

STATE OF MICHIGAN  
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.

v.

Court of Appeals No. 369559

CINECCA DAQUAN MADISON

20<sup>th</sup> Circuit Court No. 22-45611-FC

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF JURISDICTION  
AND BASIS FOR INTERLOCUTORY APPEAL**

At its substantive core, this application arises from the trial court's denial of Defense's motion to present evidence of Defendant's diminished capacity. As stated by Justice Cavanagh in her dissent in *People v Tyson* last summer,

**I urge future practitioners to file motions in the trial courts seeking to admit diminished-capacity evidence. Although these motions will be invariably denied, they will satisfy preservation requirements and provide this Court an opportunity to review this issue without the complications of a heightened standard of review. In the meantime, mentally ill defendants who do not possess the requisite specific intent for their crimes will likely continue to be convicted of crimes of which they are legally innocent.** *People v Tyson*, 511 Mich 1080; 992 NW2d 293 (2023) at 304. [Emphasis added]

Procedurally, this application arises under MCR 7.303(B)(1), 7.305(B)(3) and (B)(5)(a). On January 10, 2024, the 20<sup>th</sup> Circuit Court issued its Order denying Defense's November 2023 motion to present evidence of diminished capacity and related jury instructions. Defense filed an interlocutory appeal on January 31, 2024, with the Michigan Court of Appeals (COA). On May 10, 2024, the COA entered its unpublished decision denying immediate appellate review.

Accordingly, this Court has jurisdiction to hear this appeal under MCR 7.305(B)(3), in that the concurring and dissenting opinions in *Tyson* highlight that diminished capacity and the wrongfully decided *People v Carpenter*, 464 Mich 223; 627 N.W.2d 276 (2001) are ripe for consideration by this Court as "legal principles of major significance to the state's jurisprudence." MCR 7.305(B)(3).

This Court also has jurisdiction to hear this appeal under MCR 7.305(B)(5)(a) in that the COA's decision to deny immediate appellate review of Defense's interlocutory application is clearly erroneous and will cause material injustice. Defendant will suffer substantial harm by awaiting final judgment before taking an appeal. If he is convicted, the trial judge could sentence him to life without parole. If, therefore, this Court does not hear this appeal on an interlocutory basis and, instead, requires Defendant to await final judgment before taking an appeal, if convicted, he may serve a significant portion of a prison sentence before he is able to vindicate his rights before this Court. Subjecting Defendant (with an IQ of 66 operating at the reasoning ability of a 13-year-old or below, with diagnosed paranoid schizophrenia) to the stress and stigma of felony prosecution and incarcerating him as he appeals a conviction are all substantial harms avoided by

interlocutory review. And, in the words of Justice Cavanagh, Defendant may be among those defendants who “...continue to be convicted of crimes of which they are legally innocent” (*supra*) an outcome that is contrary to society’s comprehension of mental health and desire to address underlying mental health needs since the decision in *Carpenter* more than 20-years ago.

## **ORDER APPEALED FROM, CONCISE ALLEGATION OF ERRORS, AND RELIEF SOUGHT**

### **Orders Appealed From**

Defendant-Appellant moves this Court, through his attorney, for leave to appeal two orders:

**First**, the unpublished order of the Court of Appeals issued on May 10, 2024 (the “COA Order”)<sup>1</sup>, denying the application for leave to appeal on immediate appellate review and denying stay of the trial; and,

**Second**, the underlying substantive order issued by the 20<sup>th</sup> Circuit Court on January 10, 2024 (the “Trial Court Order”).<sup>2</sup> In the Order, the Honorable Trial Judge, Karen Miedema, denied Defendant’s motion (filed on November 17, 2023) to present evidence and jury instructions regarding Defendant’s diminished capacity.<sup>3</sup>

### **Concise Allegation of Errors**

Defendant is charged with Count 1, Homicide – Open Murder of Antory Burrell (statutory short form) under MCL 750.316; Count 2, Assault With Intent To Murder Demontae Knight under MCL 750.83; and Counts 3 and 4, Felony Firearm under MCL 750.227b. The shooting occurred in Holland, Michigan, Ottawa County, on June 1, 2022. Defendant claims self-defense and that he was justified in shooting Antory Burrell and Demontae Knight. Defendant claims that Demontae Knight said “get ‘em” to Antory Burrell who then began “clutching” (drawing) a modified 9mm handgun loaded with a 30-round magazine and capable of firing fully-automatic. Defendant states he fired first in order to protect himself from the imminent harm. Demontae Knight states that there was no threat of harm to Defendant; raising the question as to whether the threat occurred or whether Defendant perceived the threat as occurring based upon his diminished

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<sup>1</sup> Exhibit 1, COA Order

<sup>2</sup> Exhibit 2, Trial Court Order.

<sup>3</sup> Exhibit 3, the motion is fashioned as Defense’s Brief In Response To The Court Order Dated October 25, 2023.

capacity. A point highlighted by the State Forensic Psychologist who evaluated Defendant for competency and criminal responsibility, stating:

**...Although it is entirely possible, given his report to CMH prior to the alleged offense of hearing, seeing and believing things that are not real, that Mr. Madison could have *imagined* that the alleged victims were talking about him and planning to kill him, potentially impairing his capacity to appreciate the nature, quality or wrongfulness of his behavior, as well as the capacity to conform his behavior to the requirements of the law, thus causing him to act in what he believed was genuine self-defense...**<sup>4</sup>

Defendant has an IQ of 66 and operates at the reasoning ability of a 13-year-old or below. He had untreated schizophrenia at the time of the incident. Given the high legal standard for competency and criminal responsibility evaluations, the State Forensic evaluator found Defendant both competent and criminally responsible, and Defense's evaluator found Defendant criminally responsible<sup>5</sup>. Defense filed a motion in the trial court to include evidence of Defendant's diminished capacity.

The trial court denied Defendant's motion under the controlling case *People v Carpenter*, 464 Mich 223; 627 N.W.2d 276 (2001). Defense states that *Carpenter* was wrongly decided and relies upon the dissenting opinion in *People v Tyson*, 511 Mich 1080, 1080; 992 NW2d 293 (2023) (Justice Cavanagh writing for the dissent, joined by Justices Welch and Bolden).

Also in *Tyson*, Justice Clement wrote a concurring opinion in which she focused on the issue as not properly preserved in the trial court. Justice Clement wrote, "[I]ike Justice Cavanagh, I conclude that *People v Carpenter* was wrongly decided" ... "[h]owever, I believe that preservation concerns present a barrier to overruling *Carpenter* through this case." *Carpenter*, at 2 (internal citation omitted). Presumably, had the issue been raised in the trial court Justice Clement would have joined with the dissent making the dissenting opinion the 4-3 majority opinion and overturning *Carpenter*. Here, the issue presented in *Tyson* was properly preserved in the trial court and, presumably, this case provides the basis for *Carpenter* to be overturned.

Since *Tyson*, Defense is aware of only one additional case seeking leave for review by the Court on this issue, *People v Sudz*, \_\_\_ Mich \_\_\_; 996 NW2d 477 (November 1, 2023); in the Court

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<sup>4</sup> Exhibit 4. Dr. Hill Addendum to Criminal Responsibility Report.

<sup>5</sup> Defense's evaluator was not asked to consider competency.

of Appeals see *People v Sudz*, \_\_\_NW2d\_\_\_; 2023 Mich. App. LEXIS 2031 (Ct App, Mar. 23, 2023). The Court denied leave in *Sudz*.

But *Tyson* and *Sudz* are both factually and procedurally distinct from the instant case. Most significantly, the challenges to *Carpenter* (whether diminished capacity or automatism) were not preserved in the trial court. Here, Defense raised and preserved the issue in the trial court, and sought interlocutory appeal in order to present diminished capacity at trial.

Secondarily, *Tyson* and *Sudz* were not self-defense cases. Here, Defendant's diminished capacity not only goes to the element of mens rea but also to the self-defense analysis. Whether the use of force is reasonable in a claim of self-defense "depends on what an ordinarily prudent and intelligent person would do on the basis of the **perceptions of the actor.**" *People v. Orlewicz*, 293 Mich. App. 96, 102; 809 N.W.2d 194 (2011) [Emphasis added].

The COA clearly erred in denying interlocutory review of Defense's application given the significance of resolving the availability of diminished capacity evidence. *Tyson* invited the opportunity for Defendant to present self-defense and, likely in the alternative, diminished capacity, to the jury. Both the People and the Defense are prejudiced by proceeding to a trial without certainty based upon the issues raised by the Defense on appeal and the lingering divide under *Tyson*.

### **Relief Sought**

Defendant requests this Court grant leave to appeal, overturn *People v Carpenter*, 464 Mich 223; 627 N.W.2d 276 (2001), vacate the pertinent provisions of the COA Order and the Trial Court Order, remand this case to the trial court with instructions that it permit the Defense to present legally admissible evidence to the jury of Defendant's diminished capacity and related appropriate jury instructions on mens rea, and perception in self-defense.

**QUESTIONS PRESENTED**

**A. DID THE COA ERR IN DENYING IMMEDIATE APPELLATE REVIEW?**

COA answers, “No.”

Defendant-Appellant answers, “Yes.”

**B. IS CARPENTER WRONGLY DECIDED?**

Circuit Court answers, “No.”

Defendant-Appellant answers, “Yes.”

**C. SHOULD THE DEFENSE BE PERMITTED TO PRESENT EVIDENCE OF DIMINISHED CAPACITY TO THE JURY WITH RELATED JURY INSTRUCTIONS ON MENS REA, AND PERCEPTION REGARDING SELF-DEFENSE?**

Circuit Court answers, “No.”

Defendant-Appellant answers, “Yes.”

## STATEMENT OF FACTS

Defendant Cinecca Daquan Madison is charged with Count 1, Homicide – Open Murder of Antory Burrell (statutory short form) under MCL 750.316; Count 2, Assault With Intent To Murder Demontae Knight under MCL 750.83; and Counts 3 and 4, Felony Firearm under MCL 750.227b. The shooting occurred in Holland, Michigan on June 1, 2022. Defendant was charged and arrested the next day and is in custody in the Ottawa County Jail.

Defendant is an African American male, diagnosed with schizophrenia among other mental health diagnoses. Defendant was only 19 years old at the time of the shooting. As significant, Defendant has an IQ of 66 and operates at the reasoning ability of a 13-year-old or below.

Defendant began hearing voices at age ten. He was diagnosed ADHD prior to kindergarten and prescribed Adderall. Educational resources were recommended by the school to help Defendant, but his parents declined a special education evaluation and special education services. Junior high school records indicate his below average performance and he received mostly failing grades according to high school transcripts. He ultimately dropped out of high school and has not completed his diploma or GED. Defendant was unable to maintain steady employment, though he was working part-time at the Boston Market restaurant in Holland at the time of the incident.

Defendant relocated from Muskegon to Holland with his mother, with whom he lived at the time of the shooting. Defendant has only one prior conviction; a misdemeanor disturbing the peace arising out of the 58<sup>th</sup> District Court, Holland.

Defendant is the subject of a Mental Illness Proceeding opened just 10-months prior to the shooting.<sup>6</sup> On August 4, 2021, Chief Probate Judge Mark Feyen issued a mental health pick-up order for Defendant. Previously, Defendant was seen at Holland Hospital on July 25, 2021, due to paranoia and hallucinations. He was reportedly agitated, psychotic and disorganized. Following the Probate Court's pick-up order, Defendant was again seen at Holland Hospital on August 8, 2021. In both circumstances, Defendant was denied follow-up psychiatric treatment due to uncertainty as to whether he was experiencing mental health decompensation or substance use.<sup>7</sup>

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<sup>6</sup> Ottawa County Probate Court, Case Number 21-6795-MI.

<sup>7</sup> Defendant underwent a substance abuse evaluation on April 27, 2022, and was deemed not in need of substance abuse services, but rather in need of psychiatric services.

On January 27, 2022, Defendant informed Community Mental Health of Ottawa County (CMH) that “the voices are getting to be bad now, I need to talk to someone about them. I can’t sleep because of them.”

On March 23, 2022 (just after Defendant’s 19<sup>th</sup> birthday), a psychosocial assessment of Defendant was finally completed through CMH. Defendant reported that:

- His mind races, he hears voices and sees signs in the community.
- The television tells him things. He stated, “it’s an evil whisper that tells me what’s going to happen.”
- He receives messages from signs and nature.
- The voices are worse at night, he becomes paranoid and is unable to sleep.
- He stated he “see whisps of air, sometimes the air will look away and something it will move, it’s usually inside. The air is like purple ink or like mice scurrying. Most of the time I don’t pay attention to it, but it’s happening all the time. I feel like people are talking to me, like the air is trying to be funny, like the teddy bear will look at me then go back to how it was, sometimes they are evil, but now they are annoying. It’s been hurting my relationships with other people.”
- He stated “I want someone to talk to. I want to know that I am not the only person who experiences this. I also want to get back on meds. The voices are starting to get worse and I need something that’s going to calm me down so I can relax.”
- He indicated he feels unsafe in his home, stating “I feel like another human being is in the house scratching the walls trying to get me. I hear sounds of weapons in the wall and that scares me real bad.”

The assessment diagnosed Defendant with schizophreniform disorder, the precursor diagnosis to schizophrenia. The assessor also noted that Defendant presented as mildly cognitively impaired and was unable to relay basic information or fill out paperwork on his own. The assessor noted that Defendant did not make appropriate eye contact during the assessment (he would look up at the ceiling or the corner when speaking). He was later diagnosed with paranoid schizophrenia.<sup>8</sup> He was also later assessed as having a full scale IQ of 66, general ability index of 69, and reasoning abilities at or below a 13-year-old.

CMH developed a Master Treatment Plan for Defendant on April 21, 2022. The plan included a follow-up to be evaluated for and prescribed supportive medications. The appointment

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<sup>8</sup> The trial court erred in its Order indicating that it is unclear whether Defendant is officially diagnosed with schizophrenia. Defendant was seen in the jail by a CMH psychiatrist on June 16, 2022 and diagnosed with paranoid schizophrenia as was reported in the criminal responsibility evaluations received and referred to by the trial court.

scheduled for Defendant to be evaluated for medications was June 1, 2022, the day of the shooting. The appointment was cancelled and rescheduled by the provider for 9-days later.

On June 1<sup>st</sup>, the day of the cancelled appointment, Defendant left the Boston Market at the end of his workday sometime between 7:00 PM and 8:00 PM. He went home (where he resided with his mother), called a friend, took care of his dog and played NBA 2k (a basketball video game). He then decided to ride his bike to his sister's apartment.

The People allege that Defendant encountered Demontae Knight, Antory Burrell and Kishaun Steward who were walking near 491 Columbia Avenue in Holland at approximately 9:20 PM. Being a summer evening in West Michigan, the sun was slowly setting but conditions were still light out at that time of night. It was a mild evening with temperatures in the upper 60s and no precipitation.

Knight and Steward had traveled together to Holland that afternoon from Muskegon to meet up with Burrell. According to the police investigation, Burrell and Steward were both implicated in a criminal investigation. Steward had an outstanding warrant and was a "person of interest" in two active homicide investigations in Muskegon at the time.

Burrell and Knight were both known associates/friends of TJ Wells, a 14-year-old gang member killed by the Latin Kings gang in a 2019 Holland shooting. They were known to have had run-ins with the Latin Kings since the Wells shooting. Knight claimed to have been shot at twice by unknown Latin King gang members since the murder of Wells. Knight's own family told law enforcement that Knight associated with known gang members.

The People allege that Burrell, Knight and Steward were on foot when Defendant coincidentally encountered them that night. Defendant was on his bicycle. The men allegedly all knew Defendant. Steward was his cousin through adoption. Knight knew Defendant from school. Burrell knew Defendant from the Holland area.

Defendant tagged along with their group that night. Neither Knight nor Steward claimed any animosity or tension existed between Defendant and the group.

Knight testified at the preliminary hearing that Knight and Burrell then each stole a bicycle because they were bored. With Steward still on foot, the four men went to Knight's mother's home on East 19<sup>th</sup> Street in Holland. Knight, Burrell and Steward entered the home. Defendant remained in the driveway. Approximately 5-minutes later, Knight and Burrell reemerged but Steward stayed

behind. Knight testified that he, Burrell and Defendant then began riding bikes together in the area, with Defendant on his own bike and Knight and Burrell on the bikes they had each just stolen.

In addition to the stolen bike, Burrell carried a stolen firearm. The firearm was a 9mm Glock 17, semi-automatic pistol, illegally modified with a device called a “switch” rendering the firearm fully automatic. With the modification, the illegal pistol was capable of firing approximately 20-rounds per second. Attached to Burrell’s illegal pistol was an extended clip capable of holding 30-rounds and 1-round in the chamber. Based upon police reports, the illegal pistol was fully loaded. What Burrell carried had the firing rate of a machine gun, capable of killing masses.

Knight testified in the preliminary exam that he knew Burrell was carrying the illegal pistol because Burrell regularly carried it. When asked why, Knight testified it was because of previous situations he and Burrell had been through that were “too big” to elaborate on.

Knight testified he knew the pistol was a 9mm Glock, unlawfully modified with a switch, and could hold approximately 30-rounds. Knight testified that Burrell took the illegal pistol everywhere he went.

In addition, law enforcement interviewed Steward about the illegal pistol. According to the detectives in that interview, the combination of the pistol with the extended clip would have been difficult to conceal. In the interview, Steward confirmed that everyone knew Burrell was carrying the illegal pistol that night. The detectives conducting the interview joked that it was “no secret” that Burrell’s reputation was to carry that firearm all the time and that Burrell had the firearm “splashed” all over Facebook. Steward also stated that the group knew that Defendant was carrying a pistol (a common 9mm lawfully registered to his mother). Steward stated the conversations were not threatening and there was no indication of any disagreement, tension or hostility among anyone that night before Steward left the group. Knight confirmed the conversation with Steward in his exam testimony, and that Knight knew Defendant was carrying a pistol prior to the shooting.

Law enforcement also interviewed Xavier Rose, an associate of Burrell and Knight. Rose stated he was with Burrell smoking marijuana together until late afternoon on the day of the shooting. Burrell left to meet Steward and Knight. Rose also knew of Burrell’s illegal pistol, that Burrell was “glued to it”, and that it had the switch modification. Again, the detectives conducting

the interview joked that everyone knew about that gun, including people who were not even close with Burrell.

Rose also confirmed he knew of no issues Defendant had with the group and claimed he would have known if Defendant did. Rose and Steward both described Defendant as being well acquainted with the group but existing outside of the circle and not bonded with them.

Less than 2-days after Defendant's arrest, law enforcement intercepted a jail call (as part of their ongoing investigation) in which Defendant told a female friend that he saw Burrell "clutching" it (meaning holding the illegal pistol through his clothing in a threatening manner). Defendant stated that Burrell was going to shoot him. In the call, Defendant goes on to say that he would rather be in the position he is now [jail] than be dead. Defendant further claimed that he then heard Knight state "get em".

The People allege that shortly after 10:00 PM shots were fired in the area of 16<sup>th</sup> Street and College Avenue. Burrell was fatally shot. Knight was shot, treated and survived. Other than Knight, the People have not identified anyone who witnessed the shooting.

Burrell was shot 4 times. The entry wounds were from both the front and the back. Knight was shot 5 times. The entry wounds were from both the front and the back. Moreover, a claim of self-defense does not require a use of force from any particular direction or angle.

Defense put the People on notice of Defendant's legal claim of self-defense within weeks of Defendant's arrest even though there is no statutory or court-rule requirement that a defendant file a pretrial notice regarding a claim of self-defense. See MCL 780.971 et seq. (Self-Defense Act); MCR 6.001 et seq.

In the District Court, the Defense moved for a competency exam and criminal responsibility exam based upon Defendant's mental health circumstances in the months leading up to the shooting.<sup>9</sup>

The competency exam report was completed on September 8, 2022, by Dr. Michelle Hill, Ph.D., consulting forensic examiner for the Michigan Department of Health and Human Services, Center for Forensic Psychiatry. Defendant was evaluated by Dr. Hill on July 19 and August 31, 2022. By that time, Defendant had been in the jail for approximately 2-months and was under a

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<sup>9</sup> Order for competency exam and criminal responsibility exam granted by the Honorable Juanita Bocanegra, June 21, 2022, 58<sup>th</sup> District Court – Holland, Case No. HL-22-098908-FY.

medication regimen administered by the jail through CMH (beginning June 16, 2022), that included the antipsychotic Risperidone. Dr. Hill found Defendant to be competent.<sup>10</sup>

Due to delay in Dr. Hill commencing the criminal responsibility exam, the Circuit Court entered its own order for an exam on November 29, 2022. Dr. Hill then evaluated Defendant on December 14, 2022. Her initial report was completed on December 29, 2022.<sup>11</sup> Upon reviewing the initial report, Defense noted that the CMH records (prior to the shooting) pertinent to the schizophreniform diagnosis and treatment plan were absent in Dr. Hill's review. Defense provided the records directly to Dr. Hill and she authored an addendum to her report on March 23, 2023.<sup>12</sup> Dr. Hill noted that "[o]verall...it is this examiner's opinion that Mr. Madison was experiencing a substantial disorder of thought that at times significantly impaired his capacity to recognize reality during the months leading up to the alleged offense and was mentally ill." Nevertheless, Dr. Hill concluded that Defendant was not legally insane. She qualified her opinion stating,

This does not change my ultimate opinion the Mr. Madison was not legally insane. **Although it is entirely possible, given his report to CMH prior to the alleged offense of hearing, seeing and believing things that are not real, that Mr. Madison could have *imagined* that the alleged victims were talking about him and planning to kill him, potentially impairing his capacity to appreciate the nature, quality or wrongfulness of his behavior, as well as the capacity to conform his behavior to the requirements of the law, thus causing him to act in what he believed was genuine self-defense, this cannot be shown to be true within reasonable medical or clinical certainty due to lack of available corroborating information.** [Emphasis added].

Defense then retained its own expert, Dr. Jeffrey Kieliszewski, Ph.D., of HRA Psychological Services, to conduct a criminal responsibility exam. Dr. Kieliszewski evaluated Defendant on June 1, 2023 and October 6, 2023, and authored his report on October 18, 2023.<sup>13</sup> Dr. Kieliszewski also opined that Defendant was not criminally insane, adding

Cinecca and I talked at length about his frame of mind prior to, during, and after the alleged offenses. His description indicates he was actively mentally ill at the time of the alleged offense. However, his description and other data in the records did not point to his choice of behavior and actions as a direct manifestation of the effects of the symptoms of his mental illness. **In essence, he described a scenario where in his perception he acted in self-defense.** [Emphasis added].

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<sup>10</sup> Exhibit 4. Dr. Hill Competency Examination Report.

<sup>11</sup> Exhibit 4. Dr. Hill Criminal Responsibility Report.

<sup>12</sup> Exhibit 4. Dr. Hill Addendum to Criminal Responsibility Report.

<sup>13</sup> Exhibit 5. Dr. Kieliszewski Criminal Responsibility Report.

Defense also retained Dr. Michael Wolff, PsyD, of the Behavioral Resources and Institute for Neuropsychological Services, for further forensic evaluation<sup>14</sup> of Defendant. In addition to testing Defendant's IQ and establishing his reasoning abilities, Dr. Wolff also opined that,

[Defendant] knew the individuals who were involved in this case. He knew that they had intent to commit a theft, but then became more suspicious of their behaviors, thinking that they might be out to attack him in some way. These qualities are certainly probable if not quite common in psychotic disorders where there was fear of others being out to harm them. **In combination with intellectual disability, it would be harder for him, in comparison to someone else in his age group, to combat the confusion that he was experiencing at and around the time of the alleged criminal activity.** [Emphasis added].

Nevertheless, the trial court stated in its Trial Court Order that "because the Defendant does not meet the definition of legal insanity, he is prohibited from presenting evidence of his mental illness to negate the specific intent elements of the charged crimes or reduce his criminal responsibility."

## ARGUMENT

### Standard of Review

The Court reviews questions of statutory interpretation de novo. *People v Gardner*, 482 Mich 41, 46; 753 N.W.2d 78 (2008). Preliminary questions of law such as whether a rule of evidence or a statute precludes the admission of evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). In *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004), the COA denied defendant's motion for leave for an interlocutory appeal "for failure to persuade the Court of the need for immediate appellate review." This Court then granted defendants leave for an interlocutory appeal. *Grossman v Brown*, 468 Mich 869; 661 NW2d 230 (2003)

### Statement of Law

The state may not deprive any person "of life, liberty, or property, without due process of law . . . ." US Const, Am XIV; Const 1963, Art 1, § 17. Even though it is not an absolute right to present evidence relevant to the defense, under certain circumstances such limitation violates due process. See *Rock v Arkansas*, 483 U.S. 44, 55; 107 S. Ct. 2704; 97 L. Ed. 2d 37 (1987);

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<sup>14</sup> Exhibit 6 Dr. Wolff Forensic Evaluation and Addendum to Forensic Evaluation.

*BChambers v Mississippi*, 410 U.S. 284, 294; 93 S. Ct. 1038; 35 L. Ed. 2d 297 (1973); *United States v Scheffer*, 523 U.S. 303, 308; 118 S. Ct. 1261; 140 L. Ed. 2d 413 (1998).

### **1. Diminished Capacity**

In *People v. Carpenter*, the Michigan Supreme Court held that the legislature abolished the defense of diminished capacity. 464 Mich 233, 225-226; 627 NW2d 276 (2001).

But, in July of last year Justice Cavanagh issued a compelling dissent articulating why *Carpenter* was wrongly decided. *People v Tyson*, 511 Mich 1080; 992 NW2d 293 (2023). Justices Welch and Bolden joined in the dissent. Justice Clement agreed with the dissent that *Carpenter* is wrongly decided but opined that the issue had not been properly preserved in the trial court to be considered on appeal. Presumably, had the issue been preserved at trial, Justice Clement would have joined with the dissent, thus making the dissenting opinion the 4-3 majority and overturning *Carpenter*.

### **2. Self-Defense and Perception**

“A killing may be considered justified if the defendant acts in self-defense.” *People v Bailey*, 330 Mich App 41, 46; 944 NW2d 370 (2019); see MCL 780.972. A person may use deadly force against another in self-defense if the person “honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.” MCL 780.972(1)(a). Where defendant “is attacked by two or more persons or is attacked by one person and others are acting with the assailant or are present and aiding and encouraging him, he has a right to act in self-defense against all and, in a proper case, to kill one or all.” *People v Gregory Johnson*, 112 Mich App 483, 316 NW2d 247, (1982) (internal citation omitted). Psychological history of the defendant may be relevant to his or her belief that he or she was in danger warranting self-defense. *People v Wilson*, 194 Mich App 599, 604; 487 NW2d 822 (1992) (discussing the “battered spouse syndrome”). “Reasonableness depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.” *People v Orlewicz*, 293 Mich. App. 96, 102; 809 N.W.2d 194 (2011) citing *People v Doss*, 406 Mich 90, 102; 276 NW2d 9 (1979) (discussing what constitutes “reasonable force” for a police officer to effectuate an arrest). “A defendant's psychological idiosyncrasies may, at least in theory, be relevant to the reasonableness of the defendant's belief that he or she was in danger.” *People v. Orlewicz*, 293 Mich. App. 96, 101; 809 N.W.2d 194 (2011).

## Discussion

### A. Diminished Capacity and Carpenter

The trial court denied Defendant's motion under the controlling case *People v Carpenter*, 464 Mich 223; 627 N.W.2d 276 (2001). In *Carpenter*, the defendant was charged with first degree home invasion and felonious assault. He presented evidence at his bench trial that he lacked the mental capacity to form the specific intent required for the crimes. Writing for the majority, Justice Young stated,

We originally granted leave to consider whether the lower courts properly determined that it was defendant's burden to establish his diminished capacity defense by a preponderance of the evidence under MCL 768.21a. However, we are now persuaded by the prosecution's argument that, by enacting a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation, the Legislature has signified its intent not to allow a defendant to introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. Therefore, we affirm the decision of the Court of Appeals on that basis. *Id* at 225. [Footnote added]

Based upon the *Carpenter* court's statutory interpretation of Michigan's legal insanity statute, diminished capacity was essentially extinguished in Michigan for the past 23-years.

Then in July 2023, the Michigan Supreme Court was again presented with the issue of diminished capacity in *People v Tyson*, 511 Mich 1080, 1080; 992 NW2d 293 (2023). The result was a 3-1-3 opinion, in which Justice Clement wrote a concurring opinion declining to review *Carpenter* because the issue of diminished capacity had not been raised in the trial court, but agreeing with the dissent's analysis that *Carpenter* was wrongly decided.

Justice Cavanagh's dissenting opinion in *Tyson* sets forth the correct history and analysis behind *Carpenter* and why it was wrongly decided. Significantly, Justice Cavanagh stated,

In my view, *Carpenter* was wrongly decided.

To begin, the *Carpenter* Court improperly read meaning into the Legislature's silence. We "determine the Legislature's intent from its words, not from its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 N.W.2d 574 (1999). While the Legislature certainly "has the authority to abrogate the common law, . . . [w]hen it does so, it should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 N.W.2d 340 (2006). The Legislature has never abolished the diminished-capacity defense or expressed any unambiguous intent to preclude a defendant from producing evidence of diminished capacity. This makes sense because it is well-settled that "[t]he prosecution must carry the burden of proving every element beyond a reasonable doubt . .

. .” *People v Mills*, 450 Mich. 61, 69-70, 537 N.W.2d 909, (1995), mod 450 Mich 1212, 539 N.W.2d 504 (1995). This necessarily includes the mens rea of an offense, and diminished-capacity evidence may be used to negate a specific-intent mens rea.

In addition, the Carpenter Court failed to examine all the language actually employed by the Legislature. When the Legislature codified the version of the insanity defense under consideration in that case, it provided:

It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense . . . . Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity. [MCL 768.21a(1), as amended by 1994 PA 56]

The last sentence of MCL 768.21a(1), while providing that mental illness or intellectual disability short of the statutory standard did not constitute a legal insanity defense, is silent as to whether mental illness or intellectual disability may be admitted to negate specific intent. As one commentator has persuasively explained:

Contrary to clear rules of statutory construction, the Michigan Supreme Court’s reading pretends that the last three words of this sentence do not exist. The legislature expressly defined exclusivity and left open the possibility that other defenses, like diminished capacity, might rest on mental conditions. If the legislature actually wanted to eliminate the diminished capacity defense, it could have done so simply by omitting the words “of legal insanity.” That would have expressly channeled all mental illness evidence into the insanity defense. [Vars, *When God Spikes Your Drink: Guilty* [\*\*\*16] *Without Mens Rea*, 4 Cal L Rev Circuit 209, 211 (2013).]

Given the Legislature's silence on diminished-capacity evidence and the actual language used in MCL 768.21a, I would conclude that the Legislature did not implicitly modify the common law to preclude a defendant from arguing that they lacked specific intent on the basis of diminished capacity. See *Smith v Martin*, 124 Mich 34, 35; 82 N.W. 662 (1900) (“Courts will not hold the principles of the common law abrogated by implication, unless the common law and the statute are in direct conflict.”). *People v Tyson*, at 298.

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Similarly, the ability to present diminished-capacity evidence to negate specific intent does not render the GBMI verdict nugatory. For example, a defendant charged with first-degree murder might raise both an affirmative insanity defense and also make a diminished-capacity argument. The finder of fact could find the defendant guilty but mentally ill if it believes that the defendant proved mental illness by a preponderance of the evidence and

that the prosecution had proven all the elements of the crime, including specific intent, beyond a reasonable doubt. On the other hand, a fact-finder could instead conclude that because of the defendant's mental illness (diminished capacity), the prosecution did not prove the specific intent necessary for first-degree murder and instead find the defendant guilty of second-degree depraved-heart murder, a general-intent crime. See *People v Goecke*, 457 Mich 442, 466; 579 N.W.2d 868 (1998). Because diminished capacity is not mutually exclusive or in direct conflict with the GBMI verdict, the *Carpenter* Court erred when it held that existence of the GBMI verdict prohibited the introduction of diminished-capacity evidence. *Smith*, 124 Mich at 35.

In sum, the *Carpenter* majority mischaracterized the codification of the insanity defense and its attendant provisions as a “comprehensive statutory framework” that requires all evidence of mental illness to be funneled into the insanity defense. Along the way, the *Carpenter* Court ignored a host of statutory canons by improperly interpreting and speculating about legislative silence, ignoring statutory language, and failing to recognize that the Legislature must “speak in no uncertain terms” to abrogate the common law. For all these reasons, I believe that *Carpenter* was wrongly decided. *People v Tyson* at 300.

Since *Tyson*, Defense is aware of only one additional case seeking leave for review by the Michigan Supreme Court on this issue, *People v Sudz*, \_\_\_ Mich \_\_\_; 996 NW2d 477 (November 1, 2023); in the Court of Appeals see *People v Sudz*, \_\_\_ NW2d \_\_\_; 2023 Mich. App. LEXIS 2031 (Ct App, Mar. 23, 2023). The Michigan Supreme Court denied leave in *Sudz*.

Neither *Tyson* nor *Sudz* preserved the issue of diminished capacity in the trial court (automatism in *Sudz*).

Here, Defendant moved the trial court to permit introduction of evidence supporting diminished capacity, and the trial court denied the request under the wrongly decided precedent in *Carpenter*. Considering that the instant case avoids Justice Clement’s preservation concerns in *Tyson*, Defense believes that *Carpenter* is ripe to be overturned by the Michigan Supreme Court and, therefore, Defendant permitted to defend his case including the introduction of diminished capacity evidence.

## **B. Self-Defense and Perception**

Secondarily, *Tyson* and *Sudz* were not self-defense cases. Here, Defendant’s diminished capacity not only goes to the element of mens rea but also to the self-defense analysis. Whether the use of force is reasonable in a claim of self-defense “depends on what an ordinarily prudent and intelligent person would do on the basis of the **perceptions of the actor.**” *People v Orlewicz*, 293 Mich. App. 96, 102; 809 N.W.2d 194 (2011) [Emphasis added].

From the onset of this case, the Defense has argued that Defendant's account of the circumstances forcing him to defend himself are true, or true to him. As for the latter, there is the possibility that his psychological and cognitive circumstances informed his belief that he was in danger warranting self-defense. *People v Wilson*, 194 Mich App 599, 604; 487 NW2d 822 (1992) (discussing the "battered spouse syndrome").

Such possibility is identified in the reports of both criminal responsibility evaluations. Dr. Hill stating that,

... it is entirely possible, given his report to CMH prior to the alleged offense of hearing, seeing and believing things that are not real, that Mr. Madison could have *imagined* that the alleged victims were talking about him and planning to kill him, potentially impairing his capacity to appreciate the nature, quality or wrongfulness of his behavior, as well as the capacity to conform his behavior to the requirements of the law, thus causing him to act in **what he believed was genuine self-defense** . . . [Emphasis added]

And, Dr. Kieliszewski stating "[i]n essence, [Defendant] described a scenario where **in his perception he acted in self-defense.**" [Emphasis added].

Similarly, Dr. Wolff stated that,

With [Defendant's] intellectual abilities in combination with schizophrenia, his thought process is much less-developed and it would be anticipated that he would have a much harder time making difficult decisions in the moment. He would be more easily confused, would have to try to differentiate between various hallucinations or ideas of reference in comparison to also determining reality while being much slower in evaluating all of the critical factors that should be considered in the moment. This could negatively influence logical decision-making and increase his susceptibility to poorly informed decisions.

In short, three psychologists evaluated Defendant, and all three psychologists emphasized the influence of Defendant's cognitive and/or psychological circumstances on his perception of the moment.

Nevertheless, the trial court stated that "[b]ecause [D]efendant does not meet the definition of legal insanity, he is prohibited from presenting evidence of his mental illness to negate the specific intent elements of the charged crimes or reduce his criminal responsibility."

At a minimum, Defendant should be permitted to present his history, and psychological and cognitive circumstances to the jury as they relate to his perception and the formation of his belief that he was in danger warranting self-defense. And, that the jury receive an instruction on perception, that includes the subjective perception of the Defendant based upon his psychological circumstances, when considering the standard for self-defense.

**RELIEF REQUESTED**

Defendant requests this Court grant leave to appeal, vacate the pertinent portions of the COA Order and Trial Court Order, and remand this case to the trial court with instructions that the Defense be permitted to present legally admissible evidence of diminished capacity to the jury with related jury instructions on mens rea, and present legally admissible evidence of the influence of Defendant's psychological and cognitive circumstances upon his perception regarding the use of self-defense.

Date: May 21, 2024

Respectfully submitted,



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\*According to the word count of the word-processing system used to prepare this Application for Leave to Appeal, the "Order Appealed From, Concise Allegation of Errors, and Relief Sought," "Statement of Jurisdiction and Basis for Interlocutory Appeal," "Statement of Facts," "Argument," and "Relief Requested" sections of this document contain 7,125 words.