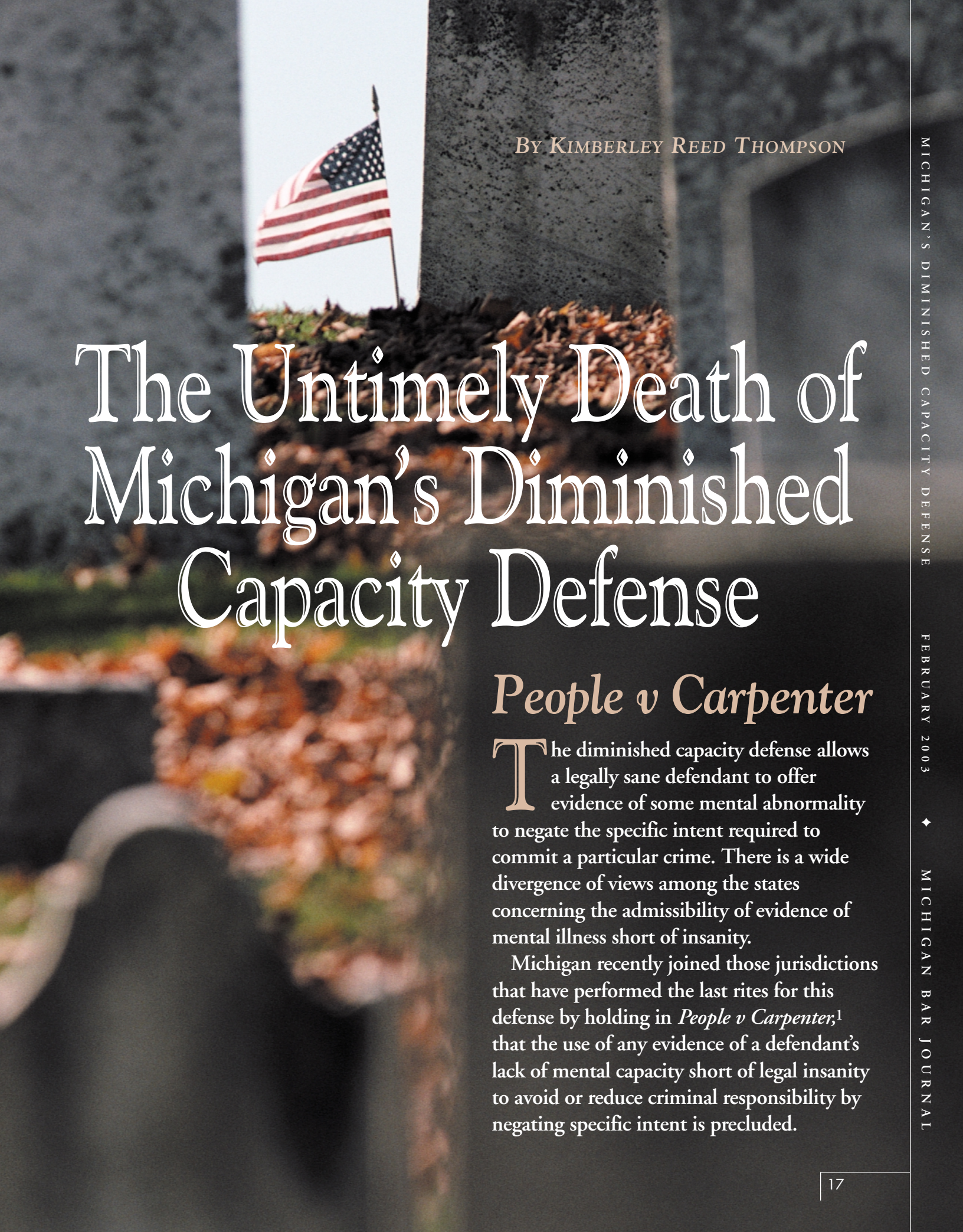


By Kimberley Reed Thompson

The Untimely Death of Michigan's Diminished Capacity Defense

People v Carpenter

The diminished capacity defense allows a legally sane defendant to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime. There is a wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity.

Michigan recently joined those jurisdictions that have performed the last rites for this defense by holding in *People v Carpenter*,[1] that the use of any evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent is precluded.

The Diminished Capacity Approach

Our court of appeals introduced the diminished capacity defense to Michigan in *People v Lynch*.[2] The defendant in *Lynch* was charged with having murdered her baby by starvation. As part of her defense, the defendant sought to have admitted into evidence testimony from two psychiatrists supporting her claim that she did not possess the requisite intent to be convicted of first-degree murder, MCL 750.316. The trial court refused to admit the evidence on the ground that the defendant had never raised an insanity defense and did not give the required statutory notice.

In reversing the defendant's jury conviction, the court of appeals rejected the prosecution's argument that allowing evidence of mental illness less than insanity as bearing on the defendant's capacity to form the intent required to commit a particular crime would "sanction a subterfuge," avoiding the standards of the insanity defense enunciated by this court in *People v Durfee*.[3]

Before the legislature's enactment of 1975 PA 180, the test for determining legal insanity was controlled by *Durfee*. Featured in the 1959 movie, *Anatomy of a Murder,* the *Durfee* test—based in part on the *M'Naughten* rule—contained two elements: "1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?"

The *Lynch* court also disagreed that recognizing a diminished capacity defense separate from legal insanity "would permit the defense to in effect sneak in the insanity defense without labeling it as such and without the necessity of complying with the notice statute as to the insanity defense."[4]

While it acknowledged that some states viewed mental capacity as an "all or nothing matter and that only insanity… negates criminal intent," the court of appeals concluded that proof of diminished capacity is admissible as "bearing on intent generally or at least on those special states of the state of mind by definition determines the degree of offense as here."[5]

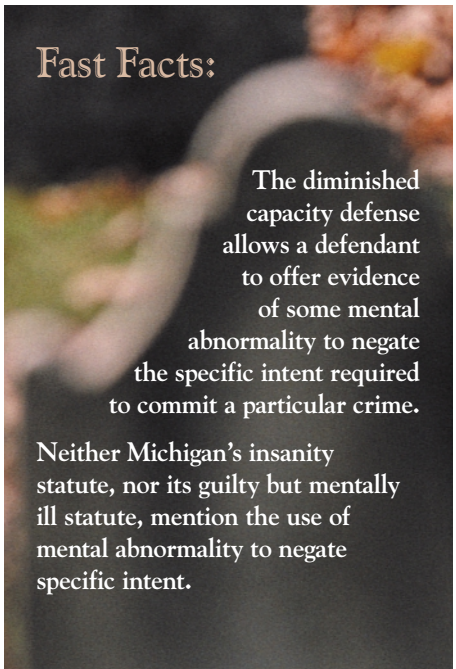
In *People v Mangiapane,*[6] the court of appeals addressed the diminished capacity defense under the current statutory framework for the insanity defense. In *Mangiapane,* the defendant sought to introduce psychiatric testimony on the issue of his capacity to form the specific intent to commit murder in violation of MCL 750.83. The trial court denied the request on the ground that the defendant did not raise the defense and give the prosecution notice under MCL 768.20a.

The court of appeals affirmed, explaining that, by enacting 1975 PA 180, the legislature intended "to bring under one procedural blanket all defenses to criminal charges that rest upon legal insanity as defined in the statute," and that "the defense known as diminished capacity comes within th[e] codified definition of legal insanity."[7]

The court thus held that before introducing evidence that the defendant—though not legally insane—lacked mental capacity to form specific intent, one must fully comply with the statutory defense provisions.[8]

The court of appeals decision in *Mangiapane* was followed by a series of decisions continuing to address "diminished capacity" as a form of the statutory insanity defense. See, e.g., *People v Denton*[9] and *People v Anderson*.[10]

Through this line of cases, the Michigan Court of Appeals held that a defendant seeking to present a diminished capacity defense bears the burden of establishing the defense through a preponderance of the evidence under MCL 768.21(a)(3). The court continually affirmed the diminished capacity defense and set forth procedural guidelines for its use.



Ironically, the prosecutorial line of reasoning, which the court of appeals rejected in *Lynch* 1973 to allow the use of the diminished capacity defense, was adopted by the Michigan Supreme Court in *Carpenter* 2001 to prohibit its use.

People v Carpenter

In *Carpenter,* the defendant was the former boyfriend of a female complainant, Ms. Thomas, with whom he had a child. He visited her home in the early morning hours, and after threats that included firing two shots, entered her home and assaulted Ms. Thomas and a male friend. After police were summoned by neighbors, he staged a standoff in Thomas's home.

When police made contact by phone, Carpenter asked for some heart medication that was in his truck and an officer lured him to a window by offering to give it to him. When the officer tried to grab the defendant through the open window, he got free and slammed the window on the officer's finger. Carpenter eventually allowed the officers to enter the home and was placed under arrest.

At his bench trial, defendant presented an unsuccessful diminished capacity defense. The trial court found that although he had a history of organic brain damage and delusions, his actions when committing the crimes charged were goal-oriented, indicating his ability to form the requisite specific intent.

Carpenter was convicted of home invasion, felon in possession of a firearm, felony firearm, resisting and obstructing a police officer, and felonious assault.

The court of appeals rejected the defendant's argument that the trial court erred in shifting the burden to defendant to prove his claim of diminished capacity by a preponderance of the evidence and affirmed his conviction.

The Michigan Supreme Court granted review of the question of law regarding the proper application of MCL 768.21a, noting that since 1975 Michigan's insanity defense has been governed by statute 1975 PA 180.

It further opined in order to prevail under the affirmative defense of legal insanity, the defendant must prove that as a result of

mental illness or being mentally retarded as defined in the mental health code, he/she lacks "the substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or the ability to conform his or her conduct to the requirements of the law."[11] In addition the court found it highly significant that "the defendant has the burden of proving the defense of insanity by a preponderance of the evidence."[12]

The Supreme Court stated that although it had several times in passing acknowledged the concept of the diminished capacity defense "[it had] never specifically authorized its use in Michigan courts."[13]

Agreeing with the defendant that there is no indication that the legislature intended to make diminished capacity a defense, the court explained that the statutory scheme of defenses based upon mental illness or mental retardation precludes the use of "any evidence" of lack of mental capacity short of legal insanity to reduce criminal responsibility by negating specific intent.

The court refuted the defendant's argument that "diminished capacity" is a viable defense holding the United States Supreme Court's decision in *Fisher v United States,*[14] controlling. In *Fisher* the refusal of the trial court to give an instruction in a District of Columbia murder trial that would have permitted the jury "to weigh evidence of his mental deficiencies," which were short of legal insanity, in determining his capacity for premeditation and deliberation was upheld.[15]

The U.S. Supreme Court noted that a radical departure, such as requiring evidence of [diminished capacity] to be admitted in criminal trials, was more properly the subject for exercise of legislative power or for the discretion of the courts because it would involve a fundamental change in the common law theory of responsibility.[16]

Affirming Carpenter's conviction, the Court also cited *Muench v Israel,*[17] a Seventh Circuit court of appeals case which relied on *Fisher* to reach the decision that: "A state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence a state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent."[18]

The Michigan Supreme Court added that our legislature had addressed situations involving persons who are mentally ill or mentally retarded, yet not legally insane. These persons may be found "guilty but mentally ill" and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment.[19]

Furthermore, the majority opined that through this statutory provision the legislature demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.

Finally, the Court held that the insanity defense as established by the legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation, as such through this framework, insanity is an "all or nothing defense."

The *Carpenter* Aftermath

The *Carpenter* decision has laid the diminished capacity defense to rest in Michigan. This presents an insurmountable hurdle for criminal defense counsel to overcome. If a defendant does not meet the statutory requirements for legal insanity, how can his claim that he suffers from a mental abnormality, which would negate specific intent be presented at trial?

The dissenting justices in *Carpenter* present some possible arguments supporting the admission of diminished capacity evidence. They opine that while *Fisher* has never been explicitly overruled, when interpreted by subsequent Supreme Court cases beginning with *In re Winship*[20] and ending with *Martin v Ohio,*[21] an inference is created that the rule of *Fisher* has implicitly been overruled.

They note that nearly every federal circuit has concluded that the insanity defense reform act does not bar evidence of mental abnormality to negate mens rea.[22] In addition, they point out that neither Michigan's insanity statute nor its guilty but mentally ill statute mention the use of mental abnormality to negate specific intent and thus the majority has engaged in erroneous statutory interpretation.

Citing *United States v Pohlot,*[23] the dissent makes the point that this clearly contrasts with the introduction of diminished capacity evidence. A defendant claiming diminished capacity denies the prosecution's prima facie case by challenging its claim that he possessed the requisite mens rea at the time of the crime and thus is not asserting an affirmative defense.[24]

The dissenting justices conclude that evidence of mental abnormality or illness should be admissible to negate specific intent and thereby afford the defendant the right to present a meaningful defense, the requirement that the state prove beyond a reasonable doubt each and every element of a charged offense, and the presumption of innocence.

Perhaps the presentation of these significant arguments, which focus upon the basic concepts of fairness and due process in our system of jurisprudence will resurrect diminished capacity as a viable defense in the state of Michigan. ✦

Kimberley Reed Thompson was appointed as the Deputy Chief Legal Counsel for the Criminal Division of the Wayne County Circuit Court in 1992. For the previous ten years she was felony trial attorney with LADA. She is a graduate of Kentucky State University, Howard Law School, and received her LLM from Wayne State Law School. She is an elected member of the Criminal Law Section.

Footnotes

1. 464 Mich 223; 627 NW2d 276 (2001).
2. 47 Mich App 8, 208, 208 NW2d 656 (1973).
3. 62 Mich 487, 29 NW (1886).
4. 47 Mich App at 20.
5. Id.
6. 85 Mich App 379, 271 NW2d 240 (1978).
7. Id. at 394–395.
8. Id. at 395–396.
9. 138 Mich App 568, 360 NW2d 245 (1984).
10. 421 NW2d 200 (1988).
11. MCL 786.21a(1).
12. MCL 768.21a(3).
13. 464 Mich at 223.
14. 328 US 463, 66 S Ct 1318, 90 L Ed 1382 (1946).
15. 328 US 463, at 470.
16. Id. at 476.
17. 715 F2d 1124, 1144–1145 (CA 7, 1983).
18. Id.
19. MCL 768.36(3).
20. 397 US 358, 363–364, 90 S Ct 1068, 25 L Ed 2d 368 (1970).
21. 480 US 228, 107 S Ct 1098, 94 L Ed 2d 267 (1987).
22. 18 USC 17.
23. 827 F2d 889, 900–901 (CA 3, 1987).
24. See, Morse, *Undiminished confusion in diminished capacity,* 75 J Crim L & Criminology 1, 6 (1984).