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Until recently the North Carolina Supreme Court has rejected a doctrine known as the "diminished capacity defense" which recognizes that a person's mental impairment might prevent him from forming the mental state that is an essential element of a crime. The doctrine is cited most often in first-degree murder cases. Long adopted by courts in other states and by federal courts, the doctrine was given effect in two 1988 North Carolina Supreme Court decisions, State v. Shank and State v. Rose. Both decisions unanimously ordered new trials for defendants convicted of first-degree murder. The Shank court found prejudicial error in a trial judge's exclusion of expert testimony relevant to the premeditation and deliberation elements of first degree murder. The decision turned on the supreme court's application of evidence rules. The Rose court found error in a trial judge's refusal to instruct jurors that they should consider a defendant's mental condition when determining whether he committed premeditated and deliberated murder. The Rose court cited Shank as authority.

Although "diminished capacity defense" is not a very accurate term, as discussed infra at notes 67-68 and accompanying text, this Note will use the term rather than create or borrow an unfamiliar term.

1. This doctrine also has been referred to as "diminished responsibility" and other terms. E.g., P. Robinson, Criminal Law Defenses § 101(a) (1984 & Supp. 1988); Note, Criminal Law—Diminished Responsibility, Long Ignored in North Carolina, is Given a Hearing But Not Yet Adopted, 54 N.C.L. Rev. 993, 993 (1976). "Diminished capacity defense" appears to be the most widely recognized term and is unlikely to be confused with other legal doctrines. See, e.g., Sendor, Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime, 74 Geo. L.J. 1371, 1430 (1986) (diminished capacity is a "negativing defense designed to rebut prosecution evidence on an essential mental element of crime"; diminished responsibility reduces criminal culpability for a defendant who, despite a mental abnormality, is proven guilty). Although "diminished capacity defense" is not a very accurate term, as discussed infra at notes 67-68 and accompanying text, this Note will use the term rather than create or borrow an unfamiliar term.

2. W. LaFave & A. Scott, Substantive Criminal Law § 4.7 (1986); P. Robinson, supra note 1, § 64(a).

3. See cases cited in LaFave & Scott, supra note 2, § 4.7(b); P. Robinson, supra note 1, § 64(a) n.5. The mens rea elements of first-degree murder in North Carolina are willfulness, premeditation, and deliberation. N.C. Gen. Stat. § 14-17 (1986).

4. See cases cited in Robinson, supra note 1, § 64(a); Annotation, Mental or Emotional Condition As Diminishing Responsibility for Crime, 22 A.L.R.3d 1228, 1239 (1968 & Supp. 1988).


8. Shank, 322 N.C. at 249, 367 S.E.2d at 643.

9. Shank was decided pursuant to rules 401, 403, 702, and 704 of the North Carolina Rules of Evidence. Id. at 247-49, 367 S.E.2d at 642-43.


also asserts the defense of insanity.\textsuperscript{12}

\textit{Shank} and \textit{Rose} have opened the door for the diminished capacity defense in North Carolina, but the width of the opening is not yet clear. The doctrine necessarily will be limited by existing constraints such as the defendant's burden of producing\textsuperscript{13} competent evidence to support any defense.\textsuperscript{14} This Note examines \textit{Shank} and \textit{Rose},\textsuperscript{15} how these decisions compare with previous North Carolina case law,\textsuperscript{16} and how they have changed the law.\textsuperscript{17} The Note also discusses constitutional protections invoked by the diminished capacity defense\textsuperscript{18} and what evidence relevant to mental condition is admissible under state and federal evidence rules.\textsuperscript{19} The Note concludes that when a defendant's mental condition at the time of an alleged offense is relevant to an element of the crime, he should be allowed to introduce otherwise admissible evidence of the condition and have the jury consider whether that evidence raises a reasonable doubt about the re-

\textsuperscript{12} \textit{Rose}, 323 N.C. at 456, 373 S.E.2d at 427.

\textsuperscript{13} To obtain a jury instruction on diminished capacity the defendant must, as with other negating defenses, meet an initial burden of production. Patterson v. New York, 432 U.S. 197, 230-31 (1976) (Powell, J., dissenting) (even where state has burden of persuasion, defendant may have burden of producing evidence sufficient to raise a reasonable doubt about the issue); Mullaney v. Wilbur, 421 U.S. 684, 701 n.28 (1975) (states may require defendant to produce some evidence to raise a negating defense); Davis v. Allsbrooks, 778 F.2d 168, 181 (4th Cir. 1985) (Phillips, J., concurring) (defendant asserting a defense to rebut a presumption must produce "at least a modicum of . . . evidence in order to hold the state to the full burden of persuasion with which it entered trial"); see also P. ROBINSON, supra note 1, § 64(a) (most jurisdictions place burden of production on defendant who claims mental defect negates a mental element). The burden might be similar to that of the intoxication defense, discussed \textit{infra} at note 79 and accompanying text, or might be lower as discussed \textit{infra} at note 192 and accompanying text.

\textsuperscript{14} To be admissible, evidence must comply with the rules of evidence of the appropriate jurisdiction. These rules sometimes exclude relevant evidence. For example, the North Carolina Supreme Court in State v. Weeks, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988), handed down the same day as \textit{Shank}, held that a psychiatrist's testimony about a murder suspect's mental state was inadmissible under rule 702 of the North Carolina Rules of Evidence because the testimony embraced precise legal terms not readily understood by the expert. \textit{Id.} The \textit{Weeks} court did not discuss whether the testimony was otherwise relevant as evidence of diminished capacity. Likewise the court in \textit{Rose}, although recognizing the diminished capacity defense, held as inadmissable under North Carolina rule 702 a psychiatrist's testimony that defendant could not have premeditated or deliberated. \textit{Rose}, 323 N.C. at 459-60, 373 S.E.2d at 429-30 (citing \textit{Weeks} and its reasoning); see \textit{infra} notes 165-78 and accompanying text for a comparison of evidentiary rulings in \textit{Weeks}, \textit{Rose}, and \textit{Shank}.

\textsuperscript{15} See \textit{infra} notes 21-61 and accompanying text.

\textsuperscript{16} See \textit{infra} notes 86-102 and accompanying text.

\textsuperscript{17} See \textit{infra} notes 181-88 and accompanying text.

\textsuperscript{18} See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (mechanistic application of hearsay rules violated defendant's due process right to present evidence to refute state's accusation); Washington v. Texas, 388 U.S. 14, 19 (1967) (defendant's right to present witnesses to establish a defense "is a fundamental element of due process of law"); see also Martin v. Ohio, 480 U.S. 228, 233-34 (1987) (if affirmative defense is rejected by jury, evidence of that defense should not be disregarded automatically by jury in considering elements of the prosecution's case); Patterson v. New York, 432 U.S. 197, 210 (1977) (although burden of proving affirmative defense may be shifted to defendant, prosecution must prove every element of criminal offense beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (due process clause requires prosecution to prove beyond a reasonable doubt the absence of heat of passion where statute defines "malice aforethought" as an element of murder); In re Winship, 397 U.S. 358, 364 (1970) (due process clause of fourteenth amendment requires prosecution to prove beyond a reasonable doubt the existence of every element of an alleged crime).

\textsuperscript{19} See \textit{infra} notes 140-80 and accompanying text.
The North Carolina Supreme Court ruled unanimously in *State v. Shank* that a defendant charged with first-degree murder should have been allowed to rebut the mental elements of that crime with evidence of his mental condition on the day he killed his wife. John Shank had been separated from his wife and had lost custody of their children to her. Unable to find work, in the days and weeks before the killing Mr. Shank had been depressed, drank heavily, and used cocaine and amphetamines. He awoke early on January 6, 1986, and, after smoking two marijuana cigarettes, drove to the Cleveland County Health Department where Ms. Shank worked. Defendant convinced his wife to step outside her office building, where the couple argued over whether he could visit the children. After Ms. Shank told him he would never see the children again, defendant pulled out a gun. As Ms. Shank ran, defendant shot her. After she fell to the parking lot pavement, he shot her four more times and then drove away. A few minutes later he telephoned his brother and said he had done "something stupid . . . shot Delaree . . . [Because she] wouldn't leave [him] alone."

Defendant was charged with first-degree murder by premeditation and deliberation. At trial, he testified that he did not remember the shooting. A forensic psychiatrist testified that, at the time he shot his wife, defendant suffered from "psychogenic amnesia" triggered by his obsessive concerns about the children and his wife's threat never to let him see them again. The psychiatrist also testified that defendant's mental problems were not severe enough to prevent him from knowing right from wrong.

Defendant did not plead the insanity defense, but asserted that at the time of the shooting his ability to premeditate and deliberate was impaired by mental disorders. The trial judge refused to allow a psychiatrist to testify that in his opinion defendant was unable to make or carry out plans on the day of the killing, and that in his opinion defendant was under the influence of mental or emotional disturbance at the time of the killing. The trial judge also refused to instruct the jury that it could consider defendant's mental disorders in deciding whether he was unable to form the requisite intent for first degree murder.

20. See infra notes 192-95 and accompanying text.
22. *Id.* at 243-44, 367 S.E.2d at 641.
23. *Id.* at 244, 367 S.E.2d at 640. Defendant tried to flee the state but was arrested later that day. *Id.*
24. *Id.* at 243, 367 S.E.2d at 640. North Carolina defines first-degree murder as "any . . . willful, deliberate, and premeditated killing." N.C. GEN. STAT. § 14-17 (1986). In addition to premeditation and deliberation, the prosecution must also prove malice and specific intent to kill. E.g., State v. Hamby, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970).
26. *Id.*
27. *Id.* at 246, 367 S.E.2d at 641. This is a shorthand answer for North Carolina's insanity defense test, based on the M'Naghten test, discussed infra at note 73.
29. *Id.* at 246, 367 S.E.2d at 641. The trial court ruled that the psychiatric testimony was inadmissible because it constituted an "ultimate issue"—whether defendant formed the requisite intent for first degree murder, which the trial court declared was "a question of fact for the jury." *Id.* at 247, 367 S.E.2d at 642. The supreme court noted that under rule 704 of the North Carolina Rules
whether he premeditated and deliberated his wife's killing.\textsuperscript{30} The court did, however, instruct the jury that in determining the \textit{mens rea} issues it could consider defendant's use of drugs.\textsuperscript{31} Defendant was convicted of first-degree murder and sentenced to life imprisonment.\textsuperscript{32}

Defendant appealed directly to the North Carolina Supreme Court, which held that the trial judge's exclusion of the psychiatrist's opinion was error requiring a new trial.\textsuperscript{33} The court based its decision on a number of North Carolina Rules of Evidence.\textsuperscript{34} First the court corrected the trial judge's reasoning that expert opinion should not be admitted if it resolved an ultimate issue that the jury was to decide,\textsuperscript{35} quoting rule 704's provision that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."\textsuperscript{36} The court further held that the testimony was admissible under rule 401 because "testimony tending to show that defendant did not have the capacity to premeditate or deliberate was relevant in determining the presence or absence of an element of the offense with which he was charged."\textsuperscript{37} The court finally held that the testimony was admissible under rule 702 because it was within the psychiatrist's specialized knowledge and would help the jury decide facts at issue.\textsuperscript{38} The court did not discuss its implicit recognition that a defendant's mental condition short of legal insanity could affect his culpability in a specific intent crime, strictly framing the decision as an evidentiary matter.\textsuperscript{39} Nor did the court acknowledge that \textit{Shank} was the first holding in this state in favor of the diminished capacity defense. Instead, the court quoted dictum from a landmark 1975 decision, \textit{State v. Cooper},\textsuperscript{40} that actually rejected the diminished capacity defense where the defendant had also pleaded not guilty by reason of insanity.\textsuperscript{41} The \textit{Shank} court of Evidence, evidence that embraces an ultimate issue is not for that reason inadmissible. \textit{Id.} (citing N.C. R. EVID. 704).


\textsuperscript{31} Brief for Defendant at 13, \textit{Shank}, 323 N.C. 243, 367 S.E.2d 639 (1988) (No. 734A86). This instruction recognized what is known as the intoxication defense. \textit{See infra} notes 78-80 and accompanying text.

\textsuperscript{32} \textit{Shank}, 322 N.C. at 243, 367 S.E.2d at 640.
\textsuperscript{33} \textit{Id.} at 249, 367 S.E.2d at 643.
\textsuperscript{34} \textit{Id.} at 247-49, 367 S.E.2d at 642-43 (citing N.C. R. EVID. 401, 403, 702, 704).
\textsuperscript{35} \textit{Id.} at 247-48, 367 S.E.2d at 642.
\textsuperscript{36} \textit{Id.} (quoting N.C. R. EVID. 704).
\textsuperscript{37} \textit{Id.} at 249, 367 S.E.2d at 643.
\textsuperscript{38} \textit{Id.} at 248, 367 S.E.2d at 643.

\textsuperscript{39} Although evidence of mental condition is logically relevant to any offense for which a statute lists a required mental state, courts have cited other factors, such as the protection of society, to justify exceptions to relevancy and other evidence principles. \textit{See, e.g.}, Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.) (expressly leaving open the issue whether diminished capacity defense should apply if it would result in acquittal rather than a reduction in offense grade), \textit{cert. dismissed}, 439 U.S. 801 (1978).

\textsuperscript{40} 286 N.C. 549, 213 S.E.2d 305 (1975).
\textsuperscript{41} \textit{Shank}, 322 N.C. at 250-51, 367 S.E.2d at 644 (citing \textit{Cooper}, 286 N.C. at 572-73, 213
held that the Cooper rule does not apply where defendants seek to introduce "evidence of mental disorders, not to support a defense of insanity, but to show that they did not have the capacity to premeditate and deliberate at the time of the killings."\textsuperscript{42} The court also expressly overruled two decisions in which, relying on Cooper, it had refused to require jury instructions on diminished capacity in cases where defendants had not pleaded insanity.\textsuperscript{43}

Six months after the Shank decision, the North Carolina Supreme Court in State v. Rose\textsuperscript{44} held that a defendant was entitled to a jury instruction on diminished capacity even though the defendant also had pleaded not guilty by reason of insanity.\textsuperscript{45} Melvin Rose, Jr., without provocation, fatally shot two friends early in the morning of January 30, 1987.\textsuperscript{46} The victims, Danny Bateman and Jill Alexander, had been drinking alcohol and watching television with defendant and his wife in their Columbia, North Carolina, home. After returning from a trip into town during which he displayed guns and shot out a window, defendant left his guests in the living room and went into the bedroom without speaking. Ten minutes later defendant entered the living room and fired a .410 shotgun at Jill Alexander's head, killing her. Before Danny Bateman could get out the door, defendant shot him with a .22 rifle. Defendant chased Bateman across the street and shot him in the head, killing him.\textsuperscript{47} Defendant then told a third guest to go home.\textsuperscript{48} When a deputy sheriff arrived, defendant confessed to the killings. "Handcuff me and shoot me," he said. Defendant then insisted on showing the bodies to the deputy.\textsuperscript{49}

Tried on two counts of first-degree murder, defendant pleaded that at the time of the shootings he was either legally insane or, if not insane, was by virtue of his state of mind incapable of premeditation or deliberation or of forming a specific intent to kill.\textsuperscript{50} A psychiatrist testified that defendant was experiencing a psychotic episode on the night of the shootings and did not understand his actions or know right from wrong.\textsuperscript{51} The psychiatrist also testified that defendant could not have formed the specific intent to kill Ms. Alexander and Mr. Bateman.\textsuperscript{52} The psychiatrist was not allowed to answer defense counsel's question whether, in the expert's opinion, defendant could have premeditated or deliberated the killings.\textsuperscript{53} The trial judge instructed the jury on the insanity

\textsuperscript{42} Shank, 322 N.C. at 251, 367 S.E.2d at 644.

\textsuperscript{43} Id. The court overruled State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), and State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), "[i]nsofar as [they] are inconsistent with this opinion." Shank, 322 N.C. at 251, 367 S.E.2d at 644; see supra note 30.

\textsuperscript{44} 323 N.C. 455, 373 S.E.2d 426 (1988).

\textsuperscript{45} 323 N.C. at 456, 373 S.E.2d at 427.

\textsuperscript{46} Id. at 457-58, 373 S.E.2d at 428-29.

\textsuperscript{47} Id. at 456, 373 S.E.2d at 427.

\textsuperscript{48} Brief for Defendant at 7, Rose, 323 N.C. 455, 373 S.E.2d 426 (1988) (No. 54A88).

\textsuperscript{49} Id. at 5-6.

\textsuperscript{50} Rose, 323 N.C. at 456, 373 S.E.2d at 427.

\textsuperscript{51} Id. at 456-57, 373 S.E.2d at 427-28.

\textsuperscript{52} Id. at 457, 373 S.E.2d at 427.

\textsuperscript{53} Id. at 459, 373 S.E.2d at 429.
defense, but refused to tell the jury that it could consider defendant's mental condition in connection with his ability to form the specific intent to kill.4 Defense was found guilty of first degree murder in Bateman's death and guilty of second degree murder in Alexander's death.5 He was sentenced to life plus fifty years and appealed directly to the North Carolina Supreme Court.6

The supreme court found prejudicial error in the trial court's refusal to instruct jurors that they could consider mental condition in determining specific intent. The supreme court set aside the first degree murder conviction and ordered a new trial.7 Because specific intent, premeditation, and deliberation are not elements of second degree murder in North Carolina, the court found no error in defendant's second degree murder conviction.8 The court cited State v. Shank to support the admissibility of testimony concerning specific intent.9 The court, however, found no error in the trial judge's exclusion of expert testimony concerning defendant's ability to premeditate and deliberate.10 The court explained that those words were legal terms of art not sufficiently understood by the expert to qualify his opinion.11

A brief description of the diminished capacity defense will make the facts and results of Shank and Rose more understandable. As the defense operates, it denies that a defendant formed a mental state that is an element of the crime he is accused of committing, therefore preventing conviction for that crime.12 Unlike the insanity defense, an affirmative defense for which the burden of persuasion may be imposed on the defendant,13 the diminished capacity defense negates an element within the state's burden of proof.14 By keeping the burden

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54. Id. at 457, 373 S.E.2d at 428.
55. Id. at 456, 373 S.E.2d at 427.
56. Id. at 455, 373 S.E.2d at 427.
57. Id. at 458, 373 S.E.2d at 428-29.
58. Id.
59. Id. at 457-58, 373 S.E.2d at 428.
60. Id. at 460, 373 S.E.2d at 429-30.
61. Id.; see supra note 14; infra notes 173-74 and accompanying text (legal terms not understood by an expert are inadmissible under N.C. R. EVID. 702).
62. See P. Robinson, supra note 1, § 101 (diminished capacity defense described as "failure of proof" defense); Sendor, supra note 1, at 1430.
63. Patterson v. New York, 432 U.S. 197, 202-10 (1977) (New York statute requiring defendant to prove extreme emotional disturbance by preponderance of evidence held unconstitutional because defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder"); Leland v. Oregon, 343 U.S. 790, 799 (1952) (Oregon statute requiring defendant to prove insanity beyond a reasonable doubt not violative of due process clause).

"Burden of proof" in this Note refers to the burden of persuasion and not to the burden of production.

The burden of production refers to the obligation to raise an issue. The burden of persuasion refers to the risk of uncertainty as to the issue's resolution. Thus, the party bearing the burden of production will have an issue resolved against him if it is not raised by the
of persuasion on the prosecution and attempting to create only a reasonable doubt about a mental element of an offense, the diminished capacity defense is more likely to succeed than the insanity defense. Use of the defense typically will not result in acquittal, however, because it does not preclude conviction for a lower grade offense that does not require proof of a specific mental state.

The term "diminished capacity defense" is a misnomer, because this doctrine recognizes not an independent defense but a rule of relevancy: if a criminal offense is defined by a mental element, evidence of a defendant's defective mental condition logically should be allowed to rebut evidence presented by the prosecution concerning the existence of that element. Strictly speaking, a showing of diminished capacity is only necessary to allow the logical deduction that a defendant without capacity in fact could not have formed a state of mind required for a particular criminal offense.

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Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 85 YALE L.J. 1325, 1329 n.8 (1979). The burdens of production and persuasion in the context of specific intent are discussed in H. BRANDIS, NORTH CAROLINA EVIDENCE § 234 (3d ed. 1988).

65. Cf. State v. Beach, 102 N.M. 642, 699 P.2d 115 (1985); Wagner v. State, 687 S.W.2d 303 (Tex. Crim. App. 1984); see also CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-6.2 (Tent. Draft) (Am. Bar Ass'n 1983) ("In the great majority of cases, the evidence concerning a defendant's abnormal mental condition will, if believed, do no more than reduce the grade of the offense."); Mandiberg, Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses, 53 FORDHAM L. REV. 221, 228 (1984) (diminished capacity can only negate subjective mens rea requirements, which author says are limited to specific intent crimes). But see Hendershott v. People, 653 P.2d 385 (Colo. 1982) (due process requires that diminished capacity defense be allowed to negate general intent crimes), cert. denied, 459 U.S. 1225 (1983). The Model Penal Code, which abolishes all distinctions between specific and general intent crimes, recognizes the diminished capacity defense in any case where the defendant's mental state is an element of the offense. MODEL PENAL CODE § 4.02 (Proposed Official Draft 1962). One commentator has argued that diminished mental capacity should also negate general intent because "general intent crimes presuppose a minimal ability to act voluntarily." Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 COLUM. L. REV. 827, 832 n.25 (1977).

Public policy may justify a prohibition of the diminished capacity defense in cases where no lesser general intent crime exists to punish a defendant whose mental state negates a mental element of the crime. See, e.g., Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.), cert. dismissed, 439 U.S. 801 (1978); infra notes 125-27 and accompanying text. But see People v. Wetmore, 22 Cal. 3d 318, 328, 583 P.2d 1308, 1315, 149 Cal. Rptr. 265, 272 (1978) (diminished capacity defense "extends to all specific intent crimes, whether or not they encompass lesser included offenses. . . . [W]e do not perceive how a defendant who has in his possession evidence which rebuts an element of the crime can logically be denied the right to present that evidence merely because it will result in his acquittal."), superseded by 1981 Cal. Stat. 404 § 4 (current version at CAL. PENAL CODE §§ 28, 29 (West 1988)).


68. State v. Cooper, 286 N.C. 549, 593-94, 213 S.E.2d 305, 333 (1975) (Sharp, C.J., dissenting) (citing authority from other jurisdictions that evidence of defendant's mental condition is admissible when considering whether the accused had the capacity to form intent "and whether he did so"). One commentator has recommended scrapping the term "capacity" from the defense, which he calls...
Although most crimes include a *mens rea* element, the concept of negating that element is obscured by the more famous insanity defense, which excuses criminal behavior even when *mens rea* elements are established. Because diminished capacity may result from mental disorder similar to but milder than disorder constituting legal insanity, in particular cases the defense may serve as a feasible alternative to a dubious insanity defense. A brief description of the insanity defense therefore sheds light on the diminished capacity defense.

The insanity defense in North Carolina asserts that the defendant at the time of an alleged offense was incapable of knowing the nature and quality of an act or incapable of distinguishing right from wrong in relation to that act, thereby providing a complete excuse for one who otherwise could be guilty.

North Carolina's standard for legal insanity, like the test employed in over half of American jurisdictions, is derived from the insanity test in *M'Naghten's Case.* Because the insanity defense is an affirmative defense not negating any element of the crime, the burden of persuasion as well as the burden of produc-

the "*mens rea variant.*" Morse, *Undiminished Confusion in Diminished Capacity,* 75 J. CRIM. L. & CRIMINOLOGY 1, 44 (1984). "The real question is whether the defendant actually formed a requisite *mens rea,* and all testimony on this issue should be directed towards showing what actually went on in the defendant's mind." *Id.*

One writer has expressed concern that the capacity standard requires the defendant to show more than is necessary to negate a *mens rea* element. "If it seems to a jury that the only way it can find intent to have been absent is if it was not possible, conviction is probable." Clark, *Clinical Limits of Expert Testimony on Diminished Capacity,* 5 INT'L J.L. & PSYCHIATRY 155, 162 (1982); see also Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation,* 66 VA. L. REV. 427, 475-76 (1980) (expert witness should be allowed to testify as to the probability that defendant actually had the requisite state of mind at a given time). *But see* Lewin, *supra* note 67, at 1065 ("Requiring the expert to testify that he has an opinion as to the exact state of mind at the time of the crime would seem to ask the impossible.").

69. P. ROBINSON, *supra* note 1, § 64(a) n.1 (both defenses are often raised at trial when defense attorney is unsure which, if any, the jury might believe).

70. In jurisdictions that place the burden of persuasion on the prosecution to prove sanity, a prosecution that has carried its burden is perhaps more likely to prevail over a diminished capacity defense. But as demonstrated by the examples in Clark, *supra* note 68, at 167-68, legally sane people suffering from mental disorders can commit criminal acts without the requisite criminal intent. A more common type of defendant who may be legally sane but lack a criminally defined mental state is a mentally retarded person. *See, e.g.,* State v. Gonzales, 140 Ariz. 349, 352-53, 681 P.2d 1368, 1371-72 (1984) (evidence that defendant was mildly retarded might have raised reasonable doubt whether he understood circumstances well enough to have knowingly restrained victim).


73. 8 Eng. Rep. 718, 722, 10 Clark & Fin. 200, 210 (1843). In *M'Naghten* the Queen's Bench announced this test:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.

*Id.;* W. LAFAVE & A. SCOTT, *supra* note 2, § 4.2(a). This Note will not discuss the insanity defense or its various tests in detail. For discussions of other tests, see W. LAFAVE & A. SCOTT, *supra* note 2, §§ 4.2(d), 4.3 (discussing contemporary insanity tests); Sendor, *supra* note 1, at 1380-94 (surveying the "major modern insanity defenses used or proposed in Anglo-American law, beginning with the *M'Naghten* test"); see also MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (insanity defined as one's lack of "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law").
tion may be imposed—and in North Carolina is imposed—on the defendant. The diminished capacity defense may benefit a defendant who has failed to prove insanity but may have raised some doubt about mental elements that the state must prove beyond a reasonable doubt. At least one court has confused the diminished capacity defense with the insanity defense, failing to recognize any distinction between the two. The confusion is understandable when the same evidence may be used to show both defenses.

Although diminished capacity is most similar to the insanity defense in its symptoms, its function as a negating defense is more similar to the defense of intoxication. In North Carolina, as in many other states, evidence of voluntary intoxication (usually by alcohol) is admissible to negate premeditation and deliberation in first degree murder cases. To be entitled to a jury instruction on the intoxication defense, a defendant in North Carolina must meet the relatively high burden of production of introducing evidence that intoxication rendered him "utterly incapable" of forming the alleged mens rea. In some jurisdictions the intoxication defense provided the initial rationale for allowing the diminished capacity defense.

North Carolina juries are instructed that premeditation means a defendant "formed the intent to kill the victim over some period of time, however short, before he acted." Likewise, the term deliberation means "in a cool state of


75. An early New York decision demonstrates the relationship between the insanity defense and the diminished capacity defense:

Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense.

People v. Moran, 249 N.Y. 179, 180, 163 N.E. 553, 553 (1928); see also Jones v. Commonwealth, 75 Pa. 403, 408 (1874) (defendant may not be convicted in absence of required mens rea "whether it is caused by insanity, intoxication, or other controlling influences").

76. Sprague v. State, 52 Wis. 2d 89, 187 N.W.2d 784 (1971).


79. Mash, 323 N.C. at 348, 372 S.E.2d at 537. Evidence that a defendant's blood alcohol would violate the law against drunken driving is not sufficient to entitle him to submit the intoxication defense to the jury. Id. (citing State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978)); cf. State v. Propst, 274 N.C. 62, 71, 161 S.E.2d 560, 568 (1968) (intoxication evidence was sufficient for jury consideration although defendant, a schizophrenic, was not so drunk as to be "utterly unable" to form specific intent).


mind... with a fixed purpose, not under the influence of some suddenly aroused violent passion.”

The intent to kill is defined as “a mental attitude seldom provable by direct evidence” that “must ordinarily be proved by circumstances from which it may be inferred.” Juries also are told that they may infer premeditation and deliberation from circumstances including lack of provocation by the victim, conduct by the defendant before, during and after the time of the killing, threats and declarations by the defendant, and the use of grossly excessive force.

The diminished capacity defense, rarely discussed in North Carolina cases, was first addressed by the state supreme court in State v. Cooper. Defendant in Cooper was diagnosed as a paranoid schizophrenic after he killed his wife and four of their five children under the delusion that the children had been sent from outer space to kill him. Charged with five counts of first-degree murder, he pleaded not guilty by reason of insanity; a jury rejected that defense. Upon conviction on all five counts, defendant appealed and assigned error to the trial court's failure to instruct the jury that it should consider evidence that his mental illness may have impaired his ability to kill with premeditation and deliberation. The supreme court found no error in the trial court’s failure so to instruct the jury. The court acknowledged that:

a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication, . . . or some other cause.

The court then explained why its decision should be distinguished from the general rule of law:

82. Id.
83. See, e.g., State v. Tysor, 307 N.C. 679, 683, 300 S.E.2d 366, 368 (1983) (deliberation does not mean defendant was calm or tranquil, but that emotion “must not have been such as to disturb the defendant’s faculties and reason”); State v. Misenheimer, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981) (if intent to kill is premeditated and deliberated, it does not matter that intent is executed while defendant is excited); State v. Corn, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (intent must arise from “a fixed determination previously formed after weighing the matter”) (quoting State v. Exum, 138 N.C. 599, 618, 50 S.E.2d 221, 223 (1949)).
84. NORTH CAROLINA PATTERN JURY INSTRUCTIONS, Crim. § 206.10 (1987).
85. Id.
86. 286 N.C. 549, 213 S.E.2d 305 (1975).
87. Id. at 558, 213 S.E.2d at 311-12. Before authorities discovered the bodies in the family's apartment, defendant told a doctor of his acts and asked if he had done the right thing. Id.
88. Id. at 552, 213 S.E.2d at 305.
89. Id. at 572, 213 S.E.2d at 320. Defendant did not request a diminished capacity instruction at trial but assigned error to the trial court's failure to give the instruction sua sponte. Id. at 595, 213 S.E.2d at 334 (Sharp, C.J., dissenting).
90. Id. at 573, 213 S.E.2d at 321. The court found no other error in the jury instructions, which included a typical first-degree murder charge and an instruction on the insanity defense. But the court suggested the procedure could be improved by instructing jurors to consider the insanity defense before considering whether elements of the offense had been proved. The suggested procedure would avoid wasted time when jurors found a defendant not guilty by reason of insanity. Id. at 571, 213 S.E.2d at 320.
91. Id. at 572, 213 S.E.2d at 320. This sentence was quoted in Shank. 322 N.C. at 251, 367 S.E.2d at 644.
The jury, by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts.

... It requires less mental ability to form a purpose to do an act than to determine its moral quality. The jury, by its verdict, has established that this defendant, at the time he killed his wife and the four little children, had this higher level of mental capacity. It necessarily follows that he had the lesser, included capacity to premeditate and deliberate.92

The court cited no authority for its formula defining the ability to form specific intent as a necessary component of the ability to determine right from wrong.93

Chief Justice Sharp dissented in a lengthy opinion, advocating that the court follow other jurisdictions' position "that mental disease short of legal insanity may be considered in determining whether the accused at the time of the alleged homicide was capable of forming a premeditated and deliberate intent to kill, and whether he did so."94 The dissent argued that a jury instruction to that effect should be given in first degree murder cases where the state was required to prove premeditation and deliberation and where "substantial evidence" indicated that the defendant at the time of the killing was suffering from "a recognized serious mental disease and engaged in abnormal behavior characteristic of such disease."95 The chief justice drew an analogy to North Carolina decisions recognizing that intoxication could negate the premeditation and deliberation elements of first degree murder.96 The Cooper majority had summarily distinguished the intoxication cases, noting that in those cases the jury had not determined that defendants knew right from wrong.97

92. Cooper, 286 N.C. at 572-73, 213 S.E.2d at 321 (emphasis added).
93. See Note, supra note 1, at 998 (criticizing Cooper court for "recognizing a theory that should not be judicially noticed, since it is not well established or authoritatively settled"). The United States Supreme Court has invalidated on due process grounds a statute which operated in a manner analogous to that of the formula followed in Cooper. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (due process is violated by a statute requiring defendant to disprove, in effect, an element of first-degree murder in order to limit his conviction to the lesser offense of manslaughter). Commentators likewise have argued that these kinds of formulae violate due process. See Clark, supra note 68, at 167-68 (examples of people who have committed criminal acts while legally sane but without specific intent); Morse, supra note 68, at 40-41 & n.138 (mens rea is rarely negated by insanity or mental disorder per se); Comment, Diminished Capacity—Recent Decisions and an Analytical Approach, 30 VAND. L. REV. 213, 232 (1977) (citing Cooper as an example of cases that may violate fourteenth amendment due process requirement suggested by Mullaney decision).
94. Cooper, 286 N.C. at 593, 213 S.E.2d at 333 (Sharp, C.J., dissenting).
95. Id. at 592, 213 S.E.2d at 332 (Sharp, C.J., dissenting). Chief Justice Sharp emphasized the limited scope of her proposed rule by repeating it verbatim later in her opinion. Id. at 596, 213 S.E.2d at 335 (Sharp, C.J., dissenting).
96. Id. at 592-93, 213 S.E.2d at 333 (Sharp, C.J., dissenting) (citing State v. Propst, 274 N.C. 62, 71-72, 161 S.E.2d 560, 567 (1968) (evidence of alcohol consumption warranted jury instruction on intoxication defense)).
97. Id. at 572, 213 S.E.2d at 321 (Sharp, C.J., dissenting). Neither Chief Justice Sharp nor the majority mentioned the argument that basic fairness prohibits allowing persons impaired by intoxi-
The supreme court followed the Cooper formula in more than a half dozen murder cases rejecting the diminished capacity defense. For the most part, the later cases simply have cited Cooper's holding without looking beyond it for support. The supreme court's summary affirmance of Cooper has led the court to approve jury instructions that are even more detrimental to the defendant's interest than Cooper's omission of instructions. For example, in State v. Mize the supreme court affirmed a jury instruction that evidence of insanity be considered "only if you find that the State has proved beyond a reasonable doubt" each element of first-degree murder, second-degree murder or manslaughter. Under this instruction, defendant argued, a juror who absent any instruction might have considered the impact of mental condition on premeditation and deliberation would understand that she could not consider such evidence until after determining the defendant's guilt. In other words, such an instruction prevents the use of diminished capacity evidence in the guilt phase of a trial. More recently, the Attorney General of North Carolina cited Cooper when arguing that the failure of defendant in Shank to raise the insanity defense established his mental capacity for premeditation and deliberation purposes.

Three North Carolina statutes recognize that mental disability not rising to the level of insanity may affect culpability or, if not that, punishment. North Carolina General Statutes section 15A-959, commonly known for requiring a
defendant to file pretrial motions of plans to assert the insanity defense, also
requires pretrial notice if a defendant plans to introduce testimony "relating to a
mental disease, defect, or other condition bearing upon the issue of whether he
had the mental state required for the offense charged."

The supreme court has rejected the argument that section 15A-959 would not require the notice
unless such a defense were anticipated, finding it "implausible that the Criminal
Code Commission . . . would implant a new and far-reaching theory on North
Carolina law by implication." Two other statutes include mental impairment
not rising to the level of insanity as a mitigating factor to be considered in
sentencing.

Several federal and state appellate courts have wrestled with the diminished
capacity defense. These decisions provide a backdrop for evaluating North
Carolina law.

Significant to the diminished capacity defense are several United States
Supreme Court rulings that due process requires the state to prove beyond a
reasonable doubt every element of an alleged crime. Among these decisions
Mullaney v. Wilbur is most closely related to the diminished capacity defense.
The Court in Mullaney ruled that a state law requiring the defendant

105. Id. § 15A-959(b).
106. State v. Harris, 290 N.C. 718, 725, 228 S.E.2d 424, 429 (1976). In Harris defendant's attor-
ney requested a diminished capacity instruction based on both the text of the statute and the follow-
ing official commentary: "'[T]here may be a number of situations where the defense of insanity itself
is not technically raised but expert testimony as to mental state will be introduced to negative the
defendant's culpability with respect to some element of the offense.'" Id. at 725 (quoting N.C. GEN.
STAT. § 15A-959 official commentary).
lists aggravating and mitigating factors to be considered by jurors when choosing between sentences
of life imprisonment or death for first-degree murderers, includes as a mitigating circumstance that
murder "was committed while the defendant was under the influence of mental or emotional distur-
bance." Id. § 15A-2000(f)(2). Section 15A-1340.4(a)(2)(d), part of the Fair Sentencing Act, lists
factors to be considered by judges in determining sentences and includes as a mitigating factor a
defendant's mental condition "that was insufficient to constitute a defense [to the crime] but signifi-
cantly reduced his culpability for the offense." Id. § 15A-1340.4(a)(2)(d).
108. See infra notes 117-49 and accompanying text.
on defendant to show self-defense, as long as evidence for that defense may also be considered in
determining the sufficiency of the state's proof of the essential elements of murder); Francis v. Frank-
lin, 471 U.S. 307, 317-18 (1985) (presumption of intent, even though rebuttable, held unconstitu-
tional shifting of burden of proof to defendant in murder case); Sandstrom v. Montana, 442 U.S. 510,
512, 524 (1979) (presumption that person intends ordinary consequences of his voluntary acts vol-
lated due process by allowing shift of burden of persuasion to defendant); Patterson v. New York,
432 U.S. 197, 210 (1977) ("Due Process Clause requires the prosecution to prove beyond reasonable
doubt all of the elements included in the definition of the offense of which the defendant is charged,"
although burden of production may be placed on defendant to justify reasonable doubt); Mullaney v.
Wilbur, 421 U.S. 684, 686 n.3, 704 (1975) (due process requires state to prove absence of heat of
passion where murder included "malice aforethought, either express or implied," as an ele-
ment of the crime); In re Winship, 397 U.S. 358, 363-64 (1970) (requirement that state prove every
element of a crime beyond a reasonable doubt is important where defendant faces stigma of convic-
tion and loss of liberty).

The United States Supreme Court has never considered the constitutional requirements of the
diminished capacity defense. The Court addressed diminished capacity only as a matter of subs-
tantive law in Fisher v. United States, 328 U.S. 463, 473-77 (1945), an appeal from the District of
Columbia, but deferred to Congress to create such a doctrine.
111. See Comment, supra note 93, at 229-230 ("Arguably, if a failure to find insanity constitutes
to disprove, by an affirmative defense, an intent element of murder unconstitutionally shifted the burden of proof.\textsuperscript{112} Justice Rehnquist wrote a concurring opinion noting the continuing validity of the Court's previous ruling that a state law requiring the criminal defendant to prove the insanity defense did not violate due process.\textsuperscript{113} He explained why the old and new decisions were both correct: "Although . . . evidence relevant to insanity as defined by state law may also be relevant to whether the required \textit{mens rea} was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."\textsuperscript{114}

Subsequent Supreme Court decisions have followed and refined the \textit{Mullaney}\textsuperscript{115} rule, carefully distinguishing between permissible burdens of persuasion for defenses that negate offense elements and for defenses that excuse or justify criminal behavior.\textsuperscript{116} Lower federal and state appellate courts also have recognized the diminished capacity defense based on similar constitutional princi-

\begin{itemize}
  \item \textsuperscript{112} 421 U.S. at 701-04. The Court struck down a Maine statute requiring a defendant charged with murder to prove that he acted in a heat of passion on sudden provocation in order to reduce his conviction to manslaughter. \textit{Id.} Even though the absence of heat of passion and sudden provocation was not an essential element of the murder statute, malice aforethought was an essential element. \textit{Id.} at 512 n.3 (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (1964)). Malice is an element of second degree murder in North Carolina, and a presumption of malice is raised when the prosecution proves an unlawful killing by intentional use of a weapon. State v. Phillips, 264 N.C. 508, 515, 142 S.E.2d 337, 341 (1965). Following \textit{Mullaney}, the North Carolina Supreme Court held that this presumption of malice would be reduced to an inference once the defendant produced some evidence to negate malice. State v. Hankerson, 288 N.C. 632, 643-44, 220 S.E.2d 575, 584 (1975), rev'd on other grounds, 432 U.S. 233 (1977).
  \item \textsuperscript{113} See Leland v. Oregon, 343 U.S. 790 (1952). The trial court in \textit{Leland} had instructed jurors that:

  \[\text{[In determining whether or not the defendant acted purposely and with premeditated and deliberate malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact, his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in this case.}]\]

  \textit{Id.} at 795 n.8.
  \item \textsuperscript{114} \textit{Mullaney}, 421 U.S. at 705-06 (Rehnquist, J., concurring).
  \item \textsuperscript{115} The subsequent decisions cite not only \textit{Mullaney} but also its more famous precursor, \textit{In re Winship}, 397 U.S. 358, 368 (1970), in which the Court held that due process requires the prosecution to prove beyond a reasonable doubt the existence of every element of a crime defined by state statute.
  \item \textsuperscript{116} Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977). In \textit{Patterson} the Court upheld a statute that defined murder as the intentional killing of another, except when the defendant could prove as an affirmative defense that he acted "under the influence of extreme emotional disturbance." 432 U.S. at 200. The Court distinguished \textit{Mullaney}, noting that because the burden of proving intent remained with the prosecution, and because an emotional disturbance as defined by the statute "does not serve to negative any facts of the crime which the State is to prove," the state could properly place the burden of proving that defense on the defendant. \textit{Id.} at 207. In \textit{Martin} the Court upheld an Ohio law defining murder as "purposely, and with prior calculation and design, causing the] death of another," and defining as an affirmative defense a defendant's claim of self-defense. 480 U.S. at 230 (citing OHIO REV. CODE ANN. § 2903.01 (Anderson 1982)). The Court, as in \textit{Patterson}, held that the affirmative defense excused purposeful killing and did not negate any element of murder. \textit{Id.} at 233. The Court also reasoned that instructions to the jury allowed it to consider all the evidence—including evidence introduced to show self-defense—in determining whether the prosecution had proven the elements of murder beyond a reasonable doubt. \textit{Id.}
\end{itemize}
The United States Courts of Appeals for the Eleventh and Seventh Circuits have held that the exclusion of evidence of mental impairment, coupled with a jury instruction allowing a permissive presumption of intent, violated defendants' due process rights. The Eleventh Circuit's en banc decision in *Bowen v. Kemp* spoke to the relationship between diminished capacity and insanity and rejected the type of formula that the North Carolina Supreme Court defined in *State v. Cooper*. The *Bowen* court held that a jury's rejection of the accused's insanity defense "does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a normal or average person." An uncertain jury, the court noted, could have rejected defendant's insanity defense and at the same time decided that the prosecution failed to prove intent. Accordingly, the court held that intent remained an issue for the jury and thus an instruction that intent could be presumed coupled with the exclusion of evidence to negate intent was unconstitutional. In *Hughes v. Mathews* the Seventh Circuit similarly held that a jury instruction allowing a rebuttable presumption of intent coupled with the exclusion of psychiatric testimony that could have rebutted the presumption unconstitutionally relieved the state of its burden of proof. The *Hughes* court also held that the exclusion of diminished capacity evidence was by itself unconstitutional. Under the sixth and fourteenth amendments a criminal defendant has the right to call witnesses in his behalf, with the result that a trial judge could not exclude competent, relevant psychiatric evidence for the defense without justification. The state's fear that a new defense would set free criminals who were not legally insane did not justify excluding psychiatric evidence to negate intent, the court held, in a case such as *Hughes* in which the defense would only reduce the degree of guilt, not gain acquittal. The court's distinct-

121. See *Bowen*, 832 F.2d at 549-51. For a discussion of the North Carolina formula, see *supra* text accompanying notes 91-93, *infra* notes 183-88 and accompanying text.
122. *Bowen*, 832 F.2d at 550. Although four dissenters argued that overwhelming evidence in the case rendered the error harmless, all agreed with the majority statement that legal sanity may not be equated with capacity. *Id.* at 551-54 (Roney, C.J., dissenting in part).
123. *Id.* at 550.
124. *Id.* at 551. The United States Court of Appeals for the Eleventh Circuit had previously held that instructing the jury that intent could be presumed would be harmless error in a case if intent were not at issue or if evidence of defendant's guilt were overwhelming. *Id.* at 548.
126. *Id.* at 1255.
129. *Id.* at 1258. The court reserved, however, a more difficult issue: "We expressly leave open the question of whether the State's fear of the 'guilty' going free is sufficient justification for exclud-
tion between results to be gained from the defense thus injected a policy consideration into the constitutional analysis.

Policy decisions about the diminished capacity defense are most often discussed by courts reviewing substantive, rather than constitutional, appeals of criminal cases. The United States Court of Appeals for the District of Columbia Circuit decided en banc in *United States v. Brawner*\(^{130}\) that expert testimony about a defendant's abnormal mental condition should be admitted "if it is relevant to negative, or establish, the specific mental condition that is an element of the crime."\(^{131}\) The court based its decision on an analogy to the intoxication defense:\(^{132}\)

> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.\(^{133}\)

Although several courts have followed *Brawner's* holding,\(^{134}\) the District of Columbia Court of Appeals criticized sharply what it deemed to be a "flawed" analogy between mental impairment and intoxication.\(^ {135}\) "Unlike the notion of partial or relative insanity," the court explained in *Bethea v. United States*,\(^ {136}\) "conditions such as intoxication, medication, epilepsy, infancy, or senility are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding."\(^ {137}\) The *Bethea* court agreed that psychiatric testimony is generally relevant to the issue of intent,\(^ {138}\) but cautioned against "the unwarranted additional assumption that the psychiatric sciences are capable of direct proof of the existence of the necessary mental state as defined by law."\(^ {139}\)

In spite of concerns such as those of the *Bethea* court, more than half the states have adopted the diminished capacity defense to some degree\(^ {140}\) by stating psychiatric testimony on the issue of capacity to form intent when there is no lesser included crime of which, absent specific intent, a defendant would be guilty." *Id.*

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130. 471 F.2d 969 (D.C. Cir. 1972) (en banc). This was not a constitutional review, but instead a substantive review of an appeal from the District of Columbia. *Id.* at 973.
131. *Id.* at 1002.
132. *Id.* at 998-99.
133. *Id.*
136. *Id.*
137. *Id.*; accord Steele v. State, 97 Wis. 2d 72, 94-97, 294 N.W.2d 2, 12 (1980).
138. See *Bethea*, 365 A.2d at 86 n.46.
139. *Id.* The incompatibility of scientific and legal concepts of intent has been acknowledged as problematic in the diminished capacity context. See Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 313, 324-25 (1971).
140. P. ROBINSON, supra note 1, § 101(b) (diminished capacity negating *mens rea* recognized in most jurisdictions, either in all cases in which intent is an element, only those cases in which specific
ute\textsuperscript{141} or case law.\textsuperscript{142} Some states allow the defense to be raised to negate any mental state that is an element of any offense;\textsuperscript{143} some allow the defense to negate specific intent elements only;\textsuperscript{144} and some allow it to negate only specific intent elements of murder.\textsuperscript{145} Exactly what range of disorders would be considered relevant to \textit{mens rea} is unclear, but several courts have excluded evidence of emotional or volitional impairment, distinguishing it from cognitive impairment.\textsuperscript{146} At least one state court has held that evidence of mental retardation is relevant to a \textit{mens rea} element.\textsuperscript{147} Since a federal insanity defense was first codified in 1984\textsuperscript{148} in a statute making no mention of a defense that could negate mental elements of offenses, federal courts have disputed whether the statute leaves room for the diminished capacity defense.\textsuperscript{149}

intent is an element, or only murder cases in which premeditation and deliberation are elements). For a categorical list of states that have adopted the diminished capacity defense in varying degrees and states that have rejected it, see \textit{id}. § 64(a) nn.3-6.

California led the nation in developing the diminished capacity defense in a series of decisions beginning with the holding that psychiatric evidence was admissible to negate the element of malice aforethought defined in an assault statute. People v. Wells, 33 Cal. 2d 330, 357, 202 P.2d 53, 65, cert. denied, 338 U.S. 836 (1949). Typical of the doctrine's development is the decision in People v. Wetmore, 22 Cal. 3d 318, 321, 583 P.2d 1308, 1317, 149 Cal. Rptr. 265, 267 (1978), superseded by 1981 Cal. Stat. 404 § 4 (current version at CAL. PENAL CODE § 28(a)-(b) (West 1988)), holding that psychiatric evidence was admissible to show that a psychotic person had no intent to burglarize an apartment when he broke in under the delusion that it was his own home. The \textit{Wetmore} court noted that "if the evidence of a defendant's mental illness indicates that the defendant lacked the specific intent to commit the charged crime such evidence [on the intent issue] cannot reasonably be ignored merely because it might (but might not) also persuade the trier of fact that the defendant is insane." \textit{id}. at 324, 583 P.2d at 1321, 149 Cal. Rptr. at 269. More extreme examples of the defense include a case in which defendant successfully argued that depression and the effects of too much sugary junk food—the infamous "Twinkie" defense—negated specific intent to commit murder. \textit{See Getting Off? Depression as a Defense, Time}, May 28, 1979, at 57. Shortly after this case was decided, the California statute was amended to prohibit the diminished capacity defense. CAL. PENAL CODE § 28(a)-(b) (West 1988); cf. Zamora v. State, 361 So. 2d 776, 779 (Fla. Dist. Ct. App.) (rejecting "T.V. intoxication" as a defense to first degree murder), cert. denied, 372 So. 2d 472 (Fla. 1978).

\textsuperscript{141} See, e.g., COLO. REV. STAT. § 18-1-803 (1987) (evidence of mental impairment admissible to negate mental element of any offense).

\textsuperscript{142} See cases cited \textit{supra} note 66 for examples of decisions permitting in varying degrees the diminished capacity defense.


\textsuperscript{146} E.g., Commonwealth v. Kenny, 326 Pa. Super. 425, 429-30, 474 A.2d 313, 315-16 (1984) (lack of emotional control held to be "irresistible impulse" and not diminished capacity). For examples demonstrating the difference between volitional and cognitive defects, see Sendor, \textit{supra} note 1, at 1403-04. Sometimes a cognitive defect can contribute to volitional impairment. \textit{See} Sendor, \textit{supra} note 1, at 1411-12.


\textsuperscript{149} See, e.g., United States v. Pohlot, 827 F.2d 889, 903 (3d Cir. 1987) (Congress eliminated any excusing defense other than insanity but did not preclude the use of relevant psychiatric evidence to negate a mental element of an offense), cert. denied, 108 S. Ct. 710 (1988).
If the diminished capacity defense is recognized in a jurisdiction, courts still must decide whether expert testimony offered for the defense is admissible under governing evidence law. Scientific evidence was first identified as deserving extra scrutiny in *Frye v. United States* where the United States Court of Appeals for the District of Columbia Circuit held that a scientific principle could not have probative value unless it had gained "general acceptance" in the field to which it pertained. In the sixty-six years since *Frye* was decided, courts have retreated from this standard. The court in *United States v. Brawner* warned that introducing such testimony "requires careful administration by the trial judge" by means of a proffer outside the jury's presence and a determination by the judge "whether the testimony is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in reaching a decision on the ultimate issues." Courts and scholars continue to debate evidence problems inherent in the diminished capacity defense. At least one court following the *Brawner* standard of "sufficient scientific support" rejected psychiatric testimony that did not meet that test. Commentators have suggested prohibiting psychiatric testimony on the ultimate issue of intent, or allowing only relatively simple psychiatric testimony that is clearly probative of a mens rea element and that jurors can understand easily, or allowing less than exact evidence that is relevant to the definition of mens rea provided by the criminal statute.


150. 293 F. 1013 (D.C. Cir. 1923).
151. Id. at 1014.
155. Brawner, 471 F.2d at 1002.
156. United States v. Bright, 517 F.2d 584 (2d Cir. 1975). The *Bright* court upheld the exclusion of a psychiatrist's testimony that defendant's "passive-dependent personality disorder" prevented her from believing that stolen checks given to her by her boyfriend were actually stolen. Id. at 586 (quoting *Model Penal Code* § 4.01 (Proposed Official Draft 1962)). The court made a common sense observation:

[i]n the case of a defendant ... the host of attitudes and syndromes that are a part of daily living, into opinion evidence to the jury for exculpation or condemnation is to go beyond the boundaries of current knowledge. The shallower the conception the deeper runs the danger that the jury may be misled.

Id.

157. Bonnie & Slobogin, *supra* note 68, at 456 (ultimate issue is a moral judgment beyond clinical expertise); Morse, *supra* note 68, at 48-50 (conclusion about mens rea is not a scientific process but a common-sense inference that would be unduly influenced by a psychiatrist's conclusion or diagnosis).
158. Lewin, *supra* note 67, at 1095-97; Note, *supra* note 154, at 441-42; Comment, *supra* note 93, at 237 (testimony should be excluded when psychiatrists are "unable to match their evaluation of a defendant's mental condition to the culpable mental states defined by the law").
159. Bonnie & Slobogin, *supra* note 68, at 446 ("If the law chooses to define culpability in subjective terms, it cannot close the door on the defendant's effort to reconstruct his actual state of mind."); id. at 466 (imprecision of expert testimony can be explored through direct and cross-examination of witness).
each allow the introduction of relevant expert testimony as long as such evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue." The expert's testimony generally must be based on facts "reasonably relied upon by experts in the particular field."

The North Carolina rules differ from the federal rules, however, by allowing otherwise admissible expert testimony to be introduced even if it embraces an ultimate issue of a criminal defendant's mental state. North Carolina Rule 704 supersedes earlier cases in the state prohibiting expert opinion about a defendant's mental ability to commit a crime. But as demonstrated by recent North Carolina Supreme Court decisions, including State v. Rose and State v. Weeks, other evidence rules will render inadmissible expert conclusions that simply parrot legal standards without any scientific basis. In State v. Rose the supreme court held that although expert testimony that defendant could not form a specific intent to kill was admissible, testimony from the same expert that defendant could not premeditate or deliberate at the time of the killings was properly excluded at trial. The court, referring to State v. Weeks and earlier decisions as authority, explained that the terms "premeditation" and "deliberation" were legal terms of art whose meanings were not readily apparent to a medical expert. In State v. Weeks the court was presented with a defendant who was convicted of first-degree felony murder and second-degree murder after attempting to assert both the insanity defense and the diminished capacity defense. Defendant denied that he had acted with malice, an element of each offense. Defendant challenged the trial court's exclusion of a psychologist's testimony that defendant at the time of the killings was not "in a cool state of

161. FED. R. EVID. 702; N.C. R. EVID. 702.
162. FED. R. EVID. 703; N.C. R. EVID. 703.
163. N.C. R. EVID. 704. The rule is identical to the first half of the correlating federal rule. But it does not include a corollary to Federal Rule of Evidence 704(b):

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of the defense thereto.

164. See cases cited in H. BRANDIS, supra note 64, § 127.
167. Id. at 164-66, 367 S.E.2d at 903 (citing N.C. R. EVID. 702); State v. Ledford, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986) (citing N.C. R. EVID. 702 and finding error in pathologist's testimony that injuries were "proximate cause" of death); Murrow v. Daniels, 85 N.C. App. 401, 408, 355 S.E.2d 204, 210 (1987) (expert cannot draw conclusion that lack of security was "gross negligence"), rev'd and remanded on other grounds, 321 N.C. 494, 364 S.E.2d 392 (1988).
168. Rose, 323 N.C. at 457-60, 373 S.E.2d at 429.
169. Id.
170. Weeks, 322 N.C. at 157, 367 S.E.2d at 898. The defendant was charged with two counts of first-degree murder in the shooting and burning deaths of his father and stepmother. He was found guilty of second degree murder in the death of his father and guilty of first-degree felony murder in the death of his stepmother, the underlying felony being the other murder. Id.
171. Malice is an essential element of common-law murder, codified in North Carolina as second degree murder. N.C. GEN. STAT. § 14-17 (Supp. 1987). Common-law murder committed during the commission of another felony is first degree felony murder. Id.
mind, that he was acting under a suddenly aroused violent passion, that he did not act with deliberation, and that as a result of his mental disorder his ability to conform his behavior to the requirements of the law was impaired." The supreme court affirmed the exclusion, ruling that the evidence was "expert testimony embracing a legal conclusion that the expert is not qualified to make." In reaching this conclusion, the court cited rule 702 of the North Carolina Rules of Evidence which allows an expert to testify only about what the expert actually understands.

The difference between the decision in State v. Shank and those in Weeks and Rose is attributable to North Carolina Rule 702. Expert testimony about legal conclusions that the expert himself does not understand cannot possibly help the jury do its job. The exclusion of such testimony does not necessarily mean that an expert witness cannot explain his understanding of legal standards or approximate the legal standards with similar terms that he does understand, as did the expert whose testimony was ruled admissible in Shank. The supreme court ruled that the expert in Shank could testify that "in his opinion, defendant's diminished mental capacity affected his ability to make and carry out plans" as support for defendant's contention that he did not premeditate and deliberate. That such testimony by an expert is probative of the legal terms would be clear to a jury, especially if the jury were instructed to consider evidence of mental condition when determining the intent issue.

A more slippery evidentiary basis for excluding evidence to support the diminished capacity defense is relevancy. Under both the Federal Rules and North Carolina Rules of Evidence, evidence must be relevant to be admissible. Judges differ in their opinions of which evidence is logically related to elements of a criminal offense.


173. Weeks, 322 N.C. at 164-67, 367 S.E.2d at 902-04. The proffered testimony, the court ruled, "embraces precise legal terms, definitions of which are not readily apparent to medical experts." Id. at 166, 367 S.E.2d at 904.

174. Id. at 164, 367 S.E.2d at 904; see N.C. R. Evid. 702. The court's decision found some support in the trial record of the expert's testimony that the proffered legal terms "come a little hard to psychologists and psychiatrists." Weeks, 322 N.C. at 166 n.2, 367 S.E.2d at 904 n.2. The court also cited two decisions, handed down after rule 702 became state law in 1986, in support of its ruling. Id. at 164-65, 367 S.E.2d at 903-04 (citing State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986) and Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987), rev'd and remanded on other grounds, 321 N.C. 494, 364 S.E.2d 392 (1988)).

Because it held that the evidence was inadmissible under the evidence rules, the Weeks court did not need to evaluate the diminished capacity defense. See State v. Clark, No. 27A88 (N.C. March 2, 1989) (LEXIS, States library, N.C. file).


176. See 322 N.C. at 246, 367 S.E.2d at 641-42.

177. Id.

178. Id.

179. FED. R. EVID. 401; N.C. R. Evid. 401. These rules define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id.

180. For one court's fine distinctions between relevant and irrelevant mens rea elements, see United States v. Pohlot, 827 F.2d 889, 905-06 (3d Cir. 1987), cert. denied, 108 S. Ct. 710 (1988).
By requiring the admission of competent evidence supporting the diminished capacity defense, the North Carolina Supreme Court in Shank has enforced the sixth amendment\(^\text{181}\) requirement that defendants be allowed to present evidence in their defense.\(^\text{182}\) By applying the rule of Shank to cases in which the defendant asserts an insanity defense as well as cases in which the defendant does not, the supreme court in Rose corrected the threat to due process created in Cooper,\(^\text{183}\) albeit sub silentio. In doing so the court enforced the fourteenth amendment requirement that to convict the defendant the prosecution must prove each offense element beyond a reasonable doubt.\(^\text{184}\) The formula established in Cooper, that a jury's rejection of the insanity defense necessarily means defendant had the capacity to premeditate and deliberate,\(^\text{185}\) amounted to a de facto presumption.\(^\text{186}\) That this formula appears unsupported by scientific or legal authority was only half of its shortcoming.\(^\text{187}\) By creating a presumption based not on any fact that the state proved, but rather on the defendant's failure to prove an affirmative defense, the Cooper court relieved the state of its duty to prove each offense element beyond a reasonable doubt.\(^\text{188}\)

Shank and Rose take a careful step forward for North Carolina. These decisions mean that competent expert testimony relevant to specific intent elements of first degree murder may be introduced to challenge the prosecution on its burden of proof, and that juries should be instructed to consider such evidence for that purpose.\(^\text{189}\)

One important issue that neither Shank nor Rose explicitly addressed is what burden of production a defendant must meet to require the court to submit the diminished capacity defense to the jury. In Rose the supreme court required

\(^{181}\) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State, . . . [and] to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend. VI.


\(^{183}\) Rose, 323 N.C. at 457-58, 372 S.E.2d at 429; see Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); supra text accompanying notes 95-106.


\(^{185}\) See supra text accompanying note 92.

\(^{186}\) Through presumptions, the existence of one fact is presumed from proof of another. . . . The 'true' presumption creates an inference that is mandatory unless rebutted . . . . Although some penal statutes purport to create presumptions in mandatory terms, they are generally not given compulsory effect. Instead, the term 'presumption' is used in the criminal law to describe what might better be termed a permissible inference. Jeffries & Stephan, supra note 64, at 1335-36 (footnote omitted); see also id. at 1387-93 (constitutional import of presumptions).

\(^{187}\) H. BRANDIS, supra note 64, § 234 (permissive presumption of intent may arise if a rational connection exists between facts found and existence of intent); Comment, supra note 93, at 230; see also State v. Hankerson, 288 N.C. 632, 647, 220 S.E.2d 575, 586 (1975) (presumption of premeditation and deliberation not allowed under North Carolina precedents), rev'd on other grounds, 432 U.S. 233 (1977).

\(^{188}\) The due process problem is discussed at supra note 93 and notes 120-26 and accompanying text.

\(^{189}\) Although Shank did not expressly rule that jury instructions are required, Shank expressly overruled two cases that upheld denial of jury instructions for diminished capacity based on Cooper. Shank, 322 N.C. at 251, 367 S.E.2d at 644 (overruling State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) and State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981)).
a jury instruction on diminished capacity based on a psychiatrist’s testimony that defendant “could not have formed the specific intent to kill” his victims.\textsuperscript{190} The court did not discuss whether less certain testimonial or circumstantial evidence would meet defendant’s burden.\textsuperscript{191} As a matter of public policy, the burden should be lower than that for the intoxication defense because mental impairment is an immutable defect not voluntarily incurred by the defendant.\textsuperscript{192}

If no evidence of \textit{mens rea} is presented, the prosecution has a procedural advantage in North Carolina, because jurors are instructed that intent to kill, premeditation and deliberation may be inferred from circumstantial evidence.\textsuperscript{193} Although a permissible inference favors the prosecution only slightly in comparison to a presumption, it often delivers a prima facie case for the state on \textit{mens rea} elements. Fairness may require that a trial judge who allows jurors to infer the existence of mental elements of a crime based on circumstantial evidence also instruct jurors that they may infer the nonexistence of those elements based on circumstantial evidence. If such evidence were sufficient to obtain a jury instruction on the diminished capacity defense, defense witnesses would not be forced to walk the fine line between qualified expert opinion and unqualified legal conclusion.

Other issues also remain unresolved. North Carolina courts must decide whether evidence of diminished capacity will be allowed to negate \textit{mens rea} elements of offenses other than murder. The battle over what evidence is relevant, competent, and helpful to a jury will no doubt continue.

Issues surrounding the diminished capacity defense should be carefully scrutinized in capital murder cases, which the United States Supreme Court has recognized require the greatest procedural care.\textsuperscript{194} The Supreme Court’s deci-

\textsuperscript{190} Rose, 323 N.C. at 457, 373 S.E.2d at 427. The court in Shank did not reach the jury instruction issue.

\textsuperscript{191} One United States Court of Appeals judge, in a concurring opinion, has defined the burden for raising negating defenses as “the ultimately modest one of merely producing ‘some’ evidence” when the absence of a defense will result in a presumption against the defendant. Davis v. Allsbrooks, 778 F.2d 168, 182 (4th Cir. 1985) (Phillips, J., concurring).

\textsuperscript{192} In a decision handed down after this Note was written, the North Carolina Supreme Court adopted a lower burden of production for the diminished capacity defense. State v. Clark, - N.C. -, 377 S.E.2d 54 (1989). The court held:

\begin{quote}
The proper test is whether the evidence of defendant’s mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.\textsuperscript{193} Id. The court explained that “where the defendant’s mental defect was beyond his or her control, the policy reasons for posing the high, ‘utterly incapable’ standard of voluntary intoxication cases do not apply.” \textit{Id.} For a discussion of the intoxication defense see \textit{supra} notes 78-80 and accompanying text. The burden of production issue was addressed recently by the New Jersey Supreme Court in State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987). The court held that requiring a defendant to show a preponderance of evidence to raise the diminished capacity defense did not violate due process, because the existence of a mental defect was not an element of the offense charged. \textit{Id.} at 620-21, 532 A.2d at 214. The \textit{Breakiron} decision is discussed in Comment, \textit{Constitutional Law—Due Process—Criminal Defendant Must Prove He Suffered From Mental Disease or Defect by Preponderance of Evidence Before He May Introduce Such Evidence to Negate The Existence of an Element of the Offense.} State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987), 19 RUTGERS L.J. 1101 (1988).

\textsuperscript{193} NORTH CAROLINA PATTERN JURY INSTRUCTIONS, Crim. § 206.10 (1987), discussed \textit{supra} at notes 81-85 and accompanying text.

\textsuperscript{194} “This Court has always insisted that the need for procedural safeguards is particularly great where a life is at stake.” Barefoot v. Estelle, 463 U.S. 880, 913 (1982) (Marshall, J., dissenting)
sions prohibiting a shifting of the burden of proof to the defendant on elements of crime\textsuperscript{195} require that all defendants charged with first degree murder be afforded every opportunity to negate the prosecution's proof with evidence of mental impairment.

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\footnotesize{(citations omitted). "[H]ow much more should we guard against a fatal mishap where life is at stake." Fisher v. United States, 328 U.S. 463, 488 (1946) (Frankfurter, J., dissenting).}

\textsuperscript{195} Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (cannot make defendant prove he acted in the heat of passion on sudden provocation in order to reduce homicide to manslaughter); cf. Martin v. Ohio, 480 U.S. 228, 236 (1987) (can put burden of proof on defendant to show an affirmative defense because this is not an element of the crime); see also supra note 116 (discussing the reasoning in Martin).