THE DIMINISHED CAPACITY DEFENSE IN CAPITAL LITIGATION
A SUMMARY EXPLANATION

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"...The prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired*." Commentary to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev.* ***2003).***

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Under *State v. Shank* (1988), evidence of diminished capacity is admissible to show that the defendant WAS INCAPABLE OF FORMING SPECIFIC INTENT TO KILL <u>AFTER</u> PREMEDITATION AND DELIBERATION DUE TO A MENTAL OR EMOTIONAL CONDITION OR DISTURBANCE.

A successful diminished capacity defense in a prosecution for first-degree murder based upon premeditation and deliberation will reduce the offense to second-degree murder unless there is evidence to support a parallel theory of felony murder based upon a "non-specific intent" felony and there is no defense to that predicate felony.

I. Why the Diminished Capacity Defense is Essential to Capital Defense.

Almost three decades of capital litigation throughout the nation has shown that pursuing the strategy of a diminished capacity defense is the most effective way to assist a capital jury in returning a verdict for life and that it often leads to a life-saving settlement of the case by having the case prosecuted non-capitally or with a plea to LWOP or a term of years. A robust forensic report establishing a diminished capacity defense will give the prosecutor something they can use in negotiating with the victim's survivors to get acceptance of a non-capital resolution.

A diminished capacity defense is one of the best ways to humanize your client in a capital trial so that the jury can determine in the guilt phase that the defendant is not among "the worst of the worst" and that this murder was not the kind of extremely calculated and cold-blooded killing for which capital punishment is appropriate.

A diminished capacity defense, unlike a "*denial defense*," can show a jury that your client can accept responsibility for their actions and can experience remorse, two very important reasons why jurors choose life. By shouldering the immense burden of presenting the detailed life-history or "trauma history" of the client, the defense team will establish credibility with the jury and show that they can be relied upon as a credible source of truth-telling and guidance throughout the legal labyrinth of a capital trial.

A thorough investigation and compelling presentation of a diminished capacity defense will generate the by-product of empathy-rich mitigation in sentencing and support at least two statutory mental health-based mitigating circumstances.[1]

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[1] N.C.G.S. §15A-2000 (f)(2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance; and, (f)(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was impaired.

A compelling diminished capacity defense can empower a capital jury “to give full consideration of [all the] evidence that mitigates against the death penalty [which] is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime."'[2]

Therefore, it is essential for the capital defense attorney, defense experts, and the entire defense team to understand the theories, legal definitions, and underlying rationale of a diminished capacity defense and its power to generate life-saving mitigation, to identify effective jury selection questions, and to create a consistent theme for life throughout the entire trial process.[3]

The ABA Guidelines for Capital Defense Attorneys mandates that the capital defense team include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments...the presumption is that one of four core team members will have this qualification. Typically, the mitigation specialist has this training and experience.”[4] However, it is still necessary for both attorneys and all other defense team members, and certainly all forensic mental health experts on the team, to have a general understanding of the legal parameters, underlying theories, and “terms of art” comprising a diminished capacity defense. It will be up to the trial attorneys and defense experts to explain to the court and the jury in clear and understandable language, why the evidence supports a diminished capacity defense.

II. A Diminished Capacity Defense Will Lead to a Commonsense Assessment of Degrees of Guilt & Moral Culpability.

[2] Justice Sandra Day O’Connor, *Penry v. Lynaugh,* 492 U.S. 302, 319, 328, (1989) (quoting *California v. Brown,*479 U.S. 538, 545 (1987)(O' Connor **J.,** concurring).

[3] See: “Mitigation in Capital Cases,” viewable here: https://capitalpunishmentincontext.org/issues/mitigation.

[4] ABA Guidelines in Capital Cases, **31** HOFSTRA L. REV. at 952, 999-1000; downloadable at: https://scholarlycommons.law.hofstra.edu/hlr/vol31/iss4/2/ .

I'm sure you all have heard the adage, "to understand is to forgive." This is commonsense. We encounter this intuitively when we are children and especially when we raise children. Every juror should have an innate sense of this. It does not mean "to understand all is to *condone* all." Rather, this insight reflects a basic human emotional truth that helps us assess when a particular *individual* deserves a more severe or lesser punishment. Understanding why someone did something extremely horrific does not necessarily mean that person deserves "a pass" or an acquittal. A sentence of life without parole is not a "pass." A conviction of second-degree murder is not a "pass." A diminished capacity defense and capital mitigation are not about letting an offender off "Scot free." These strategies are about understanding not only the big *why* question about how the offense happened, but also the deeper life-historical question of exactly *who* our client is as a vulnerable and possibly terrified human being facing trial and being publicly exposed in all their "individual human frailties."[5]

Not only do the *ABA Guidelines for Defense Teams in Capital Litigation*[6] require us to investigate, explore, and present in a credible and compelling way a complete answer to THE BIG WHY that led our client to commit an apparently cruel and heinous act, so does the U.S. Supreme Court which has adopted these guidelines as our attorney "standard of care." This is our duty under the Fifth, Sixth, Eighth and Fourteenth Amendments in providing effective assistance of counsel and Due Process to our clients.

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[5] Only through a process which requires the sentencer to "consider in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), can capital defendants be treated "as uniquely individual human beings." *Id*.

[6] ABA Guidelines downloadable here: https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/.

The capital defense team is required to conduct the investigation of a possible mental health defense and life-history-rich mitigation **whether the capitally charged client consents to it or not.**[7] However, under *State v. Ali*, 329 N.C. 394 (1991), the client's wishes will be the final say as to what is ultimately presented at trial.[8]

A thorough guilt-phase fact and mitigation investigation will show not one big why, but NUMEROUS CONTRIBUTING AND OVERLAPPING REASONS WHY extending from the present back through the offender's lifetime, including possible prenatal and genetic influences going back several generations. **Every mitigation specialist is trained to create a family genogram which can reveal genetic and "epigenetic" inheritances of trauma and various mental disorders, including addictions, sexual abuse, family and sibling histories of suicide, homicide, incarceration; or other relevant matters BEYOND THE DEFENDANT'S CONTROL which placed them at risk for future violence through NO CHOICE OF THEIR OWN.**

III. Underlying Theory of Diminished Capacity: The Empathetic Response.

The process of showing a jury through story and example what went into putting a capital client at risk for violent behavior hopefully will trigger specific neurological responses in a juror's brain which can evoke an ***empathetic response*** to this evidence. An empathetic response most

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[7] See: *Wiggins v. Smith,539 U.S. 510 (2003)*; *Rompilla v. Beard, 545 U.S. 374 (2005)*; *Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976)*; and *Eddings v. Oklahoma, 455 U.S.104 (1982)(capital sentencers must consider all relevant mitigating evidence regarding a defendant's background, character, and* ***emotional development including evidence of a turbulent childhood, severe emotional disturbance, and physical abuse.)***

[8] See: UNC SOG BLOG here for a complete discussion about "absolute impasse" with client on what evidence to present if client objects to diminished capacity defense or mitigation. Viewable here: https://nccriminallaw.sog.unc.edu/absolute-impasse/.

often occurs when a juror is paying close attention to credible, possibly dramatic or graphic testimony presented in an anecdotal or story-like format. The best plaintiff's attorneys know this and utilize it every day in civil litigation.

All human beings learn *moral lessons* through "story" formats. It's in our DNA. I'm sure you've all heard of a "day in the life" video often played for a jury to illustrate an injured party going through their daily routine, perhaps without the use of a limb or other injury, to support a verdict for damages. There is no reason why a capital defense team cannot also do this and produce a video of parents or other witnesses describing relevant events in the client's life or to show the stressful environment a client grew up in or worked in. The video could be illustrated with photos of the defendant as a child or parent interacting with loved ones on holidays or at school or sporting events to show a prior "baseline" level of functioning before they suffered the onset of a major mental illness like schizophrenia or other debilitating mental disorder such as PTSD, or meth addiction.

Video documentations can be tailored to illustrate the testimony of experts and lay witnesses alike in a narrative or story format. If the video supports a diminished capacity defense it may be presented to support and illustrate lay testimony in the guilt phase or sentencing phase, or as a basis for expert opinion in either phase of the trial.

A video interview of a mentally disordered client with an expert and offered as part of the basis of an expert's opinion, or as illustrative evidence, possibly filmed during a competency or state-of-mind-at-the-time-of-offense evaluation, may show behaviors and impairments not readily observable on direct or cross examination of a defendant in trial.

Witnessing and hearing about the pain of others (including your client) can trigger what is called a "mirror neuron response." It happens subconsciously. Like a contagious yawn or contagious laughter. It is what a juror who is not "mitigation impaired" will likely experience when they hear about what a defendant has suffered at the hands of an abusive parent or bullying by gang members. The trauma, dangers, and deprivations suffered during a period of homelessness; being orphaned at a young age; experiencing job loss; or juvenile incarceration in a supermax facility: these kinds of experiences cause **chronic stress and are "brain-altering" experiences that can compromise a person's capacity for "free choice" and capacity for rational action in a cool state of blood in the face of a perceived threat.**

Prior trauma and chronic stress may explain why a client has a heightened or exaggerated perception of danger resulting in a client's "incapacity to deliberate in a cool state of blood." [9]

This is how mitigation works. It is how a diminished capacity defense works. It is what is meant by "mitigating value," plain and simple. But mitigation can be anything, not just mitigation arising from trauma, mental conditions, or emotional disturbances.

"Mitigation" is a strange-sounding word, but it is not a complicated thing. It is simply *any reason* whether in the evidence, or just something noticed or felt by any individual juror which they can't put into words. It may be based on the weight of all the evidence, or LACK of evidence, that the juror sees as a reason to give life. **Mitigation may simply be an inexpressible feeling that emerges from the presentation of a compelling diminished capacity defense.**
Without evidence that can evoke an *empathic response*, all the jury sentencing instructions in the world will not show a juror WHY there is life-saving mitigation. This is why presenting a diminished capacity or other mental health defense is considered an effective way to **"front-load**

[9] See: Robert Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (2017); and, *Determined: A Science of Life Without Free Will* (2024).

mitigation" in the guilt phase of a capital trial.

Giving notice of a diminished capacity defense with an accompanying detailed and compelling expert opinion and report, is one of the best ways to get a life-saving plea offer in a capital case.

Post-trial capital jury surveys over the years reveal that jurors by and large decide guilt or innocence as well as life or death in the *first phase* of a capital trial, not during the sentencing phase or final summations.[10]

Like it or not, evolution has wired the human brain to make snap-judgments about first impressions when it comes to decision-making involving personal safety and survival. First impressions are created in jury selection, not just in opening statements. First impressions in a capital case tend to be *bad* impressions created by the impersonal and dehumanizing language of prosecutors and by the very procedural structure of a capital trial.[11] According to Dr. Craig Haney, it takes a considerable amount of credible and compelling evidence to break through the dehumanizing structural procedures of a capital trial, and the unconscious or implicit biases jurors bring with them from their own life[12]. We all have unconscious biases including various racial prejudices, despite our best efforts to overcome them.[13]

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[10] See generally: The published articles and books by Scott Sundby. His excellent book length study is available here: https://www.amazon.ca/Life-Death-Decision-Weighs-Penalty/dp/1403961182; and see: https://news.miami.edu/stories/2023/02/law-professor-studies-the-decision-making-process-of-capital-murder-juries.html.

[11] See: *Death by Design: Capital Punishment As a Social Psychological System* (2005), by Craig Haney, available on Amazon.

[12] *Id.*

[13] See: robust primer on various kinds of unconscious or implicit biases, viewable here: https://www.cultureally.com/blog/what-is-unconscious-bias-training#:~:text=Unconscious%20bias%20is%20a%20subliminal,diversity%2C%20equity%2C%20and%20inclusion.

Sadly enough, there are deeply ingrained unconscious biases many persons hold against the intellectually disabled,[14] the neurodivergent, the homeless, community outsiders or immigrants, or those with a history of incarceration. These unconscious biases are constantly at work beneath the surface of every capital trial fighting against the empathic impact of inherently mitigating evidence, including evidence of diminished capacity.

If the defense team uncovers and dramatically presents, through concrete examples and story, compelling evidence that evokes an automatic empathetic response in each juror, this will allow each juror to "feel the pain" your client went through at the hands of a childhood sex abuser, or sadistic and authoritarian parent, the pain of hunger and emotional neglect, the terror of insidious voices in their head, or their constant exposure to low-level violence. The jury can then understand why the client had to develop knee-jerk reactions to real, perceived, or imaginary threats. This can counter the dehumanizing impact of unconscious bias and open a juror's heart to mitigation and a mental health defense like diminished capacity.

Compelling, overwhelming, and recurring evidence of crippling anxiety, clinical depression, PTSD, or chronic pain or stress throughout a defendant's life will evoke an automatic empathic response in each juror which will explain itself as mitigating. The best evidence supporting mitigation will tend to establish or contribute to diminished capacity and vice versa. Hopefully, shocking and traumatic life experiences in a client's social history may reach a "tipping point" in the eyes of the jury and attain the status of what attorneys practicing tort law consider: **"res ipsa loquitur" (the thing speaks for itself.)** The juror exposed in an effective and graphic

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[14] The United States Supreme Court recognized biases against the intellectually disabled in *Atkins v. Virginia*, 536 U.S. 304 (2002), as one reason to take this class of offender out of the pool of "death-eligible" offenders, stating that many jurors may view these defendants as "scary or dangerous."

way to shocking traumatic life experiences of a capital defendant will know and understand at a deep-gut-level what "mitigating value" means, and why this evidence has mitigating value.

Examples of significant mitigating emotional trauma: parental neglect or abuse, peer pressure, extreme poverty or severe emotional deprivation, exposure to violence in incarceration triggering the need to learn prison-survival skills, the chronic stress of a veteran's combat trauma, the scary onset and persistence of a serious major mental disorder, or the mental and emotional erosion of years of substance addiction or abuse.

IV. The Neuroscience of Diminished Capacity:

All the above stressors and trauma can cause a person's brain to develop hyper-reactivity to perceived or imagined threats by enlarging the amygdala structure in the brain (the "flight or fight" center) and short-circuiting the rational control centers of the frontal lobes.[15]

Trauma and chronic emotional stress can destroy a person's capacity to *deliberate* before acting and cause a person to react on impulse from fear or panic to a perceived threat without calmly considering alternatives or consequences of their acts.

V. Shopping Mitigation and Identifying Defense and Mitigation Impaired Jurors.

A diminished capacity defense will overlap and parallel evidence that can be presented and developed in greater detail as mitigation in sentencing. The capital defense attorney should draft jury selection questions well ahead of time that will enable them to "shop mitigation," challenge for cause "mitigation impaired" jurors, and explore with open-ended questions juror receptivity to

[15] See: detailed analysis of effects of chronic stress on the brain in the work of Robert Sapolsky available on Amazon: *Behave: The Biology of Humans at Our Best and Worst* (2017); and, *Determined: A Science of Life without Free Will* (2024).

a diminished capacity defense. A "defense or mitigation impaired" juror can be ***"deselected"*** from the panel. Any juror who indicates that they cannot consider and possibly give effect to the testimony of a mental health expert who is offering evidence of diminished capacity or "lack of mental capacity" to form a mental element required for conviction of first-degree murder ***should be challenged for cause.***[16]

VI. Origins of First-Degree Murder Based on "Premeditation & Deliberation:" The Evolution of "Degrees of Murder"

a. Ethical & Theological Sources from Ancient Greece and the Middle Ages to Colonial Pennsylvania.

To understand where the diminished capacity defense came from and what it is designed to do, we must dive into the traditions of Western Civilization. Our first stop down "the deep well of the past" is in 1893, when North Carolina first adopted "degrees of murder" in G.S. 14-17 (1893), which divided murder into "first-degree murder" based on "premeditation and deliberation" requiring a "specific intent to kill"; and, "second-degree murder" or "malice murder" based on a "general intent to kill." This statutory amendment required the North Carolina Supreme Court to make sense of "premeditation and deliberation." Which the Court did in *State v. Gabriel*

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[16] **Constitutionally permitted *voir dire*:** "If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction?" *State v Robinson*, 339 N.C. 263 (1994) (using an example from *State v Skipper*, 337 N.C. 1, 23 (1994)); **A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause**. *State v Leonard,* 295 N.C. 58, 62-63 (1978)."[P]art of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois,* 504 U.S. ___, ____, 112 S.Ct. 2222, 2224, 119 L. Ed. 2d 492, 503 (1992). In order to probe any such specific concerns, a defendant on trial for his life should be given great latitude in examining potential jurors. *State v. Vinson,* 287 N.C. 326, 215 S.E.2d 60 (1975), *judgment vacated in part*, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976).

Thomas (1896); and in, *State v. Dowden*, 118 N.C. 1145, 1153 (1896) (holding that where intent to kill is formed ***simultaneously*** with the act of killing, the homicide is not murder in the first degree).

In 1893 the "specific intent" components of "premeditation" and "deliberation," added by the General Assembly to existing theories of murder to distinguish between first-degree and second-degree created a near-revolution in the strategic defense and prosecution of murder cases. Prior to 1893, there was only "one degree of murder;" and all murders except manslaughters were punishable by death. "Actual or implied malice" and "intent to commit certain dangerous felonies" during which a death occurred, were the only "intent" elements a defense attorney had to address in a pre-1893 murder case.[17]

The added requirement of "premeditation and deliberation" was intended as a ***merciful or life-saving measure*** to separate the more calculated and cold-blooded "death eligible" murders from mere "malice" or "impulse murders" based on some measure of provocation.

The model for this reform arose in ***colonial Pennsylvania*** and was soon followed in a dozen states after the American Revolution eventually finding its way to North Carolina in 1893.

"Premeditation" and "deliberation" were not elements of murder in England in 1776 and were not part of English Common Law. The concepts of "premeditation and deliberation" are not discussed in the criminal law sections of *Blackstone's Commentaries on the Laws of England*. The jurisprudential origins of "premeditation" and "deliberation" appear to go back to the Middle Ages in the writings of Thomas Aquinas (See: *Summa Theologica* (1274)).

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[17] In 1868 and for the next 150 years, North Carolina punished burglary, arson, and rape with capital punishment **without a death** occurring during the perpetration of these felonies.

Aquinas borrowed these concepts from Aristotle who wrote about the rational decision-making process of "deliberation" in *The Nicomachean Ethics* (*circa* 350 BCE). Aristotle discussed various constraints compromising or limiting a person's freedom of choice. Aristotle examined the ethical implications of impersonal factors restricting voluntary acts during the process of "deliberation."

The concepts of "premeditation" and "deliberation" eventually made their way to colonial Pennsylvania, prior to the American Revolution, when a progressive colonial governor felt the need to reform the crime of murder to allow greater latitude in sentencing with degrees of culpability so that all murder convictions were not punishable by death due to extenuating circumstances. [18]

Thomas Aquinas adopted Aristotle's lengthy analysis of the ethical implications of various forms of "deliberation" as the ultimate benchmark of "moral culpability" and "willful sinfulness." For Aristotle and Aquinas, an actor's "blameworthiness" derived from their degree of "free choice" unimpaired by mental defects, lunacy, or extreme passion. For them "personal responsibility" or "moral blameworthiness" was determined by examining an actor's degree of calm rationality when deciding upon an act and by assessing the actor's capacity for free exercise of the will during commission of an act.

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[18] See: Edwin R. Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," Vol, 97, No. 6, *University of Pennsylvania Law Review* (May,1949), viewable on the internet. For a discussion of the history of the N.C. Act of 1893, dividing murder in first and second degree, see: *State v. Fuller*, 114 N.C. 885; 19 S.E. 797; 1894 N.C. LEXIS 165 (1894). For a discussion of how state courts have eroded and misunderstood the concepts of dividing murder into first and second degrees by reducing and conflating the meaning of "premeditation" and "deliberation" from what was originally intended by the Pennsylvania reformers see: Frank Brenner, "The Impulsive Murder and the Degree Device," 22 Fordham L. Rev. 274 (1953). Available at: http://ir.lawnet.fordham.edu/flr/vol22/iss3/4.

Aristotle and Aquinas weighed a person's mental and situational limitations on freedom of choice, awareness of guilt, consideration of consequences, and ability to consider alternative courses of action. For Aquinas, an actor's determination to commit or perform a forbidden or "sinful" act after reflecting upon it, knowing it may likely result in "eternal damnation," then deciding to commit the act anyway, constituted the ultimate degree of moral blameworthiness.

For Aquinas and Aristotle, the less "rational" the act was, and the more a forbidden act was seen to be driven primarily by "overwhelming emotion or extreme passion," the more "beyond the willful control" of the actor it was, and, therefore, the less morally blameworthy the act was adjudged to be.

It is apparent then that adoption of this kind of "ethical calculus" imparts a "quasi-religious" overtone to theories of first-degree murder based on "malice, premeditation and deliberation." This explains on a deep psychological and "moral level" why a diminished capacity defense has mitigating value.

In summary, a diminished capacity defense ***negates*** certain specific "rational" mental capacities or "specific intents." This is why it is called a "negating defense," not an "affirmative defense" like self-defense.

SPECIAL NOTE: ORDINARY PROVOCATION AND "IMPULSE KILLINGS" ARE CLOSELY RELATED TO DIMINISHED CAPACITY.

A person who acts in a sudden passion based on sufficient provocation is not acting rationally[19]. A person who acts under the influence of a mental disorder or emotional disturbance, such as PTSD or the manic psychotic phase of bipolar disorder, may have little or no awareness

[19] See: Sample Special Request for Jury Instructions on Ordinary (or Sufficient) Provocation at Appendix "C", p. 47.

of guilt and may have very little freedom of choice at the time of their offensive act.

A person acting in a state of extreme fear or panic may have no capacity to consider consequences and no time for or capacity to consider alternative courses of action. A person who ***is simply reacting in the moment*** to a perceived threat or gross insult MAY NOT have the capacity to deliberate or reflect on their acts and have no capacity to make plans. See: Appendix "C" at p 47.

b. The Anachronism of Felony Murder.

Somewhat incongruously, the 1893 N.C. homicide statute retained the ancient theory of "felony murder."[20] However, when one considers that in 1893 North Carolina continued to punish burglary, arson, and rape with capital punishment, first-degree felony murder made more sense when one could be sentenced to death for those felonies *without killing anyone*. The first-degree felony murder rule now seems like a relic leftover from the days of Shakespeare and William Blackstone's *Commentaries on the Laws of England.*

To achieve juridical consistency, some states have denominated "felony murder" as "second-degree murder." North Carolina has not done this. The felony murder rule continues to be a popular and frequently utilized theory by prosecutors in N.C. today. Approximately half the States in the U.S. continue to make some form of felony murder "death eligible."[21]

For now, the capital defense attorney must discover a diminished capacity defense to certain underlying "specific intent felonies" to avoid a death sentence. Unfortunately, there is no "diminished capacity defense" for felony murders predicated on "general intent" felonies.

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[20] Felony murder was invented by the Lord Chief Justice of England, Edward Coke, during the time of Shakespeare and Sir Walter Raleigh in the Seventeenth Century.

[21] See: Kimberly Kaiser & Sierra Molina, "Analyzing State-Level Variation in the Felony Murder Rule…," (July 2025); Viewable at: https://link.springer.com/article/10.1007/s12103-025-09817-8.

c. St*ate v. Gabriel Thomas,* 118 N.C. 1113 (1896)*:* The Legal Meaning of Deliberation and the "Seeds" of Diminished Capacity.

One of the first North Carolina cases to discuss what the 1893 requirement of "premeditation and deliberation" meant was *State v. Gabriel Thomas* (1896). A close reading of this case will show you what our Supreme Court determined was required to be proven in a first-degree murder case based on "premeditation and deliberation." In *Thomas* we can see the intellectual inheritance from Aristotle and Aquinas.

The *Thomas* case is still good law. It involved the "impulse killing" of a wife who was struck in the head by a husband during a heated quarrel overheard by a witness. It provides us with the distinction between a "cold-blooded and calculated killing" versus a killing committed upon "sudden impulse." To understand what the new mental elements of "premeditation and deliberation" meant, the North Carolina Supreme Court looked to how it had been interpreted in the dozen or so other states which had followed Pennsylvania's lead in creating "degrees of murder."

The language and synonyms used by the Court in *Thomas* provide legal guidance for what a capital defense attorney and mental health expert should understand and what an expert can put in a report and testify to without using what our courts deem "legal terms of art" like "premeditation" and "deliberation." The *Thomas* case calls out for a defense request for special Instructions.

The *Thomas* court states:

> "To say that murder was of the first degree, simply because it was intended at the moment, …would be to construe the words 'deliberate and premeditated' out of the statute." "**It is a perversion of terms …to apply the term 'deliberate' to any act which is done on a sudden impulse**." "An intent to kill may exist in other degrees of unjustifiable homicide [i.e., second-degree murder], but in no other degree [except in first degree murder] is that intent formed into a fixed purpose by deliberation and premeditation." … This intent is

> defined by ... [other state courts construing 'P & D'] as **a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences.** … "The fixed resolve to kill, [citation omitted] which belongs to murder in the first degree is **something different from the** minor quality of intention, **which lacks the marked and distinguishing characteristics of deliberation or** cold premeditation.**" The same state of mind is described as "a cool state of the blood"** in *State v. Carter,* 70 Mo. 594. *State v. Thomas*, 118 N.C. 1113, 1121, 24 S.E. 431, 433-434, 1896 N.C. LEXIS 184, *13-14 (citations omitted, emphasis added).

***State v. Gabriel Thomas*, also contains the "seeds" of today's diminished capacity defense in this passage:**

> "Aside from murder in the commission of the enumerated felonies, ... the rule is that, where the deliberate intention is to take life, and death ensues, it is murder in the first degree; where it is the intention to do serious bodily harm, and death ensues, it is murder in the second degree; where the intellect is so confused by drink or stimulants, [*now "voluntary intoxication"*] or by undue and yet not homicidal passion, as to be incapable of deliberation [*now what we understand as "diminished capacity"] …*and where the killing is done in the attempt to commit any other unlawful act than those enumerated in the [felony murder] statute, but with no design to take life, though the slayer would be guilty of murder at common-law, it is now only murder in the second degree." Wharton, supra, Sections15389-392; ... In order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice, or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill, in furtherance of such purpose or motive." *State v. Thomas*, 118 N.C. 1113, 1122-1123, 24 S.E. 431, 434, (1896) (citations omitted, emphasis added).

The court awarded *Thomas* a NEW TRIAL and ORDERED that the trial court should instruct on the lesser included offense of second-degree murder.

d. The special meaning of "specific intent to kill" versus a "general intent to kill."

According to *Thomas*, "specific intent to kill" in a first-degree murder based on premeditation and deliberation, means it was formed "*after* premeditation and deliberation." So, when a forensic expert is allowed to render an opinion about the "lack of

mental capacity to form specific intent to kill," this *__presumes__* the expert understands that this refers to "an intent to kill formed *after* premeditation and deliberation."

"Specific intent to kill" in first-degree murder based on P & D refers to a "cold-blooded and calculated" killing, not a murder which happens on impulse or in the heat of the moment (as described in *State v. Thomas*), such as upon "sudden impulse" or upon "sudden provocation" or "ordinary provocation."[22]

Until 1988, the primary "mental health defense" allowed in North Carolina (other than voluntary intoxication or unconsciousness) was the insanity defense.[23] A medical doctor, psychiatrist, psychologist, or other mental health professional, was not generally allowed to testify about whether a defendant had the capacity to form the element of "specific intent to kill" as required for first-degree murder ***unless*** the defense had given notice of ***insanity***. In 1988, all this changed.

e. The Diminished Capacity Defense was recognized in North Carolina in *State v. Shank,* 322 N.C. 243, 247-48 (1988).

This opened the door for testimony of any number of various mental health experts in cases where insanity was not a defense. For the last twenty-five years it has become the primary and

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[22] See: *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223, 1981 N.C. LEXIS 1105 (found evidence insufficient for premeditation and deliberation due to sudden altercation); see also: proposed jury instructions on Ordinary Provocation below at APPENDIX "C".

[23] The test for insanity in North Carolina is:
"[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if [the accused] commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act [the accused] is doing, or, if he [or she] does know this, [is] incapable of distinguishing between right and wrong ***in relation to such act***." *State v. Johnson*, 298 N.C. 47, 65-66, 257 S.E.2d 597, 612 (1979), *quoting State v. Swink*, 229 N.C. 123, 125, 47 S.E.2d 852, 853 (1948) (emphasis).

most successful defense in capital litigation. It took about a decade, after *State v. Shank*, for the Capital Defense Bar to fully understand the life-saving power of the diminished capacity defense and to discover its relevance and utility in every stage of capital litigation.

A diminished capacity defense can focus the defense investigation on relevant mitigation and facts arising from the client's entire life. Developing a diminished capacity defense can foster a deeper trust and better relationship with the client and their family. It can lead to fruitful and life-saving plea negotiations because a diminished capacity forensic report will give the prosecutor something to go to a grieving family with to explain a plea offer. The basis of a diminished capacity defense can provide the basis for a successful life-saving jury selection. If "front-loaded" in jury selection and in the guilt phase, a diminished capacity defense will provide a consistent life-giving theme throughout the trial.

f. Definition of "Diminished Capacity" in North Carolina: Also Called "Lack of Mental Capacity to Form a Required Specific Intent."

Under *State v. Shank*, evidence of diminished capacity is admissible to show that your client **WAS INCAPABLE OF FORMING SPECIFIC INTENT TO KILL AFTER PREMEDITATION AND DELIBERATION DUE TO A MENTAL OR EMOTIONAL CONDITION OR DISTURBANCE**. A successful diminished capacity defense in a prosecution for first-degree murder based upon premeditation and deliberation will reduce the offense to second degree murder unless there is evidence to support a parallel theory of felony murder.

g. Relationship to Felony Murder: General vs. Specific Intent Felonies & Merger.

Diminished capacity is not a defense to felony murder unless the underlying felony has an element of "specific intent," i.e., burglary (a prior specific intent to commit another crime once inside dwelling); armed robbery (specific intent to "permanently deprive owner of property"); ADWISIIK (specific intent to kill); or first-degree kidnapping (kidnapping for an enumerated purpose, i.e., an intent to "terrorize").[24]

. In a capital case where the defendant is being tried for first-degree murder based on premeditation and deliberation AND felony murder (based on either a general or specific intent felony),[25] it is essential to try to use the defense of diminished capacity on the P & D theory so that if the defendant is only convicted on the basis of a single felony, that felony will merge into the guilt phase conviction and will not be available as an aggravating circumstance for capital sentencing under 15A-2000, (e) (5) (if that felony is one that is specified in (e) (5).[26] This strategy may be the only way to avoid a death sentence. However, if there is evidence at trial to support the commission of a separate "uncharged felony," that ***felony will not merge*** and may be an additional basis for a felony murder instruction ***and*** an aggravating circumstance if it is one specified by 15A-2000 (e)(5).

VII. Consent of Defendant May Be Required to Present a Diminished Capacity Defense: *Harbison* Hearing.

[24] If the state is trying the defendant only on the theory of felony murder and the evidence for that felony is not in conflict, the court will not instruct on a lesser-included offense. *State v. Millsaps*, 356 N.C. 556, 557, 572 S.E.2d 767, 768, (2002). If that felony does not have an element of specific intent, diminished capacity and voluntary intoxication are not available defenses since both only negate specific intent elements that are not present in a "non-specific intent" predicate felony.

[25] Diminished capacity is a defense to felony murder only if it is a defense to the underlying felony, *State v. Roache*, 358 N.C. 243 (2004); *State v. Carroll*, 356 N.C. 526 (2002); *State v. Daughtry*, 340 N.C. 488 (1995) (first-degree sexual offense not a specific-intent crime; intent to commit the crime is inferred from commission of the act); *State v. Page*, 346 N.C. 689 (1997) (diminished capacity isn't a defense to AWDWLEO because it is a general intent crime).

[26] 15A-2000 (e)(5): The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The Court should conduct a *Harbison* hearing prior to jury selection to be sure the defendant understands and consents to counsel presenting evidence of diminished capacity since **in most cases it will entail an admission that the defendant committed the act resulting in death or other acts committed during** any lesser included offenses.

VIII. Special Circumstance: When Defendant Does Not Concede Commission of Act Resulting in Death or Act Required for the Underlying "Specific Intent Felony.

In some cases a defendant may not recall committing the act resulting in death due to the additional possible defense of voluntary intoxication or the defendant may have been "blacked out" at the time of the offense due to psychosis or other mental defect. In that case the defendant may not be able to make a "knowing, voluntary, and informed decision" to concede to their "commission of the act or acts resulting in the death of the victim." The defendant, based upon a plea of not guilty, has a due process right to contest every element of the offense (s) charged and wish the state to first prove beyond a reasonable doubt the identity of the perpetrator, that *they* (and not a third party) committed the act or acts resulting in death of the victim and then, if the jury so finds, allow counsel to ***argue in the alternative*** that the jury should consider whether the defendant, as a result of a mental disorder or emotional disturbance, was incapable of forming "specific intent to kill after premeditation and deliberation," as required by the elements of first-degree murder based upon "malice, premeditation, and deliberation."

PRACTICE POINTER:

As of this writing, 9/1/2026, the defense will most likely have to litigate whether this kind of alternative argument will be allowed, due to a ruling in *State v. Copenhaver,* ___N.C. App.__ (2025), which seems to require defendant to make a "limited concession" to having committed the act resulting in death in order to present a diminished capacity defense. However, *Copenhaver* may eventually be seen as an "outlier" and its "holding" may be limited to the facts of that case and the limited question presented on appeal in that case. **A suggested "Motion to Allow Arguments in the Alternative" as a matter of due process and constitutional right is included in Appendix "D" to this paper.**

Depending on the facts and defense strategy, and existence of alternative theories of defense, the defendant should still consent in a *Harbison* hearing to allow counsel to argue in the alternative that the defendant may be only guilty of second-degree murder or other lesser included offense in a felony murder case if the jury finds diminished capacity.

IX. Notice Requirement: Within 20 days of Trial Date Set by Court; May Trigger Independent State Exam; Defense May Seek Protective Orders to Record Evaluation Interview or Allow Defense Counsel to be Present at it.

Diminished capacity is a "negating" defense which requires notice to the State under 15A-905 (c)(1) (if the State has provided discovery and moved for reciprocal discovery) within 20 days of the case being set for trial by the Court, unless another later date is ordered, and requires notice of a defense expert, their CV and report "within a reasonable time prior to trial."

The State may request discovery of the expert's data and interview notes and copies of any other materials which they relied upon in forming their opinions. **Defense counsel should be careful to protect and clearly label any confidential and privileged attorney work product communications and emails with defense experts so as not to subject confidential materials to discovery or inadvertently disclose confidential communications to the State.**

It is advisable NOT to provide notice of diminished capacity (or insanity) to the State until the defense has a final report or reports from defense experts AND the trial team knows they have the consent of the defendant to offer a diminished capacity (or insanity) defense. The defense should make every effort to resist the State prematurely sending the defendant

off for a State evaluation without the defense having provided a copy of defense expert reports to the State. (See also: *State v. Clark*, below at footnote #25).

If the defendant is already committed for evaluation of capacity to proceed, the defense should resist the State attempting a premature diminished capacity evaluation (or state-of-mind at the time of the offense evaluation) until the defense has provided notice and defense expert reports to the State.[27]

Late Notice of Diminished Capacity: What to do.

If you file late notice of diminished capacity, the court has discretion to overlook late notice under 15A-952(e), and you can argue that you had good cause for filing late notice under *State v. Nelson*, 76 N.C. App. 371 (1985), *modified and aff'd*, 316 N.C. 350, 354 (1986). You can also argue that your client has a right to present a diminished capacity defense, notwithstanding late notice, under the Sixth and Fourteenth Amendments and Art. 1, Section 23 of the NC Constitution. The Court should allow late notice unless it is so late as to unduly prejudice the State's

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[27] *State v. Clark,* 128 N.C. App. 87, 94-95, 493 S.E.2d 770, 774-775, 1997 N.C. App. LEXIS 1280, *11-14: "When a defendant attempts to establish a diminished capacity defense and introduces expert testimony regarding his mental status, the State may then introduce expert testimony derived from prior court-ordered psychiatric examinations ...to rebut that testimony without implicating the fifth amendment of the U.S. Constitution or Article I, Section 23 of the North Carolina Constitution. See *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903(1985); *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336, *reh'g or modification denied,* 483 U.S. 1044, 108 S. Ct. 19, 97 L. Ed. 2d 807 (1987); *U.S. v. Byers,* 239 U.S. App. D.C. 1, 740 F.2d 1104 (D.C. Cir. 1984). In *Huff, supra,* our Supreme Court specifically addressed the constitutional propriety of multiple psychiatric examinations when used by the State for the purpose of rebutting a defendant's assertion of the insanity defense. There, the Court held that "a fair opportunity to rebut may include more than one examination of defendant." *Huff*, 325 N.C. at 47, 381 S.E.2d at 661. Although the issue in *Huff* involved the State's right to rebut a defendant's insanity defense, and in this case Clark asserted a diminished capacity defense, we nonetheless believe that the rationale set forth by the *Huff* court applies here. *Huff* implicitly empowers a trial court with the authority to require a defendant to submit to more than one mental examination for the purpose of inquiring into his mental status at the time of the alleged offense when that mental status is made an issue, in some form or another, by the defendant. *State v. Clark,* 128 N.C. App. 87, 94-95, 493 S.E.2d 770, 774-775, 1997 N.C. App. LEXIS 1280, *11-14.

opportunity to respond to it (i.e., during or at the time of trial). Late notice may trigger a continuance so that the State can obtain its own forensic examination of the defendant. The trial court should understand that to prevent the case from coming back for ineffective assistance of counsel. A continuance to allow the State to challenge the defense may be wiser than denying presentation of the defense altogether. However, counsel should have good reasons for the late notice and certify that late notice was not for purposes of delay or ambush.

If the investigation for the defense [or the evidence for the State] shows that the defendant qualifies for the diminished capacity defense, and the defendant consents to an assertion of this defense at trial, the defendant has a Due Process Right under the 6th and 14th Amendments, and Art. I, Section 23, of the North Carolina Constitution "to present a defense" and evidence of it. If the Court refuses to allow presentation of this defense, make an exception and offer of proof to preserve the record by **putting on live testimony** from your experts or lay witnesses.

Notice of diminished capacity will likely trigger a motion by the State for another evaluation by Central Regional Hospital or by a private expert of the State's choosing. See footnote #25, *supra.* If this happens the defendant can file a motion for an order to require the State evaluator to videotape the State expert's interview with defendant and allow counsel to be outside the room of the interview if client needs to consult with them.

X. The Defendant Has the Burden of Production on Diminished Capacity.

The defendant bears the **burden of production** on this defense to get a jury instruction. However, the State always bears the burden of persuasion and the burden of proof beyond a reasonable doubt that despite evidence of diminished capacity, the defendant ***in fact*** formed specific intent to kill after premeditation and deliberation. *State v. Shareef*, __ N.C. App. __, 727 S.E.2d 387 (2012) (citing *State v. Mash*, 323 N.C. 339 (1988)).

The burden of production for diminished capacity means that based on all the evidence for the State as well as the defense, including the testimony of all experts and lay witnesses AND any admissible statements or testimony of the defendant, that enough evidence has been presented to the jury to:

RAISE A REASONABLE DOUBT THAT AT THE TIME OF THE OFFENSE, AS A RESULT OF A MENTAL, EMOTIONAL, OR OTHER MEDICAL CONDITION OR DISTURBANCE, THE DEFENDANT WAS INCAPABLE OF FORMING THE SPECIFIC INTENT REQUIRED FOR FIRST DEGREE MURDER UNDER THE THEORY OF PREMEDITATION AND DELIBERATION.

XI. Legal Definitions of "Premeditation and Deliberation" and "Cool State of Blood."

In order to know what kinds of "specific intent" elements a diminished capacity defense is "negating," it is helpful to be aware of the various North Carolina definitions of "premeditation" and "deliberation" in light of the *State v. Gabriel Thomas* opinion issued in 1896 as discussed above, and as illustrated in the N.C. Pattern Jury Instructions:

> "With regard to premeditation and deliberation, premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; State v. Myers, 299 N.C. 671, 263 S.E. 2d 768 (1980). **Deliberation means an intent to kill, carried out in a cool state of blood in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.** *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837; *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). **The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome his reason**. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768." *State v. Barts*, 316 N.C. 666, 687, 343 S.E.2d 828, 842, 1986 N.C. LEXIS 2395, *46-47. (emphasis).

A common example given in jury instructions explaining to a jury how they can "infer" premeditation and deliberation is:

> "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. ... Among other circumstances to be considered in determining

whether a killing was with premeditation and deliberation are: (1) **want of provocation on the part of the deceased**; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased had been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704. We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). *State v. Brown*, 306 N.C. 151 (1982). *State v. Barts,* 316 N.C. 666, 687-688, 343 S.E.2d 828, 842, 1986 N.C. LEXIS 2395,*47-48.

CAUTIONARY NOTE:

It is important to understand that the above "circumstances" are simply "some evidence" possibly indicating "premeditation and deliberation" and are rebuttable by a diminished capacity defense. The jury should be told that these are not "mandatory presumptions". The above circumstances simply give rise to permissible inferences of intent which a diminished capacity defense negates.

XII. WHAT IS NOT PREMEDITATION AND DELIBERATION?

YOU MAY NEED TO SUBMIT WRITTEN SPECIAL JURY INTRUCTIONS BASED ON THESE CASES IF THE EVIDENCE SUPPORTS THEM. The cases below are NOT examples of "diminished capacity" because in these cases the defendant may have been capable of forming "specific intent to kill" after P & D but did not actually do so because there was not enough time.

State v. Misenheimer, 304 N.C. 108, 113 (1981) (although there may have been time for deliberation, if the purpose to kill was **formed and immediately executed in a passion, the murder is not deliberate and premeditated**).

For other examples of the lack of deliberation, *see also State v. Corn*, 303 N.C. 293, 298 (1981); *State v. Williams,* 144 N.C. App. 526, 530-31 (2001).

***State v. Dowden*, 118 N.C. 1145, 1153 (1896) (where the intent to kill is**

formed simultaneously with the act of killing, the homicide is not murder in the first degree).

"To say that murder was of the first degree, simply because it was intended at the moment, …would be to construe the words 'deliberate and premeditated' out of the statute." "**It is a perversion of terms …to apply the term 'deliberate' to any act which is done on a sudden impulse**." *State v. Thomas,* 118 N.C. 1113, 1122-1123, 24 S.E. 431, 434, 1896 N.C. LEXIS 184, *15-17 (citations omitted, emphasis added).

XIII. WHAT EXPERTS ARE NEEDED AND OTHER EXPERT MATTERS IF YOUR CLIENT IS FLORIDLY PSYCHOTIC NOW.

SPECIAL NOTE: If your client is "floridly psychotic" at the beginning of your appointment, you will need to get a defense psychiatrist to do an early work-product examination to determine PRESENT CAPACITY TO PROCEED. You may need to get an order for medication and/or treatment for the client before you and your team and experts can develop a diminished capacity, insanity, or other mental health defense. IF THE DEFENDANT IS INCAPABLE OF PROCEEDING AT THE TIME OF ARREST THIS IS A MAJOR "RED FLAG" THAT THEY MOST LIKELY WILL HAVE A DIMINISHED CAPACITY OR INSANITY DEFENSE AT TRIAL.

If your client needs to be committed as incapable of proceeding, you and the defense team are still permitted to visit them at the 24-hour facility to keep developing and maintaining the attorney/client relationship.

THE SEARCH FOR RECORDS AND LAY WITNESSES SHOULD CONTINUE DURING COMMITMENT FOR A CAPACITY EVALUATION OR FOR RESTORATION OF CAPACITY.

The first thing you need to do in preparing any mental health defense is to seek funds from the Capital Defender's Office for a private investigator, and a mitigation specialist who possess a working knowledge of mental health issues and who is aware of the kind of records and interviews the defense will need to investigate all aspects of a mental health defense.

The attorney should stay in at least monthly contact with these members of the defense team and brief them on what is needed to understand what mental disorders, disabilities, personal trauma, addictions, social, emotional, environmental, or other factors may have affected the client's state of mind at the time of the offense. These investigators can be used to obtain confidential work product interviews with the defendant and others to assist the defense attorney, and later other forensic experts, in getting an accurate disclosure from the client about their state of mind at the time of the offense. These investigators can also identify and vet other family members and associates of the defendant who may serve as "lay witnesses" to the defendant's mental health history and state of mind at the time of the offense. Lay opinion is admissible if relevant to defendant's state of mind at the time of the offense and based on the lay witness's personal knowledge and observations of the defendant.[28]

Your forensic mental health experts should include at least a forensic psychologist and a forensic psychiatrist. Know the differences and limitations of these experts. Vet your experts with other experienced attorneys on the capital roster and with Sarah Olson, the IDS

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[28] "[U]under Rule 701 the lay opinions regarding defendant's insanity are admissible if they are based on firsthand knowledge and if they are helpful to the jury. *State v. Davis,* 321 N.C. 52, 56, 361 S.E.2d 724, 726, 1987 N.C. LEXIS 2506, *8-9. "A lay witness may testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1986). "A lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury." *State v. Moore*, 268 N.C. 124, 127, 150 S.E. 2d 47, 49 (1966). Bayman testified at trial that he had known defendant three to five years, and that he was with him several hours on 9 July 1985. Clearly, Bayman had the opportunity to form an opinion as to defendant's mental capacity. In *State v. Moore*, we held that the trial court erred by refusing to allow a witness to answer defense counsel's question as to whether the defendant was acting like a man 'not in his right mind.'" *State v. Strickland*, 321 N.C. 31, 38-39, 361 S.E.2d 882, 886, 1987 N.C. LEXIS 2505, *15-16.

Forensic Resource attorney, to see if they are appropriate for your case and compatible with your client and your defense team. Later you may need other experts like a neuropsychologist or radiologist to do an MRI or other brain scan.

It is often helpful to request an EARLY CONSULT with the Capital Defender's Office or Trial Resource Counsel, Terry Alford, for additional guidance on locating an appropriate expert and to screen possible defenses and issues raised by your case. Do some legal research on your possible experts to identify prior appellate cases in which they have testified to identify any issues with their earlier testimony that may affect your decision.

Use Google and do some preliminary research in the DSM-V on any known mental disorders your client may have or have been treated for, as disclosed in school or medical records, to intelligently and productively engage with consulting attorneys so they can provide you with relevant advice and recommendations for your case.

There are several online checklists or "screening tools" you or your investigators can use to identify signs of traumatic brain injury, PTSD, combat trauma, or substance addiction or abuse.29 The DSM-V-TR, is also a great place to review symptoms your client may be presenting with from major personality disorders to serious mental disorders like schizophrenia, psychosis, or bi-polar disorders.

DO NOT ASK YOUR EXPERT TO DO A "DRIVE BY" EVALUATION" WITHOUT PROVIDING OR DISCUSSING WITH THEM SPECIFIC REFERRAL QUESTIONS.

DO NOT ASK YOUR EXPERT TO JUST "GO SEE MY CLIENT AND TELL ME WHAT'S WRONG WITH THEM.

Examples of specific referral questions are:

1. Can you evaluate the defendant for capacity to stand trial?

2. Can you evaluate the defendant for intellectual disability?
3. Can you evaluate the defendant for state-of-mind at the time of the offense, i.e., for [diminished capacity, voluntary intoxication, or insanity]?
4. Can you evaluate the defendant for the presence of a neuropsychological disorder, [i.e., for frontal lobe syndrome, PTSD, traumatic brain injury[29], or other organic brain defect?]

XIV. WHAT SHOULD YOUR EXPERT REVIEW IN ORDER TO EVALUATE THE CLIENT FOR DIMINISHED CAPACITY AND WHAT SHOULD GO INTO A FORENSIC REPORT ON DIMCAP?

In addition to developing a working relationship with the client through numerous in-person interviews, the expert should review **ALL RELEVANT DATA**: i.e., law enforcement and defense interviews with defendant, family, & eye witnesses; relevant state discovery; relevant digital and phone records; relevant text messages and social media posts; hospital, medical, pediatric, and prenatal records; relevant juvenile records and social histories; RELEVANT PRIOR CRIMINAL HISTORY; police "service reports;" prior psychiatric records; involuntary commitment court files and medical/psychiatric reports filed with the court; DSS records; employment records; educational and guidance records; relevant state discovery including the autopsy and relevant crime scene photos; jail medical and/or medication records; prison mental health records; prior psychological or neurological tests and records; prior MRI, PET scans, head X-rays, EEG's, and CAT scans; prior intelligence and personality testing; and any other relevant

[29] Your mitigation specialist may screen for the presence of some disorders using tools available on the internet. See for example: BIST-3, Brain Injury Screening Tool: downloadable here:
https://tbin.aut.ac.nz/__data/assets/pdf_file/0015/1017420/BIST-v3-15.05.25.pdf;
PTSD Screening Tool, downloadable here:
https://www.ptsd.va.gov/professional/assessment/documents/PCL5_Standard_form.pdf.

materials that should be relied upon by the expert or requested by your expert.

PROVIDE THE EXPERT WITH RELEVANT RECORDS AS YOU COLLECT THEM.

XV. WHAT CAN THE DEFENSE EXPERT SAY OR TESTIFY TO IN COURT?

North Carolina Rules of Evidence, Rule 704, Opinion on Ultimate Issue, states:

> (a) In General- Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

My reading of Rule 704 (b) above is that your expert is prohibited from offering an opinion that the defendant did or did not ACTUALLY form "specific intent to kill after premeditation or deliberation at the time of the offense," as that is a conclusion for the jury as the trier of fact.

However, North Carolina court interpretations of 704 (b), following *State v. Shank and its progeny,* specifically allows an expert to testify to an opinion that the defendant was suffering from a mental or emotional disorder, condition, or disturbance at the time of the offense which rendered them incapable of forming "specific intent to kill." The case law may seem complicated, but once you read a few cases you should be able to grasp the rules. Daniel Spiegel at the UNC School of Government has published an excellent blog and created a helpful chart outlining what a mental health expert can and cannot say under the N.C. Rules of Evidence, viewable here: https://nccriminallaw.sog.unc.edu/2025/12/10/mental-health-defenses-diminished-capacity-and-voluntary-intoxication-what-can-the-expert-say/.

The term "diminished capacity" does not appear in the body of the NC Pattern Jury Instructions where it is referred to as "lack of mental capacity" and is included in the same pattern instruction as voluntary intoxication.

The general rule is that your expert should not use terms that are considered “legal conclusions” or “legal terms of art.” Examples of these terms are “diminished capacity,” “cool state of blood,” “premeditation,” and “deliberation.” Under *State v. Shank,* these may be considered “legal terms of art.” If your forensic expert in psychiatry or psychology is not an attorney and has received no legal training or education in North Carolina criminal law, the appellate courts have held that they CANNOT use the terms “premeditation,” “deliberation,” or “cool state of blood” because those terms are considered “legal terms of art.” *State v. Shank*, 322 N.C. 243, 247-48 (1988).

If your experts have been trained in the law, it’s unclear whether the trial court would allow them to use these “legal terms of art,” especially considering Rule 704 (b), described above. Some attorneys have been successful in getting a trial court to allow their experts to use some of these terms of art; however, ***I would caution against it*** because that would open the door for State experts to also use the terms of art as happened in, *State v. Cabe,* 131 N.C. App. 310 (1998), where the State psychiatrist was allowed to testify the defendant *could have formed* “premeditation and deliberation” because the defense “opened the door” to the use of legal terms of art on direct exam of their own defense expert.

This is what your experts can say:

1. An expert opinion is admissible to show that, as a result of a mental disorder, mental condition, and/or an emotional condition or disturbance, the defendant could not form “specific intent to kill” at the time of the offense. *State v. Shank,* 322 N.C. 243, 247-48 (1988).

2. An expert can testify to an opinion that the defendant did not have the capacity to "make and carry out plans" because they were "under the influence of mental or emotional disturbance," *Id.,* or

3. At the time of the offense they could not consider and weigh the consequences of their acts because they were acting from a severe emotional disturbance characterized by irrational fear and panic at the time of the offense. See: *State v. Shank*, 322 N.C. 243, 247-48 (1988); and, *State v. Gilbert Thomas, supra.*

4. Under *State v. McDowell*, 215 N.C. App. 184, 715 S.E.2d 602 (2011), the defense expert must render more than a "speculative opinion" concerning the defendant's "possible state of mind" at the time of the offense. *McDowell* holds that a diminished capacity defense to first-degree murder on the basis of premeditation and deliberation requires *affirmative evidence* of an inability to form specific intent to kill and must be based on more than speculation or conjecture.

In one North Carolina case, *State v. Jackson*, 340 N.C. 301, 306, 457 S.E.2d 862, 865, (1995), an expert on voluntary intoxication was NOT ALLOWED to testify after a *voir dire* showed that the expert had not reviewed relevant statements and interviews of the defendant and other discovery in the case.[30]

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[30] "The trial court did not err by excluding a psychologist's expert opinion testimony in a first-degree murder trial that defendant's voluntary intoxication on the night of the murder rendered him incapable of forming the specific intent to kill and of carrying out plans because the psychologist's testimony was, at best, contradictory and equivocal and could not have been helpful to the trier of fact in determining whether defendant specifically intended to kill the victim where evidence presented during a *voir dire* hearing showed that the witness formulated his opinion as to defendant's intoxication without interviewing the officers who were in contact with defendant after his arrest on the morning of the murder; the opinion of the witness could not have been with adequate consideration of defendant's formal confession to the police in which defendant stated that, after he had engaged in a fight, he obtained his shotgun, drove around searching for those with whom he had fought, and took aim with the shotgun and shot the victim because he was the main one who had hit defendant, since the confession was not made available to the witness until the morning of his testimony; the witness arrived at his opinion without taking into account an officer's

Several North Carolina cases have held that the defense expert can express an opinion that describes in "lay terms" what the law considers the term "deliberation" to mean. This seems consistent with Rule 704 (a) which allows opinions "that embrace an ultimate issue."[31]

Examples of proper and improper expert testimony from the UNC School of Government, Superior Court Judge's Bench Book are:

a. An expert in psychiatry and addiction medicine was allowed to testify that the defendant lacked the capacity to form the **specific intent to kill,** *see, e.g., State v. Daniel,* 333 N.C. 756, 760-64 (1993) (trial court erred by excluding testimony from a defense expert to this effect; noting that although it has held that expert testimony regarding precise legal terms should be excluded, **"specific intent to kill" is not one of those precise legal terms that is off limits);**
b. A mental health expert was allowed to testify that the defendant lacked the **capacity to plan, think, or reflect,** *Daniel,* 333 N.C. at 760-64 (first-degree murder case);
c. That the defendant's **capacity to make and carry out plans was impaired**, *State v. Shank*, 322 N.C. 243, 246-251 (1988) …*see also State v. Fisher*, 336 N.C. 684, 704

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testimony that he overheard a telephone conversation by defendant on the morning of his arrest during which defendant said that he had killed a man and meant to kill him; the witness was not aware of a statement made by defendant to a friend shortly before the shooting that "someone is going to die tonight"; and **the witness concluded his *voir dire* testimony by admitting that his opinion as to defendant's capacity to form a specific intent to kill would have been different had he been aware of defendant's confession to the police and statements to others before making his assessment."** *State v. Jackson*, 340 N.C. 301, 306, 457 S.E.2d 862, 865, 1995)(emphasis).

[31] **CAUTION ABOUT THE SCOPE OF CROSS EXAMINATION OF THE DEFENSE EXPERT:** In *State v. Wallace*, 351 N.C. 481, 523 (2000) the Supreme Court approved of the State's cross-examination of a defense expert about unrelated crimes by the defendant to explore the foundation of the expert's opinion of the defendant's mental state at the time. **Therefore, the defense expert should be prepared to explain why or why not a defendant's prior record, or parts of that record, are or are not a relevant basis for their opinions in the case.**

(1994) (noting that a defense expert properly was allowed to opine regarding the defendant's **ability to formulate and carry out a plan).**

d. That the defendant **acted while under the influence of a mental or emotional disturbance**, *Shank,* 322 N.C. at 246-51.

e. *State v. Teague*, 134 N.C. App. 702, 708–09 (1999) (proper to allow state expert to opine that one of victim's "gunshot wounds to head was consistent with intent to cause death"). [PLEASE NOTE THAT THIS TESTIMONY IS ONLY SUFFICIENT TO SHOW A "GENERAL INTENT TO KILL" for purposes of second-degree murder, and is NOT THE SAME AS SAYING THE DEFENDANT ACTUALLY FORMED SPECIFIC INTENT TO KILL *AFTER* PREMEDITATION AND DELIBERATION.]

f. ***State v. Weeks***, 322 N.C. 152 (1988) (trial judge properly prohibited defendant's mental health experts from offering testimony about legal conclusions that defendant did not act "in a cool state of mind" that expert was not qualified to make).

So, your expert could express an opinion that the defendant was suffering from a mental or emotional condition or disturbance that rendered them incapable of forming "specific intent to kill," or which rendered them "incapable of making and carrying out plans," or "that the defendant was under the influence of a mental or emotional disturbance which prevented them from calmly reflecting upon their actions at the time of the offense," or which prevented them from "weighing alternative courses of action," or which rendered them "incapable of weighing the consequences of their actions."

XVI. REVIEW YOUR EXPERT'S OPINIONS WITH THEM BEFORE THEY WRITE THEIR REPORT SO THEY UNDERSTAND THE LIMITS AND PARAMETERS OF THEIR TESTIMONY.

Discuss the specific conclusions and wording of the expert's final opinions and conclusions before they finalize their report. The opinion must affirmatively state that the defendant's mental or emotional conditions or disturbances at the time of the offense "significantly impaired" or "entirely compromised" their capacity to formulate "a specific intent to kill." The expert should be asked to include a statement that their opinions may support one or both of the statutory mental health mitigating circumstances, 15A-2000 (f)(2) and (f)(6).

As the lead capital defense attorney, you need to see that the expert's opinion and conclusions for a diminished capacity defense in the guilt phase is ***clear and affirmative***, avoids speculation, and is enough to raise a reasonable doubt as to whether the defendant WAS INCAPABLE of forming specific intent to kill after premeditation and DELIBERATION.

XVII. LAY WITNESSES AND ANECDOTAL STORIES.

You should try to use as many lay witnesses as possible including family members and close associates of the defendant in the guilt phase to show the jury examples of the defendant acting out under prior similar emotional disturbances or on the day of the offense to lay a basis for defense expert opinions or to establish a diminished capacity defense without the use of an expert if one is not available. Lay opinion is admissible in NC if based upon the lay witness's personal observations or personal knowledge under Rule 701.

It is a good idea for your experts to have personally interviewed these lay witnesses in addition to reading any of your investigator or law enforcement interviews with them. If necessary, the expert may interview these witnesses by phone, zoom, or facetime to add weight to their reliance on this information in forming an opinion.

XVIII. THE NEED TO DEVELOP A CLOSE AND TRUSTING RELATIONSHIP WITH CLIENT TO OBTAIN RELIABLE

DISCLOSURES TO ESTABLISH AN ACCURATE STATE OF MIND AT TIME OF THE OFFENSE.

A close and informed working relationship between the attorneys, defense team, the defendant, and their family and loved ones is essential to developing a reliable mental health history and anecdote-based and verifiable theme for a successful diminished capacity defense. Due to cultural, linguistic, psychological impairments, or other social gaps or challenges, at least one member of the defense team needs to find out how best to communicate with the client.

It is often a good idea to use the time waiting to obtain and review State discovery with the client to build and develop this trusting relationship by discussing casual or “family matters,” before attempting to do a “deep dive” into the client’s own state of mind at the time of the offense due to the premature danger of denials, intentional false narratives, or confabulation that often happens before you have built a comfortable relationship of trust with the client and they realize that you are on their side.

Commentary to ABA Guideline 10.5 (Relationship with the Client) addresses the importance of establishing a relationship of trust: “Many capital defendants are ...severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be [intellectually disabled] or have other cognitive impairments that affect their judgment and understanding, they may be depressed and even suicidal; **or they may be in complete denial in the face of overwhelming evidence.”**[32]

XIX. THE PROBLEM OF INNOCENT “CONFABULATION” OR FALSE MEMORIES.

[32] See: Russell Stetler, The Mystery of Mitigation, downloadable here: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1075&context=jlasc.

"Individuals with serious mental illness or certain neurological damage so frequently deny their conditions that there is a clinical term, ***anosognosia,*** for the denial, which may itself be symptomatic."[33]

Another issue complicating forensic state-of-mind-at-the-time-of-offense evaluations is that a person with brain damage, fetal alcohol syndrome, TBI, dementia or delirium may "construct" ***false memories*** to explain behavior or ***unintentionally confabulate*** a reason for their sudden behavior after-the-fact of the behavior to explain or rationalize violent behavior that was generated subconsciously[34]. Many of these clients are now trying to recall or explain to their attorney or expert what happened or "what they were thinking or feeling" AFTER the psychosis or delirium from which they were suffering at the time of the offense conduct has passed.

This is especially difficult for a mentally disordered offender to understand or have personal insight into. The defense attorney and forensic experts should be sensitive to this when it occurs and not immediately assume the client is "malingering."

The attorney should be prepared to deal with the likelihood that a mentally disordered defendant may have made several "inconsistent statements" to law enforcement as a result of this phenomenon and be prepared to acknowledge this. However, the defense should be prepared to show through the forensic expert that the client has either now worked through these inconsistencies, or that the expert can explain the inconsistencies as an artifact of the client's mental disorder.

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[33] *See:* Xavier Amador, "I'M NOT SICK/I don't need help!" (2nd ed. 2007); YouTube talk viewable here: https://www.youtube.com/watch?v=58WzJAsKT0E.

[34] *See*: "Is it confabulation, malingering, or deceit?" Viewable here: https://psychology.tips/confabulation/.

If the State requests a jury instruction that the client's inconsistent statements can be considered by the jury as an "awareness of guilt," be prepared to argue that it is up to the jury to decide beyond a reasonable doubt exactly "what" the defendant would have been conscious of: a simple act resulting in death, or "first-degree murder", "second-degree murder", or "manslaughter"?

The defendant may have been aware of having committed "an act" but that does not necessarily mean they were aware of committing **every element** of first-degree murder.[35]

The mentally disordered client may never recall exactly what they were thinking at the time of an offense due to an organic defect or other medical condition like delirium. In my opinion it is tantamount to "neglect of due diligence" and possibly "client abuse" to insist that clients in this kind of disordered state of mind, ***"must give their side of the story or else!"*** The attorney or forensic examiner should NEVER refuse to complete the work needed to.examine all available collateral sources that can shed light on the client's state of mind at the time of offense, especially if the client ***cannot*** "give their side of the story" for valid medical, emotional, or psychiatric reasons.

In the eyes of the Court or the prosecution an offender's statements about the offense conduct may seem "self-serving" or be characterized as "malingering." **Further investigation may reveal the offender's statements or explanation of events is *an unintentional generation of a false memory with no intent to deceive*.** The defense team must be prepared to patiently explain with anecdotal stories and evidence from the client's past life WHY the client may be

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[35] See: *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) ("[t]he ability to choose is not necessarily inconsistent with a diminished capacity defense in that the **mere decision to commit an act does not satisfy the test for specific intent.");** *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992) (holding that "**the State must show more than an intentional act by the defendant" in order to prove specific intent).**

making the statements they have made. In truth, a person suffering from some of the above disorders may have no actual memory of what happened or why they may have acted in a certain way. This kind of memory loss is not unusual in persons recovering from a psychotic break during which the alleged offense occurred. Examples of unintentional confabulation may be uncovered by asking the client's family or close friends or associates if they have observed this kind of behavior in the client on prior occasions.

XX. PREPARE YOUR EXPERTS BEFORE REPORT WRITING AND BEFORE TRIAL.

It is important to review the law with your experts prior to their report writing and testimony and to go over the questions you will be asking them at trial. Prepare them for cross examination by confronting them with expected questions they will get from the prosecutor. Alert them to potential "traps." **It is necessary to have a team meeting with each expert and your investigators to brainstorm any other mental or emotional conditions all the members of the team may be aware of to be sure the expert has a complete grasp of the case so they can make suggestions about what else may need to be done.**

APPENDIX “A”

POSSIBLE MENTAL DISORDERS THAT COULD FORM A BASIS FOR DIMINISHED CAPACITY AND POSSIBLY OVERLAP WITH AN INSANITY OR OTHER DEFENSE:

• PSYCHOTIC STATES: PARANOIA, DELUSIONAL DISORDERS

• DISSOCIATIVE STATES (LOSS OF CONSCIOUS CONTROL)

• PTSD: MILITARY COMBAT TRAUMA, BLAST INJURIES, HYPER VIGILANCE

• EMOTIONAL DISTURBANCES DUE TO A MENTAL DISORDER OR UNDERLYING MEDICAL CONDITION: EXTREME FEAR, PANIC, CONFUSION OR RAGE

• EXTREME INTOXICATION (MAY ESTABLISH ADDITIONAL DEFENSE OF VOLUNTARY INTOXICATION)

• SEVERE MENTAL ILLNESSES: SCHIZOPHRENIA, BIPOLAR DISORDER/MANIC PHASE (WITH POSSIBLE PSYCHOSIS OR PSYCHOTIC BREAK).

• BRAIN TUMORS OR LESIONS, AVM (ARTERIOVENOUS MALFORMATION IN BRAIN)

• TRAUMATIC BRAIN INJURY AFFECTING FRONTAL LOBE OR AMIGDALA (fight or flight response); HEAD TRAUMA, SEVERE CONCUSSION, STROKE

• DEVELOPMENTAL DISORDERS: SEVERE INTELLECTUAL DISABILITY OR OTHER COGNITIVE LIMITATIONS OR IMPAIRED EMOTIONAL CONTROLS PRENATAL INJURIES OR FETAL ALCOHOL SYNDROME (FAS)

• SEVERE IMPULSE CONTROL DISORDERS

• SEVERE AUTISM SPECTRUM DISORDER

• SEVERE CLINICAL DEPRESSION OR SEVERE ANXIETY DISORDERS

• SEVERE INTELLECTUAL DISABILITY COUPLED WITH AN EMOTIONAL DISTURBANCE

• **[USUALLY NOT CHARACTER OR PERSONALITY DISORDERS UNLESS THEY HAVE A "MANIC" OR "PSYCHOTIC" PHASE]**

• DEMENTIA, ALZHEIMERS

• METABOLIC DISORDERS AFFECTING BLOOD CHEMISTRY, DIABETIC DISORDERS, OR OXYGEN DEPRIVATION DUE TO A MEDICAL CONDITION

• DELIRIUM DUE TO A MEDICAL CONDITION

• REACTION TO MEDICATIONS OR DRUG INTERACTIONS

• MULTIPLE OVERLAPPING PSYCHIATRIC DIAGNOSES COUPLED WITH SUBSTANCE IMPAIRMENTS

POSSIBLE EMOTIONAL CONDITIONS OR DISTURBANCES THAT MAY LEAD TO DIMINISHED CAPACITY BY NEGATING DELIBERATION:

• PANIC

• EXTREME FEAR OR TERROR

• EXTREME CONFUSION OR PERCEPTUAL DISORGANIZATION

• EXTREME OR UNUSUAL STARTLE REFLEX

• PARANOIA

• SUDDEN RAGE

• EXTREME ANGER DUE TO AN UNDERLYING MEDICAL OR MENTAL CONDITION (SUCH AS BORDERLINE PERSONALITY DISORDER)

• FETAL ALCOHOL SYNDROME (FAS) CAUSING UNCONTROLLABLE ANGER OR UNCONTROLLABLE IMPULSES

• SPOUSAL OR PARTNER ABUSE

• DELUSIONAL JEALOUSY

• ATTACHMENT DISORDER AND/OR FEAR OF ABANDONMENT

• SUDDEN EMOTIONAL REJECTION BY A PARENT OR LOVED ONE

• SITUATIONAL STRESS LEADING TO EMOTIONAL DISTURBANCE DUE TO SUDDEN LOSS OF JOB, INCOME, HOME, FAMILY, OR LOVED ONE or EXTREME EMOTIONAL STRESS DUE TO CHRONIC HOMELESSNESS IN AN UNSAFE ENVIRONMENT

• SLEEP DEPRIVATION

• CHRONIC PAIN SYNDROMES

• PHYSICAL ALTERCATIONS RESULTING IN EMOTIONAL OVERLOAD

• INTENSE ARGUMENTATIVE CONFRONTATIONS

• FALSE OR SUDDEN INFLAMMATORY OR DEMEANING ACCUSATIONS

• "ORDINARY PROVOCATION"

• SUDDEN CONFRONTATION WITH "HATE SPEECH" RESULTING IN HUMILIATION, ANGER, RAGE, OR LOSS OF EMOTIONAL CONTROL

• HONEST BUT "UNREASONABLE" BELIEF IN SELF-DEFENSE (CAUSING FEAR OR TERROR)

• EMOTIONAL OR COGNITIVE IMPAIRMENTS DUE TO DRUG ADDICTION OR WITHDRAWAL FROM SUBSTANCE ADDICTIONS

***FOR BACKGROUND INFORMATION ON THE ABOVE MENTAL AND EMOTIONAL CONDITIONS AND DISTURBANCES, See: Robert Sapolsky, Behave: The Biology of Humans at Our Best and Worst (2017); and, Determined: A Science of Life Without Free Will (2024); AND the DIAGNOSTIC AND STATISTICAL MANUAL (AMERICAN PSYCHIATRIC ASSOCIATION), DSM-5-TR, FIFTH EDTION, TEXT REVISION (2022).**

APPENDIX "B"

NC PATTERN JURY INSTRUCTIONS ON DIMINISHED CAPACITY (Lack of Mental Capacity).

With special instructions inserted:

N.C.P.I.—Crim. 305.11 (2009), the pattern jury instruction for lack of mental capacity (diminished capacity) for first-degree murder, is as follows, with a recommended insert for "special instructions on particular conditions or disorders testified to by the expert or raised in the evidence:

> **You may find there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find the defendant lacked mental capacity, you should consider whether this condition [or these conditions] [insert the name of any diagnosis or other condition testified to or raised by the evidence, I.E. BIPOLAR DISORDER, MANIC PHASE; SCHIZOPHRENIA; TRAUMATIC BRAIN INJURY; EXTREME FEAR OR ANXIETY; PTSD; FRONTAL LOBE SYNDROME; EXTREME PANIC; etc.] affected the defendant's ability to formulate a specific intent which is required for conviction of first-degree murder on the basis of malice, premeditation and deliberation. In order for you to find the defendant guilty of first-degree murder on that basis, you must find beyond a reasonable doubt that the defendant killed the deceased with malice and in the execution of an actual, specific intent — in the execution of an actual specific intent to kill formed after premeditation and deliberation.**
>
> **If as a result of lack of mental capacity [as described above] the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, the defendant is not guilty of first-degree murder on the basis of malice, premeditation and deliberation.**

Therefore, I charge that if upon considering the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder on the basis of malice, premeditation and deliberation, you will not return a verdict of guilty of first degree murder on that basis. [Taken from: *State v. Moore,* 2014 N.C. App. LEXIS 865, *6-7, 235 N.C. App. 425, 763 S.E.2d 926, 2014 WL 3824340.

WHEREFORE, the defendant respectfully moves and requests the Court to give the above requested special instructions.

COUNSEL FOR THE DEFENDANT:

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APPENDIX "C"

SAMPLE REQUEST FOR SPECIAL INSTRUCTIONS ON ORDINARY PROVOCATION

STATE OF NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE

COUNTY OF ___________________)	SUPERIOR COURT DIVISION ____CRS__________

STATE OF NORTH CAROLINA)) Vs.) JOHN DOE)))	DEFENDANT'S REQUEST FOR SPECIAL INSTRUCTIONS ON ORDINARY PROVOCATION

NOW COMES the defendant, by and through the undersigned counsel, pursuant to N.C.G.S. 15A-1231(a), and the Defendant's Right to Due Process of Law, to present a defense, to effective assistance of counsel, and to a Fair Trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments; and, pursuant to parallel provisions of the North Carolina Constitution, art. I, section 23, and moves the Court to give the following special instructions to be inserted into NCPI-Crim. 305.11:

[INSERT AFTER INSTRUCTION ON DELIBERATION and repeat in the Final Mandate:]

> **There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator. The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree. A defendant's mere anger at the victim is not alone sufficient to negate deliberation.**

"Cool state of blood" does not mean the perpetrator was devoid of passion or emotion. A perpetrator may deliberate, premeditate, and may intend to kill after premeditation and deliberation, although prompted to a large extent and controlled by passion at the time. What is required to negate deliberation is a sudden arousal of passion, brought on by sufficient provocation during which the killing immediately takes place. *State v. Watson*, 338 N.C. 168, 172, 449 S.E.2d 694, 697, (1994). (emphasis). *State v. Corn,* 307 N.C. 79, 296 S.E.2d 261 (1982).

WHEREFORE, the defendant respectfully moves and requests the Court to give the above requested special instructions.

COUNSEL FOR THE DEFENDANT:

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APPENDIX "D"

STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
COUNTY OF _______________	)	_____CR_____________

STATE OF NORTH CAROLINA	)	
	)	DEFENDANT'S MOTION TO ALLOW
______________________,	)	DEFENDANT TO PRESENT ALTERNATIVE
Defendant	)	DEFENSES WITHOUT CONCEDING AN ACT
	)	RESULTING IN DEATH OF THE VICTIM

NOW COMES the defendant, by and through the undersigned counsel, and moves the Court pursuant to the defendant's rights to Due Process of Law, to Effective Assistance of Counsel, to a Fair Trial, and to Present a Defense, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Law of the Land Clause of the North Carolina Constitution; and with the consent of the defendant, to allow defense counsel, to argue in the alternative and require the state in the trial of this matter to prove beyond a reasonable doubt, each and every element of the offenses charged in the indictments in this case, including any lesser included offense charged, and any other felonies or misdemeanor offenses arising from the evidence in this case whether charged or uncharged, including but not limited to the identity of the perpetrator of any offense charged or uncharged in the trial of this case; and, in the alternative to allow the defense to present evidence of voluntary intoxication and/or diminished capacity [and/or insanity]. In support of this motion the defendant shows unto the Court the following:

1. On ________, 202___, the defendant was indicted in the above case for first-degree murder, [as well as__________].
2. The defendant has entered a general plea of not guilty in this case to all charges.
3. On _________, the defendant served notice on the state pursuant to 15A-905, of the potential defenses of diminished capacity, mental defect, voluntary intoxication, [guilt of a third-party suspect], and [...].

4. A recent Court of Appeals opinion, *State v. Copenhaver*, ___N.C.App.__(June 4, 2025), (attached hereto), stated that a defendant *must concede* that "she was responsible for the death of the victim" and "acknowledge her guilt to the extent necessary to pursue [a] diminished capacity defense." Taken out of context, this finding by *Copenhaver* is misleading and an incorrect "holding" concerning the defense "burden of production" or legal requirement for a defendant to "concede guilt" of an evidentiary element to present a diminished capacity defense.
5. The facts and evidence presented in *Copenhaver,* did not present to the Court of Appeals the question of whether a defendant could present an *alternative* defense in which the defendant denied committing the act or acts resulting in death of the victim, and in the alternative, if the jury so found, that the defendant due to a mental or emotional condition or disturbance, was incapable of forming specific intent to kill after premeditation and deliberation pursuant to a diminished capacity defense.
6. A gravamen of the appellant's argument on appeal in *Copenhaver* concerning the diminished capacity defense was that during the pretrial *Harbison* hearing colloquy, the trial court improperly seemed to "guarantee" the defendant a verdict of "second-degree murder" if she agreed to pursue the defense of diminished capacity by "conceding responsibility for the death of the victim." The Court of Appeals found no error regarding this claim and found that no such "guarantee" of a second-degree murder verdict was made by the trial court to the defendant.
7. In *dicta,* the court in *Copenhaver* has confused the defense of diminished capacity, a "negating offense," with an "affirmative defense," such as self-defense, in which a

defendant would be required to admit intentionally committing an act resulting in death in order to justify that act on the basis of self-defense[36].

8. The defendant in this case, pursuant to his plea of "not guilty," does not wish to acknowledge partial guilt or concede that they were responsible for commission of the act or acts resulting in the death of the victim, or commission of any other act resulting in the commission of any other felony offenses arising from the evidence at trial. However, the defendant does consent to allow his counsel to argue in the alternative to present a diminished capacity [and voluntary intoxication defense], that they were incapable of forming the specific intent required for first-degree murder or other specific intent felony.
9. Under *State v. Harbison*, 315 N.C. 175 (1985), the defendant is required to consent, on the record and outside the presence of the jury prior to trial, to the trial tactics and defense strategy of allowing counsel to argue in the alternative in his defense, that defendant is not guilty of committing an act resulting in the death of the victim, and in the alternative, that if the jury so finds, that the defendant was incapable of forming the specific intent required to be guilty of first-degree murder or any other underlying "specific intent" felony and that defendant may thus be guilty of lesser included offenses.

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[36] After acknowledging diminished capacity is a "negating defense," *Copenhaver* inexplicably and erroneously "equated" it with an "affirmative defense" stating:

> "Indeed, an affirmative defense is "of the nature of a plea of confession and avoidance[.]" ... "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because..." Copenhaver, at ___, (citations omitted.)

10. Under *State v. Ali*[37], 329 N.C. 394 (1991), defense counsel is required to comply with the wishes of the client regarding the objectives of his defense strategy.
11. The defendant in this case consents and directs the undersigned counsel, to present and argue in the alternative at trial, that if the jury finds the defendant beyond a reasonable doubt to have committed the act or acts resulting in the death of the victim, or commission of any other act resulting in the commission of any other felony offenses arising from the evidence at trial, counsel for the defendant may argue that if the jury finds the defendant did commit these acts, then they are not guilty of first-degree murder [or other specific intent felony"] because as a result of a mental defect, mental disorder or emotional disturbance at the time of the offense, i.e., they were incapable of forming the required state-of-mind element, i.e., "specific intent to kill formed after premeditation and deliberation," required for first-degree murder based on malice, premeditation and deliberation and incapable of forming the required element of "specific intent" for any other underlying felony.
12. The defendant consents to allow counsel to argue in the alternative that based on the defenses of voluntary intoxication and/or diminished capacity, that the defendant may only be guilty of second-degree murder, or other lesser included offense.
13. This defendant specifically objects as a matter of fundamental constitutional right as cited above, to the trial court requiring a limited admission by the defendant to the commission of the act or acts resulting in the victim's death in order for the defendant to present a diminished capacity defense or other defense listed above.

[37] See: UNC School of Government, Defender's Manual (2018), viewable here: https://defendermanuals.sog.unc.edu/pretrial/128-attorney-client-relationship.

14. The *defendant refuses* to make such an admission in this case, and directs defense counsel to object and argue, *inter alia*, that this defendant has a fundamental constitutional due process right by pleading not guilty to force the state to prove beyond a reasonable doubt that the defendant committed the act resulting in the victim's death as a condition precedent to the jury's alternative consideration of a diminished capacity [and/or voluntary intoxication] defense.
15. The U.S. Supreme Court held in, *In re Winship,* 397 U.S. 358, that the Due Process Clauses of the Fifth and Fourteenth Amendments protect the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged.
16. Forcing a defendant to make a "limited admission of guilt to extent of admitting to the act resulting in death of the victim," is tantamount to an unconstitutional "mandatory presumption" of an element of first-degree murder and runs counter to placing the entire burden of proof of each and every element of a crime upon the state whenever a defendant enters a general plea of not guilty. See: *Mullaney v. Wilbur*, 421 U.S. 684, 691-704 (1975), holding the Due Process Clause of the Fourteenth Amendment requires that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, citing *In re Winship,* 397 U.S. 358.
17. "The plea of not guilty... is not [like a plea in a civil case]... in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty...". *Davis v. United States*, 160 U.S. 469, at 486 (1895).

18. North Carolina does not have a plea of "not guilty by reason of diminished capacity." Diminished capacity is a "negating defense" pursuant to a general "not guilty plea" which requires the state to prove every fact and element necessary to overcome the presumption of innocence and to prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *Id.*
19. This Court should conduct a *Harbison* hearing prior to jury selection to be sure the defendant understands and consents to counsel presenting arguments in the alternative, i.e., that defendant is not guilty of commission of the act or acts resulting in the victim's death; however, if the jury so finds, the jury should consider evidence of diminished capacity and/or voluntary intoxication, and that counsel may argue that defendant may only be guilty of second-degree murder or other lesser included offense in addition to arguing for a verdict of not guilty.
20. Because a defendant is legally permitted to plead not guilty and force the state to prove every element of the crime beyond a reasonable doubt, the trial court must protect the defendant's rights to client autonomy under *State v. Ali* and *McCoy v. Louisiana, infra*, to Present a Defense, to Effective Assistance of Counsel, to a Fair Trial, and to be free from Cruel and Unusual Punishments under the Fifth, Sixth, Eighth, and Fourteenth Amendments; and, as guaranteed by the Law of the Land Clause of the North Carolina Constitution.
21. Defense counsel should be allowed to argue alternatively that the state cannot prove that the defendant (or someone with whom they were acting-in-concert) committed the act resulting in death; and, unless the jury finds beyond a reasonable doubt that the defendant is responsible for the act resulting in death, the state must then go on to prove

that the defendant, in a first-degree murder case, had the mental capacity to form "specific intent to kill" after premeditation and deliberation due to severe intoxication, mental disease or defect, or other emotional condition or disturbance. See: N.C. PJI Crim. 305.11 (2009).

22. The logic underlying this two-pronged defense is that a diminished capacity defense is a negating defense that is fundamentally unlike self-defense and other affirmative defenses. Self-defense is an affirmative defense, whereby "the defendant says I did the act charged in the indictment, but I should not be found guilty of the crime charged because . . ." *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975) (quotation marks omitted); N.C. Gen. Stat. § 14-51.3 (2025).

23. In contrast to an affirmative defense, diminished capacity is a "negating defense" which requires no limited admission to commission of an act resulting in death. In presenting a diminished capacity defense, a lawyer should be allowed to argue in the alternative to a jury, ***"my client did not commit this act; however, if you find that he did, the medical, psychological, or other evidence proves he lacked the capacity to form the required state of mind for first-degree murder based on premeditation and deliberation."***

24. Unlike self-defense, diminished capacity is not an affirmative defense, it is a "negating defense." It "negates" the specific intent required for guilt of first-degree premeditated and deliberate murder because it seeks to show that the state cannot prove beyond a reasonable doubt that the defendant formed "specific intent to kill" in a cool state of mind and was "capable of weighing the matter" prior to acting, not simultaneously with the act. See: *State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (specific intent to kill must arise from a fixed determination previously formed after weighing the matter); *State*

v. Misenheimer, 304 N.C. 108, 113 (1981) (although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, the murder is not deliberate and premeditated); *State v. Dowden*, 118 N.C. 1145, 1153 (1896) (where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree).

25. Therefore, the defendant should consent in a *Harbison* hearing to allow counsel to argue, in the alternative, that only if the jury finds beyond a reasonable doubt that the defendant committed an act resulting in death, that the defendant may be only guilty of second-degree murder due to diminished capacity or lack of premeditation or deliberation during an "impulse killing," or that the defendant may be guilty of only voluntary or involuntary manslaughter, where the evidence could support those lesser included offenses.

26. Allowing arguments in the alternative is the only way, in this case, for defense counsel to comply with the autonomous wishes of the client under *State v. Ali,* 329 N.C. 394, 407 S.E.2d 183 (1991) (...when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, ***the client's wishes must control).***

27. Under *McCoy v. Louisiana*, 584 U.S. 414 (2018), the United States Supreme Court held the Sixth Amendment guarantees a defendant the right to decide that the objective of his defense is to *maintain innocence at all costs*, even when counsel believes that admitting guilt offers the defendant the best chance to avoid the death penalty. This holding should extend the constitutional guarantee that a defendant should not be forced to concede a fact necessary to a conviction as a requirement to present a mental health defense such as diminished capacity.

28. "...[W]hen a defendant chooses to be represented by counsel, ... he does not entirely surrender his right to control his own defense; rather, he retains the right to make certain fundamental decisions, like whether to plead guilty and whether to testify. ...The choice about ...whether to concede guilt in the hope of avoiding a death sentence, or to maintain innocence at all costs—was one only the defendant may make." *McCoy*, 138 S. Ct. at 1508.

29. Since North Carolina recognized the diminished capacity defense in *State v. Shank*, 322 N.C. 243 (1988), neither *State v. Shank* or any other case in North Carolina, up until *State v. Copenhaver (2025),* has held or implied that a defendant is r***equired*** to make an admission that they are responsible for the act or acts resulting in the death of the victim in order to present a defense of diminished capacity.

30. Such a requirement ***does not*** appear in the first law review article[38] analyzing *State v. Shank*, *State v. Rose,* or the other cases in North Carolina recognizing the diminished capacity defense; and, no North Carolina case prior to *Copenhaver* has stated such a limited admission to the act or acts resulting in death of the victim is a required component of the "burden of production" placed on the defendant to raise, present, or be entitled to a jury instruction on diminished capacity [also referred to as "limited mental capacity"].

31. Such a requirement ***does not*** appear in any UNC School of Government publication or blog on Diminished Capacity in 1992, 2011, 2013, or 2025, with the sole exception of a

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[38] Lucy Noble Inman, "Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in *State v. Shank* and *State v. Rose*," 67 N.C. L. REV. 1293 (1989).

Available at: https://scholarship.law.unc.edu/nclr/vol67/iss6/6 .

case summary reporting the *Copenhaver* decision by Jeff Welty, dated June 9, 2025, without further comment or criticism.[39]

32. Until *Copenhaver* was decided in 2025, no other UNC School of Government publication or blog concerning the diminished capacity defense authored by recognized legal scholars: John Rubin[40], Daniel Speigel[41], Jeff Welty[42], or any other faculty member of the UNC School of Government, has discussed *any* requirement that a limited admission or concession to committing an act resulting in death must be made in order to present a diminished capacity defense. (See articles and links in the footnotes below, #5, #6, #7.)
33. Such a requirement of "a limited concession to commission of an act resulting in death does" ***not appear*** in the North Carolina Superior Court Judge's Bench Book concerning the burden of production or test to determine whether sufficient evidence has been presented to instruct on the diminished capacity defense.
34. A learned paper authored by UNC School of Government faculty member, John Rubin, specifically states that a defendant and defense counsel may argue and present evidence and arguments in the alternative that "the defendant did not commit the act or acts resulting in the victim's death;" and, to then argue that if the jury finds the defendant did commit an act causing death, defense counsel can also present a voluntary intoxication and a diminished capacity defense, see: UNC School of Government Paper authored by

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[39] Jeff Welty, UNC SOG, Case Summaries, June 9, 2025, viewable at: https://nccriminallaw.sog.unc.edu/2025/06/09/case-summaries-n-c-court-of-appeals-june-4-2025/.

[40] #5UNC SOG paper, "The Diminished Capacity Defense", John Rubin (1992), viewable at: https://www.sog.unc.edu/sites/default/files/reports/aojm9201_0.pdf.

[41] #6 UNC SOG Blog, "Mental Health Defenses-Voluntary Intoxication and Diminished Capacity Defenses: What Can the Expert Say?" (December 10, 2025), viewable at: https://nccriminallaw.sog.unc.edu/2025/12/10/mental-health-defenses-diminished-capacity-and-voluntary-intoxication-what-can-the-expert-say/.

[42] #7 "Diminished Capacity," Jeff Welty, UNC SOG Blog (December 15, 2013), viewable at: https://nccriminallaw.sog.unc.edu/2013/01/15/diminished-capacity/#:~:text=In%20a%20felony%20murder%20case%2C,is%20a%20specific%20intent%20crime.

John Rubin (2011), attached hereto[43], which states in part: "[t]o meet the burden of production for the defenses discussed here [voluntary intoxication and diminished capacity], **the defendant is not required to admit committing the acts charged.** ...Nor must the defendant take the stand. See: *State v. Alston*, 161 N.C. App. 367 (2003) (so holding) (emphasis added).

35. In the UNC School of Government Defender's Manual[44] (December 2018) in discussing case law concerning admissions of guilt and concessions of defendant's commission of act required for conviction by defense counsel in opening statements and closing arguments, NO CASE AND NO REFERENCE IS MADE TO ANY REQUIREMENT that the defendant MUST CONCEDE that "she was responsible for the death of the victim" and "acknowledge her guilt to the extent necessary to pursue [a] diminished capacity defense," as misstated by *State v. Copenhaver, supra.*

WHEREFORE, the defendant prays that the Court grant this motion, and:

1. Allow counsel for the defendant to present evidence and arguments in the alternative as described above to present a diminished capacity defense [and/or a voluntary intoxication defense] without requiring defendant to concede commission of an act resulting in death of the victim; and,

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[43] John Rubin, "Voluntary Intoxication, Mental Capacity, and Defensive Force: Eight Principles on Instructing the Jury," UNC School of Government (December 2011), viewable at: https://www.sog.unc.edu/sites/default/files/course_materials/Eight%20Instruction%20Principles_0.pdf .

[44] UNC SOG Defender's Manual, "Admissions of Guilt During Closing Arguments," (December 2018); viewable at: https://defendermanuals.sog.unc.edu/trial/336-admissions-guilt-during-closing-argument.

2. Conduct a *Harbison* hearing pretrial and conduct a colloquy with the defendant to ascertain defendant's consent to the presentation of alternative defenses allowing defense counsel to argue "that defendant is not guilty of commission of the act or acts resulting in the victim's death; however, if the jury so finds, the jury should consider evidence of diminished capacity and/or voluntary intoxication; and, that counsel may argue that defendant may only be guilty of second-degree murder or other lesser included offense in addition to arguing for a verdict of not guilty.

Respectfully submitted this the _____day of ________, 202_.

COUNSEL FOR DEFENDANT:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this date served a copy of this motion upon counsel for the State by ___________________________ .

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