


THE DIMINISHED CAPACITY DEFENSE IN CAPITAL LITIGATION

A CLE PRESENTATION SPONSORED BY THE MECKLENBURG COUNTY
PUBLIC DEFENDER'S OFFICE

A SUMMARY EXPLANATION BY

VINCENT RABIL, ASST. CAP. DEF. RETIRED 9/1/2026

DEFINITION OF DIMINISHED CAPACITY

- ▶ Under *State v. Shank* (1988), evidence of diminished capacity is admissible to show that the defendant 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 based upon a “non-specific intent” felony and there is no defense to that predicate felony.
-

Why the Diminished Capacity Defense is Essential to Capital Defense

- ▶ 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.
 - ▶ 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.
-

A “Dimcap” Defense Will Lead to a Commonsense Assessment of

► Degrees of Guilt & Moral Culpability

- A thorough guilt-phase fact and mitigation investigation will show NUMEROUS CONTRIBUTING AND OVERLAPPING REASONS WHY THE OFFENSE CONDUCT OCCURRED.
 - extending 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 AND other relevant matters BEYOND THE DEFENDANT’S CONTROL which placed them at risk for future violence through NO CHOICE OF THEIR OWN.
-

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 triggers specific **neurological occurrences** in a juror's brain which will evoke an *empathetic response*.
 - ▶ An empathetic response most often occurs when a juror is paying close attention to credible, dramatic, or graphic testimony presented in an **anecdotal or story-like format**.
 - ▶ All human beings learn *moral lessons* through “story” formats. It's in our DNA.
-

The Neuroscience of Diminished Capacity

- ▶ **CHRONIC STRESS** and trauma can cause a person's brain to develop hyper-reactivity to real, perceived or imagined threats by **ENLARGING THE AMYGDALA** structure in the brain (the center of “flight or fight”) and short-circuit the rational control centers of the frontal lobes.
 - ▶ These things can destroy a person's capacity to *deliberate* before acting.
 - ▶ 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)
-

Shopping Mitigation and Identifying “Defense Impaired” Jurors

- ▶ “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).
- ▶ 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(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(1975), *judgment vacated in part*, 428 U.S. 902 (1976).

Origins of First-Degree Murder Based on “Premeditation & Deliberation”

- ▶ In 1893 the “specific intent” components of “premeditation” and “deliberation” were added by the NC General Assembly to existing theories of murder to distinguish between first-degree and second-degree murder.
 - ▶ The added elements 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 or absence of enough time to deliberate.
 - ▶ The model for this reform arose in *colonial Pennsylvania prior to 1776*.
-

Ethical & Theological Sources

- ▶ from Ancient Greece (ARISTOTLE)
 - ▶ Through to the Middle Ages (THOMAS AQUINAS)
 - ▶ For Aquinas and Aristotle, the less “rational” an act was, & the more a forbidden act was 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.
-

The Anachronism of Felony Murder

- ▶ Despite creating “degrees of murder,” the 1893 N.C. homicide statute retained the 200-year-old common law theory of “felony murder” which has now been expanded to include “any other felony committed with the use of a deadly weapon.”
 - ▶ After adopting the 1868 state constitution, North Carolina continued to punish burglary, arson, and rape with capital punishment right up through the 1960’s.
-

State v. *Gabriel Thomas*, 118 N.C. 1113 (1896)

"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."

["Deliberation"] ... is described as "a cool state of the blood."

State v. Gabriel Thomas, 118 N.C. 1113 (1896)

"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."

State v. Gabriel Thomas and Dimcap

- ▶ “Aside from... [felony murder], 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 “diminished capacity” or “ordinary provocation”] ...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*, Sections 389-392; ...”

STATE V. GABRIEL THOMAS: “P & D”

- ▶ “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.”
- ▶ NOTE WELL: THE ABOVE ONLY CONSTITUTES AN ACTUAL OR PRESUMED “GENERAL INTENT TO KILL” NOT “SPECIFIC INTENT TO KILL” WHICH CAN ONLY BE FORMED AFTER PREMEDITATION & DELIBERATION].
- ▶ “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

N.C. recognized Diminished Capacity Defense in 1988 in *State v. Shank*

- ▶ Under *State v. Shank*, evidence of diminished capacity is admissible to show client WAS INCAPABLE OF FORMING SPECIFIC INTENT TO KILL AFTER PREMEDITATION AND DELIBERATION DUE TO A MENTAL OR EMOTIONAL CONDITION OR DISTURBANCE.
 - ▶ Will reduce the offense to second degree murder unless there is a parallel theory of felony murder.
-

. Relationship to Felony Murder

General vs. Specific Intent Felonies

- ▶ **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”); ADWISIK (specific intent to kill); or first-degree kidnapping (kidnapping for an enumerated purpose, i.e., an intent to “terrorize”).
- ▶ **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).

Consent of Defendant Required for Diminished Capacity Defense

► *Harbison* Hearing

- 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 it will USUALLY entail an admission that the defendant committed the act or acts of the offense and any lesser included offenses.
 - Depending on the facts, defense strategy and existence of alternative theories of defense, the defendant should consent to allow counsel to argue that the defendant may be only guilty of second-degree murder if the jury finds diminished capacity.
-

WHAT IF DEFENDANT CANNOT REMEMBER OR CONCEDE TO COMMITTING AN ACT CAUSING DEATH DUE TO BLACKOUT OR OTHER CONDITION?

- ▶ **STATE V. COPENHAVER, __N.C. APP.__(2025), seems to hold that a defendant must make a limited concession to having committed an act resulting in death in order to present a diminished capacity defense.**
- ▶ **This ruling appears to be against the greater weight of earlier legal opinions and learned treatises in North Carolina. [SEE: SUGGESTED MOTION TO ALLOW ALTERNATIVE DEFENSE ARGUMENTS IN MANUSCRIPT APPENDIX “D” at p].**
- ▶ “Diminished Capacity” is a “negating defense” NOT an “affirmative defense” in which the defendant ADMITS they committed an act resulting in death but then offers evidence that the killing was justified under the law of self-defense.
- ▶ “Alternative” arguments should be allowed requiring the State to first prove to the jury BYRD that the defendant was the perpetrator, and only if the jury is so satisfied, SHOULD THE JURY THEN CONSIDER evidence that the defendant is not guilty of first-degree murder or first-degree “specific intent” felony murder due to diminished capacity.



Notice Requirement

- ▶ **Within 20 days of Trial Date Set by Court**
 - ▶ **May Trigger State Examination**
 - ▶ **Defense May Seek Protective Orders to Record or be Present at Psych interview**
-

The Defense Burden of Production & the State's Burden of Proof

- ▶ 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.
 - ▶ The State retains the burden of proof: BYRD THAT despite diminished capacity, the defendant actually formed specific intent to kill after premeditation and deliberation.
-

Legal definitions

- ▶ “Premeditation” and “deliberation” and “cool state of blood” are “legal terms of art.”
 - ▶ Experts should avoid these terms and use other terms
 - ▶ Like capacity to form “specific intent to kill” and i.e.,
 - ▶ “capacity to consider consequences or alternative course of action was significantly impaired”
 - ▶ See: other admissible phrases in manuscript, P 32, & in UNC SOG BLOG & CHART, by Daniel Spiegel, on WHAT EXPERTS CAN SAY ABOUT DIMINISHED CAPACITY, [hyperlink on p 32](#).
-

What is not “premeditation and deliberation”?

- ▶ *State v. Misenheimer* (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* (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.

What experts are needed and other expert matters

- ▶ Fact Investigator
 - ▶ Trained Mitigation Specialist
 - ▶ Forensic Psychologist
 - ▶ Forensic Psychiatrist
 - ▶ What if client is floridly psychotic NOW
 - ▶ Other Specialists as Needed
-

What should your expert review?

- ▶ **ALL RELEVANT DATA**
 - ▶ (SEE LIST OF USUAL REQUIRED RECORDS IN MANUSCRIPT, P 31.)
 - ▶ To evaluate the client for diminished capacity what should go into a forensic report & opinion?
 - ▶ **MUST REACH A CLEAR AFFIRMATIVE CONCLUSION TO A DEGREE OF CLINICAL OR MEDICAL CERTAINTY.**
-

Review your expert's opinions with them

- ▶ Before they write their report
 - ▶ So that they understand the limits and parameters of their testimony
 - ▶ Be sure your experts understand and address your referral questions.
 - ▶ “Please examine defendant’s state of mind at the time of the offense.” (or for “capacity to proceed.”)
-

Lay witnesses and anecdotal stories

- ▶ Lay opinion is admissible in NC if based upon the 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.
 - ▶ This gives you the option to frontload LAY WITNESS TESTIMONY IN THE GUILT PHASE as a basis for expert opinions on diminished capacity.
-

Need to develop a close and trusting relationship with client

- ▶ **to obtain reliable disclosures of state-of-mind-at the time-of-offense.**
 - ▶ **To allow the defendant to “get skin in the game” and understand the strategic and tactical advantages at trial of using a diminished capacity defense.**
-

The problem of innocent “confabulation” or false memories

- ▶ “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.”
 - ▶ unintentional confabulation: the client may not actually remember what caused them to act.
-

PREPARE YOUR EXPERTS BEFORE REPORT WRITING AND BEFORE TRIAL

- ▶ **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 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.**
-

POSSIBLE MENTAL DISORDERS THAT COULD FORM A BASIS FOR DIMINISHED CAPACITY

- ▶ 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
 - ▶ BRAIN TUMORS OR LESIONS, AVM (ARTERIOVENOUS MALFORMATION IN BRAIN)
-

POSSIBLE MENTAL DISORDERS THAT COULD FORM A BASIS FOR DIMINISHED CAPACITY

- ▶ TRAUMATIC BRAIN INJURY AFFECTING FRONTAL LOBE OR AMIGDALA (fight or flight response); HEAD TRAUMA, SEVERE CONCUSSION, STROKE
 - ▶ DEVELOPMENTAL DISORDERS: SEVERE ID OR OTHER COGNITIVE LIMITATIONS OR IMPAIRED EMOTIONAL CONTROLS, PRENATAL INJURIES OR FETAL ALCOHOL SYNDROME
 - ▶ 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
-

Possible Emotional Disturbances

- ▶ EXTREME CONFUSION OR PERCEPTUAL DISORGANIZATION
 - ▶ PARANOIA
 - ▶ 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 or EXTREME IRRITABILITY
 - ▶ SPOUSAL OR PARTNER ABUSE
 - ▶ ATTACHMENT DISORDER AND/OR FEAR OF ABANDONMENT
 - ▶ SUDDEN EMOTIONAL REJECTION BY A PARENT OR LOVED ONE
-

Possible Emotional Disturbances

- ▶ SITUATIONAL STRESS LEADING TO EMOTIONAL DISTURBANCE DUE TO SUDDEN LOSS OF JOB, HOME, FAMILY, OR LOVED ONE
 - ▶ SLEEP DEPRIVATION
 - ▶ CHRONIC PAIN SYNDROMES
 - ▶ INTENSE ARGUMENTATIVE CONFRONTATIONS
 - ▶ “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
-

NC PATTERN JURY INSTRUCTIONS ON DIMINISHED CAPACITY 305.11

- ▶ 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.

REQUEST FOR SPECIAL INSTRUCTIONS ON ORDINARY PROVOCATION

- ▶ 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. Corn; State v. Watson, 338 N.C. 168.