

# The Diminished-Capacity Defense

by Richard S. Jaffe

## Availability of the Defense

The diminished-capacity defense applies when there is evidence that at the time an offense was committed, the accused was suffering from a mental disease or a mental defect that prevented him from specifically planning to commit the crime.<sup>1</sup> Diminished capacity may result from intoxication,<sup>2</sup> mental abnormality,<sup>3</sup> or combinations of both that result in a diminished mental state. The defense applies only to crimes requiring specific intent as a necessary element in the prosecution's burden of proof.<sup>4</sup>

Specific-intent crimes are those that require proof beyond a reasonable doubt that the defendant entertained an objective or engaged in mental activity that is required as an essential element of the offense.<sup>5</sup> Most jurisdictions consider voluntary intoxication as a defense to a crime if it negates the intent to commit that crime.<sup>6</sup>

Although there are differences between a diminished mental state and voluntary intoxication, presenting the proof is practically the same. While most jurisdictions accept proof of a defendant's intoxicated state to negate the intent to commit certain crimes,<sup>7</sup> many others have rejected the diminished-capacity defense if the proof is confined solely to the mental illness of the defendant.<sup>8</sup> Most courts that accept the

diminished-capacity defense<sup>9</sup> restrict its application to first-degree murder,<sup>9</sup> although in theory it applies to all crimes involving specific intent as an essential element of the prosecution's proof, e.g., murder, robbery, larceny, burglary, and rape.<sup>10</sup>

## Burden of Proof

The Supreme Court has left it to the individual states and jurisdictions to accept or reject the defense.<sup>11</sup> The court has addressed the defense with some duality as it concerns the burden of proof.<sup>12</sup>

Counsel using the defense, whether intoxication, mental abnormality, or both, should take the position that the prosecution must prove the intent of the accused beyond a reasonable doubt. But counsel should study *Mullaney v. Wilbur*<sup>13</sup> and *Patterson v. New York*<sup>14</sup> before arguing in support of that position and before drafting jury instructions.

In *Mullaney*, the Court held that due process mandated that in a murder case the prosecution must prove beyond a reasonable doubt the absence of the defense of heat of passion or sudden provocation. In *Patterson v. New York*, the Court restricted *Mullaney* by upholding a New York law

requiring the accused in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance. The subtle distinctions between *Mullaney* and *Patterson* have caused courts to split on which decision to follow.<sup>15</sup>

## The Insanity Defense

Insanity is a complete defense to a crime. It implies, from a legal standpoint, that the accused was not responsible for his actions.<sup>16</sup> A jury verdict reads that the accused is not guilty by reason of a mental disease or defect. As a result, the accused is confined to a mental institution until judged sane.

By contrast, if the jury accepts the diminished-capacity defense, the defendant remains responsible for his actions, but the result will be a guilty verdict for a lesser included offense within the original charge.<sup>17</sup> For example, if evidence is produced that the defendant was so intoxicated that he was incapable of forming the specific intent to kill, his culpability could be reduced from murder to manslaughter, which does not require proof of specific intent.<sup>18</sup>

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1. MODEL PENAL CODE §4.02 (1962).
2. See *State v. McGehearty*, 394 A.2d 1348 (R.I. 1978).
3. *State v. Correa*, 430 A.2d 1252 (R.I. 1981).
4. Bird & Vanderet, *Diminished Capacity*, 1 A CRIM. DEF. TECH. (MB) §32.01 (1972).
5. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1060 (1975).
6. Bird & Vanderet, *supra* note 4, at §32.02 [1][6]. For an early discussion of the defense, see *Chatham v. State*, 9 So. 607 (Ala. 1891).
7. Lewin, *supra* note 5, at 1092.
8. *Id.* at 1105-15 (survey of state laws).
9. *Annual Survey of Rhode Island Law, for the 1980-1981 Term*, 16 SUFFOLK U.L. REV. 515, 521 (1982).
10. Lewin, *supra* note 5, at 1055.
11. *Annual Survey of Rhode Island Law for the 1980-1981 Term*, *supra* note 9, at 518.
12. See *Patterson v. New York*, 97 S. Ct. 2319 (1977) (conviction affirmed; New York law required murder defendant to prove affirmative defense of extreme emotional disturbance); but see *Mullaney v. Wilbur*, 95 S. Ct. 1881 (1975) (Court overturned Maine law requiring murder defendant to prove affirmative defense of heat of passion or sudden provocation).
13. 95 S.Ct. 1881.
14. 97 S.Ct. 2319.
15. *Annual Survey of Rhode Island Law for the 1987-1979 Term—Burden of Proof and Contemporaneous Objection—Allowing Criminal Defendants Maximum Protection*, 14 SUFFOLK U.L. REV. 819, 822 (1980).
16. Held, *Diminished Capacity in California: A Diminished Future or Capacity for Change?* 18 SAN FERN. V.L. REV. 203, 208 (1980).
17. *Annual Survey of Rhode Island Law, for the 1980-1981 Term*, *supra* note 9, at 520.
18. Bird & Vanderet, *supra* note 4, at §32.04 [3][b].

### Use of the Defense

The diminished-capacity defense is most effective where the defendant's participation in the offense is clear and the only issue is his mental state. Defense counsel should consider presenting the insanity and the diminished-capacity defenses together. The two are not mutually exclusive.<sup>19</sup> The mental state of the defendant at the time of the offense may fit within the definition of insanity, and his mental state may also have prevented him from specifically intending to commit the crime.<sup>20</sup> The diminished-capacity defense allows for introducing practically any evidence that reflects on the accused's mental state at the time of the offense, including relevant circumstances, personal history of the accused, and expert testimony on the accused's mental or intoxicated state.<sup>21</sup>

One significant advantage of using the defense arises from the type of evidence potentially offerable. For example, consider the following fact situation:

An 18-year-old male became an **alcoholic** at age 13. By 15, **friends** introduced him to **addictive narcotics**.

During the evening of the offense, he, in the presence of **others**, consumed heavy doses of alcohol and drugs. Around midnight, on his way home, he walked past a dice game in a lighted corner of a parking lot. He took part in the game. There was a gun there. Some minor misunderstanding occurred. The young man picked up the gun, whirled around, and fired it several times, not pointing at anyone in particular. One person was killed. The 18-year-old is charged with murder.

The **bold-face** words demonstrate the kind of evidence that can be offered. Evidence of the youth's age, education, background, and personal history relates to his mental capacity. School records, juvenile records, past mental evaluations, and even the existence of mental problems in the accused's family could have contributed to his becoming addicted to drugs or alcohol and to his developing mental problems.<sup>22</sup> Testimony of lay witnesses is admissible not only to prove the addiction, but also

to prove the accused's intoxicated state at the time of the offense.

As a result, the jury may hear powerful testimony, otherwise inadmissible, some of which may result in humanizing the frailty of a human being whom the prosecution portrays as a cold, unfeeling killer. The overriding benefit occurs if the jury's focus shifts away from the details of the offense to the accused's actions—and the pain and anguish that contributed to his conduct.

### Experts

The diminished-capacity defense cannot be presented adequately without expert testimony; therefore, counsel should carefully choose an expert.<sup>23</sup> Because juries are suspicious of the behavioral sciences and probably not sympathetic to the defense of voluntary intoxication, counsel should employ an expert who has good communication skills.

Counsel should not lose sight of the fact that "insanity" and "diminished capacity" are legal—not medical—terms. While it is not crucial to select a forensic psychologist or psychiatrist, the expert should be familiar with the legal concepts as applied to the medical field.

It is important to investigate not only the qualifications but also the reputation and experience of the expert. If she has been hired by the state or appointed by the court to examine criminal defendants, this adds to her credibility; otherwise, she may be portrayed as a "hired gun," who has always testified at the request of the defendant.

The expert should review all available reports of the accused's treatments or evaluations and any other significant medical history. If appropriate, the expert should interview family members or close associates to get a broader view of the accused as well as to confirm information the accused conveyed to her.<sup>24</sup> The expert should spend enough time with the accused to avoid being challenged about basing her opinion on a single short interview with the accused.

Usually, counsel will choose a psychiatrist or a psychologist. A psychiatrist

is a medical doctor, and therefore can administer drugs and supply a wide range of treatment. A psychologist holds a Ph.D. degree, and will usually administer a wide variety of psychological tests. The results of the tests help the psychologist to render an opinion on the accused's mental state.

If intoxication is the defense, counsel should consider a psychiatrist or psychologist with expertise in substance abuse, as I did in the fact situation illustrated above, because the defense combines intoxication with mental defect.

In another case that I handled, I used three different experts to testify for a 31-year-old male accused of kidnapping. A medical doctor presented evidence that the accused had a severe case of hypoglycemia (low blood sugar) that reacted powerfully to the large amounts of alcohol the accused drank at the time of the offense. A psychiatrist and a neuropsychologist examined the accused for brain damage and other potential mental abnormalities. The result was a plea bargain in the eleventh hour that cut the risk of a much harsher sentence.

If the accused is indigent, counsel should petition the court to appoint an expert at state expense, and support the request with case law and affidavits attesting that an expert is necessary to present an adequate defense.<sup>25</sup> Per *Ake v. Oklahoma*, a capital defendant, under certain circumstances, has a right to have his/her mental condition examined at state expense.<sup>26</sup>

Many states have statutes authorizing payment of experts appointed for indigent defendants.<sup>27</sup> On several occasions, I have successfully petitioned the court to authorize expenses to hire an expert on behalf of an indigent defendant. If the court allows counsel to choose the expert, the state is precluded from cross-examining the witness on the basis of bias as to the source of payment of his fees.

### Potential Problems

Jurors' inherent suspicion of the type of evidence necessary to support the defense makes counsel's task difficult. Voir dire

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19. *Id.* at 32.04 [1][a].

20. See MODEL PENAL CODE, *supra* note 1.

21. Bird & Vanderet, *supra* note 4, at §32.04[3].

22. See *id.*

23. *Id.*

24. *Id.*

25. *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

26. *Id.*

27. See, e.g., ALA. CODE §12-19-252 (1975).

procedures are mandated at every state of the criminal process as a matter of federal constitutional law."

All this puffing and rodomontade ill-serves both author and reader. In truth *Constitutional Limitations on Criminal Procedure* is a very helpful little volume. Its conception and organization are sound, following the chronology of criminal proceedings from the initial police-citizen contact through appeal and post-conviction remedies. The style is precise and readable, and makes for good quick reference in the hurly-burly of the courthouse hallway. But there is here no comprehensive treatment of constitutional criminal procedure.

The principal short-coming of this book is its failure to keep current. The "1985 cumulative supplement" (*i.e.*, pocket part) is just now available, and will be relied upon by practitioners at least until sometime in 1987. Yet the pocket part is current only through July 15, 1985, leaving the practitioner uninformed as to case law in the intervening 1½ or more years. Such a knowledge gap may be acceptable in slower moving areas of the law. In the ever-changing area of constitutional criminal procedure, it is deadly dangerous.

Examples abound. In the Fourth Amendment area, *California v. Ciraolo*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1809, and *Dow Chemical Company v. U.S.*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1819, were critical companion opinions rendered by the Supreme

Court in 1986. In *Ciraolo*, a police officer flying at a thousand feet observed marijuana plants growing in the defendant's back yard. These observations (and photographs taken from the airplane) formed the basis of a search warrant, and the marijuana obtained via the search was admitted into evidence. Over the sharp dissent of Justice Powell, the Court extended the open fields doctrine to these facts, upholding the search and affirming the conviction. See also *Dow*, *supra*, applying the same reasoning to an Environmental Protection Agency flyover of a large, carefully secured chemical plant.

1986 also featured key Supreme Court contributions to the jurisprudence of the Fifth and Sixth Amendments. At issue in *Moran v. Burbine*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1135, was whether a confession must be suppressed either because the police misinformed defense counsel about their plans to interrogate the defendant, or because they failed to inform the defendant of the attorney's efforts to reach him. The Court held that neither Fifth nor Sixth Amendment protections were implicated. The good news was *Batson v. Kentucky*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1712, in which the Court finally acknowledged the shortcomings of *Swain v. Alabama*, 380 U.S. 202 (1965) and provided for the challenge by a criminal defendant of the prosecutor's jury selection on equal protection grounds.<sup>2</sup> And in *Crane v. Kentucky*, \_\_\_ U.S. \_\_\_, S.Ct. \_\_\_, the High

Court held that failure to permit a defendant to adduce testimony at trial of the circumstances surrounding a confession admitted against him violated his Sixth and Fourteenth Amendment rights to present a defense.

These are cases that every practitioner needs to know, and that any text promising "to delineate precisely what procedures are mandated at every stage of the criminal process" ought to discuss. Perhaps equally troubling is the complete omission of the enormously topical subject of forfeiture.<sup>3</sup>

None of this is meant to denigrate what is essentially a welcome addition to the criminal lawyer's library. *Constitutional Limitations on Criminal Procedure* is long on fundamentals, well organized, and geared for quick reference. It is not definitive or up-to-the-minute scholarship, and, the publisher's hype notwithstanding, it should not be relied upon as if it were.

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2. This term, the Court will consider in *Griffith v. Kentucky*, (No. 85-5221) and *Brown v. U.S.* (No. 85-5731) whether *Batson* should apply retroactively.

3. McNamara does discuss, in two short paragraphs, the Supreme Court's 1983 decision in *U.S. v. \$8,850 in United States Currency*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2005. See pocket parts §11.07. His discussion is limited to the speedy trial principles applied in that decision.

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must educate jurors about the defense as well as expose fixed positions concerning nonreceptivity to the defense of mental disease or defect or intoxication. Many jurors, for instance, may have religious or moral positions that prevent them from fairly considering the intoxication defense.<sup>28</sup>

When the accused's mental state is at issue, arguably any event in his past that bears on his mental state at the time of the offense becomes relevant.<sup>29</sup> The prosecu-

tor will therefore seek to discover and, if allowed, introduce evidence of past acts that may have resulted in criminal charges on the basis that they bear on the accused's mental state at the time of the offense.<sup>30</sup>

If the prosecution tries to introduce not just the act but also an arrest or conviction resulting from the act, counsel should file a motion in limine and try to exclude the evidence on the basis that its probative value is outweighed by the prejudicial effect. Counsel should argue that even if evidence of the accused's past conduct is admissible, the fact that it led to an arrest or conviction has no bearing on the accused's mental state at the time of the

offense. If the court allows this evidence, counsel should consider bringing it out first and weaving it into the defense, because even if the accused does not take the stand, the evidence can be elicited through expert testimony.

The client's Fifth Amendment privilege may further be invaded by the admissibility of a statement the client has made to the expert who examines him,<sup>31</sup> and even by statements counsel has made to the expert.<sup>32</sup>

31. *Estelle v. Smith*, 101 S.Ct. 1866 (1981); *Free v. State*, 455 So.2d 137 (Ala. Ct. App. 1984); *Crawford v. State*, 377 So.2d 145 (Ala. Ct. App. 1979).

32. See Bird & Vanderet, *supra* note 4, at §32.04[3][b]; Fuller, *Not Guilty by Reason of Insanity*, TRIAL, Oct. 1984, at 14.

28. Bird & Vanderet, *supra* note 4, at §32.04[4].  
29. See *Pilkington v. State*, 248 So.2d 755 (Ala. 1971).

30. See, *e.g.*, *Miller v. State*, 460 So.2d 228 (Ala. 1984) (per curiam).