¶ 10, as well as the due process right to a "fair opportunity to defend against the State's accusations." *State v. Cope*, 224 N.J. 530, 551 (2016). The right to a complete defense includes the opportunity to contest the existence of any fact that must be found by the trier in order to convict. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Olden v. Kentucky*, 488 U.S. 227 (1988).

Presenting witnesses is the defendant's principal means of contesting those offense elements, and the U.S. Supreme Court has thus viewed with great skepticism "rules that prevent whole categories of defense witnesses from testifying." *Washington v. Texas*, 388 U.S. 14, 22 (1967) (striking down statute prohibiting testimony of a defendant's alleged accomplice); *see*

also Rock v. Arkansas, 483 U.S. 44, 62 (1987) (striking down state rule preventing defendant from testifying on issues previously the subject of his hypnosis); *Crane v. Kentucky*, 476 U.S. 683, 691-92 (1986) (reversing conviction for excluding evidence of circumstances surrounding confession); *Chambers v. Mississippi*, 410 U.S. 284, 299-303 (1973) (ordering new trial based on exclusion of witness's out of court confession). "In light of these cases, a rule barring evidence on the issue of mens rea may be unconstitutional so long as we determine criminal liability in part through subjective states of mind." *United States v. Pohlot*, 827 F.2d 889, 901 (3d Cir. 1987).

Here, although lay testimony about Mr. Mustafa's mental state was presented to the jury, its utility was erased because the trial court withheld a diminished capacity instruction. For Mr. Mustafa's purposes, it was as if that testimony had been categorically barred from the outset—except that its prejudicial effects survived.

The Appellate Division announced this per se exclusion of lay-only testimony without acknowledging its constitutional implications, which Mr. Mustafa raised. *See* Brief of Defendant-Appellant at 8. Needless to say, it failed to engage in the necessary searching substantive inquiry it was obligated to perform before infringing Mr. Mustafa's rights. *See State v. Garron*, 177

N.J. at 169-70 ("The competing state interest served by barring proposed evidence must be 'closely examined' when the denial or significant diminution of the rights of confrontation and compulsory process 'calls into question the ultimate integrity of the fact-finding process.'") (quoting *Chambers*, 410 U.S. at 295). For its part, the trial court expressed concern that a diminished capacity instruction would "serve to confuse this jury." *State v. Mustafa*, No. A-1038-22 (App. Div. Jan. 27, 2025) (slip op. at 22). But "[w]e have always trusted juries to sort through complex facts in various areas of law." *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part). "Even were the risk of jury confusion real enough to justify excluding evidence in most cases," that risk "would provide little basis for prohibiting all [such] evidence" absent an "inquiry" into "its role in deciding the linchpin issue of knowledge and intent." *Clark*, 548 U.S. at 793 (Kennedy, J., dissenting). What's more, New Jersey's evidence rules provide the necessary protection against confusion. *See Id.*; N.J.R.E. 403.

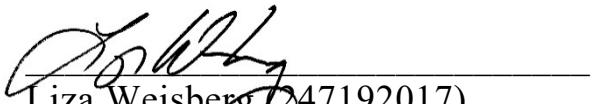
Had the Appellate Division undertaken the required constitutional analysis, it could not have avoided the conclusion that the severe burden imposed on Mr. Mustafa's right to present a complete defense was unjustified. As detailed in Section I, *supra*, lay testimony alone will frequently suffice to warrant a diminished capacity instruction. In some cases, it may even prove

more useful than expert testimony, which will often wear the misleading mantle of scientific objectivity. Here, in the glaring absence of "clear evidence" that "repudiate[es] the validity" of lay testimony on diminished capacity in all plausible scenarios, the Appellate Division's categorical rule is arbitrary and unconstitutional. *Rock*, 483 U.S. at 61.

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Division's opinion in this case.

Respectfully submitted,



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