ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. STEPHEN JAY MALONE, Appellant.	CR– Court of Appeals No. 2 CA–CR 2016-0274 Pima County Superior Court No. CR–2013-2518001

THE STATE OF ARIZONA'S CROSS-PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW.

> "Arizona does not allow evidence of a defendant's mental disorder short of insanity … to negate the *mens rea* element of a crime." *State v. Mott*, 187 Ariz. 536, 541 (1997). Premeditation is part of the *mens rea* for first-degree murder. Did a majority of a panel of the court of appeals err when it held, in a published opinion, that Malone was entitled to introduce evidence of his alleged brain damage to negate premeditation in his first-degree murder trial?

II. FACTS MATERIAL TO THE ISSUE PRESENTED.

Malone was involved in a tumultuous relationship with A.S. *State v. Malone*, 2 CA-CR 2016-0274, 2018 WL 3556119, at *1, ¶ 2 (Ariz. App. July 24, 2018) (hereafter, "Opinion"). On June 11, 2014, A.S. was driving away from Malone's home with her children and her sister in the car. *Id*. at ¶¶ 2–4. Malone used his own vehicle to block A.S.'s car. *Id*. at ¶ 4. After confronting A.S., Malone retrieved his handgun from his car and shot and killed A.S.; he also shot A.S.'s sister, injuring her. *Id*.

Prior to trial, Malone's counsel indicated he was investigating defenses that concerned Malone's "mental health" and he disclosed a report by a neuropsychologist, Dr. J. Sullivan. (R.O.A. 61 at 2; *see also* March 9, 2015, Motions Hearing, Defense Exhibit A.) In the report, Dr. Sullivan opined, among other things, that (1) Malone exhibited certain signs of "frontal lobe dysfunction"; and (2) his test results were "consistent with significant and permanent diffuse brain damage." (March 9, 2015, Motions Hearing, Defense Exhibit A.)

The State moved to preclude Dr. Sullivan from testifying about Malone's purported brain damage. (R.O.A. 109.) The State acknowledged that Sullivan could testify that Malone exhibited a character trait for impulsivity, but argued he could not testify that the alleged brain damage caused him to be impulsive because such testimony was diminished-capacity evidence under *State v. Mott*, 187 Ariz. 536 (1997*). (Id*.) The trial court granted the State's motion to preclude, ruling that, "[t]o the extent that Dr. Sullivan's opinions about Mr. Malone's impulsivity are based on findings of brain damage or brain injury (these terms the court finds to be encompassed by mental incapacity/diminished capacity/mental defect), they are precluded." (R.O.A. 133.)

Subsequently, Malone moved the trial court to reconsider its ruling based on this Court's then newly issued decision in *State v. Leteve*, 237 Ariz. 516 (2015). (R.O.A. 160.) In response, the State noted that, consistent with this Court's holding in *Leteve*, it was *not* seeking to preclude Malone's expert from testifying to a character trait for impulsivity. (R.O.A. 165.) The trial court denied the motion to reconsider, again reasoning that evidence of "diffuse brain damage is [the] functional equivalent of [evidence of] diminished capacity." (R.T. 4/4/16, at 10–11.)

On appeal, a majority of a panel of the court of appeals concluded Malone's alleged brain injury could be characterized both as evidence of a "diminished

mental capacity" and as evidence that Malone had "an impulsive personality trait." Opinion, at ¶ 7. Although the majority acknowledged "Arizona law does not recognize a defense of diminished capacity," it found that the "brain damage" evidence was admissible "to corroborate [Malone's] claims that he had a character trait of impulsivity." *Id*. at ¶¶ 7–11. The majority, however, found that the exclusion of the evidence was harmless because, *inter alia*: (1) Malone introduced "extensive evidence of his character trait for impulsivity," including evidence that he received professional treatment for his behavioral problems as a young child and as a teenager; (2) Malone's expert, "[a] clinical psychologist with certifications in neuropsychology and forensic psychology," testified that he evaluated Malone and told the jurors he had "a character trait for impulsivity"; (3) Malone's expert "explained what it means to have an impulsive personality generally and discussed his specific evaluation of Malone"; and (4) the State "never challenged that Malone had a character trait for impulsivity." *Id*. at ¶¶ 17–22.

Judge Brearcliffe dissented from the majority's conclusion that "the excluded brain damage evidence was admissible to negate the *mens rea* of premeditation." Opinion, at ¶ 37. Specifically, Judge Brearcliffe found that the trial court's preclusion of the evidence was "clearly" precluded by this Court's holding in *Mott*:

> It appears to be undisputed that Malone's "significant and permanent diffuse brain damage" is a mental defect or disorder.[1] It is undisputed that Malone sought to introduce it to prove his character trait for impulsivity. It is undisputed that Malone offered his character trait for impulsivity to negate premeditation. It is further undisputed that premeditation is a *mens rea* element of the crime of first-degree murder of which Malone was charged. *See* A.R.S. § 13-1105(A)(1); *State v. Boyston*, 231 Ariz. 539, ¶ 50, 298 P.3d 887 (2013) (premeditation part of requisite *mens rea* of first-degree murder). It is therefore undisputed that Malone sought to introduce evidence of his mental defect or disorder to negate the *mens rea* element of a crime. Under *Mott*, such evidence is simply inadmissible.

Id. at ¶ 38.

In addition to "def[ying] the clear proscriptions in *Mott*," Judge Brearcliffe noted that the majority's holding also ignored this Court's "clear distinctions between permissible evidence to show a character trait for impulsivity and impermissible evidence for such a purpose laid out just three years ago in *State v. Leteve*, 237 Ariz. 516, 354 P.3d 393 (2015)." Opinion, at ¶ 40. Judge Brearcliffe acknowledged that *Leteve* recognized "observation evidence" is admissible to negate *mens rea*, but explained why Malone's evidence could not be characterized as such:

> [E]vidence of Malone's "significant permanent and diffuse brain damage" is physical evidence of a brain defect or disorder, it is not observation evidence. Such evidence is that of a physiological

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[1] *See Mott*, 187 Ariz. at 544 (equating expert testimony on brain damage with mental capacity evidence, stating that it was "essentially expert testimony on the defendant's cognitive ability to form the requisite mental state").

> anomaly, not evidence of a behavioral tendency. Whether or not such brain damage is commonly found in people suffering from a character trait for impulsivity, the evidence itself is fundamentally either "mental disease evidence" or "capacity evidence," each of which, as the supreme court repeats for us, is prohibited by Arizona law.

Id.

Finally, Judge Brearcliffe emphasized the inevitable ramifications resulting from the majority's opinion if it is left to stand:

> If the reasoning of this opinion in this regard evades supreme court review or survives it, as a practical matter, there will be little left of *Mott* and not much left of *M'Naghten*. Every defendant who could not successfully meet the *M'Naghten* standard to evade criminal responsibility will now offer evidence of any brain defect or disorder as "consistent" with or to bolster some otherwise admissible character trait evidence. Under the majority's reasoning it will be a denial of the defendant's right "to put on a complete defense" and error not to admit such evidence. The opinion here does not help Malone given the lack of a showing of prejudice. However, if future juries can now consider brain defect evidence for the improper purpose of negating *mens rea* of premeditation for first-degree murder, what will stop them from considering it for guilt itself? After all, the defendant can't help himself, he has brain damage. Unless the reasoning of the opinion is checked, the danger identified in *Mott* will be realized: future juries will be compelled to "release[ ] upon society many dangerous criminals who obviously should be placed under confinement." *Mott*, 187 Ariz. at 545, 931 P.2d at 1055, *quoting Schantz*, 98 Ariz. at 213, 403 P.2d 521.

Id. at 41.

III. REASONS THIS COURT SHOULD REVIEW.

This Court should grant review because, as cogently set forth in Judge Brearcliffe's dissenting opinion, the court of appeals incorrectly decided an

important issue of law that contravenes this Court's clear holding in *Mott*. *See* Ariz. R. Crim. P. 31.21(d)((1)(C) (providing that reasons for granting review include "that important issues of law have been incorrectly decided").

In reaching its decision below, the majority correctly noted that, because "Arizona law does not recognize a defense of diminished capacity," "'evidence of a defendant's mental disorder short of insanity ... to negate the *mens rea* element of a crime' is not allowed." Opinion, at ¶ 7 (quoting *Mott*, 187 Ariz. at 541.) The majority also correctly noted that a defendant may "introduce evidence that he has a character trait for impulsivity as evidence 'that he did not premeditate the homicide.'" Opinion, at ¶ 7 (quoting *State v. Christensen*, 129 Ariz. 32, 35 (1981)). The court then held that, *Mott* notwithstanding, evidence of a mental defect or disorder is admissible to negate *mens rea* if: (1) it is not used to support a contention that a defendant is "incapable of reflecting"; and (2) it is only used to "corroborate" a defendant's character for impulsivity:

> Here, Malone did not proffer the expert testimony regarding brain damage to prove that he was *incapable of reflecting*. Rather, the results of those tests were offered to demonstrate a brain condition that rendered it less likely that he may have done so. Accordingly, under *Christensen* and in accord with our supreme court's clarification of that case in *Mott*, we conclude the evidence was admissible to the extent offered *to corroborate the defendant's claims that he had a character trait of impulsivity*. The evidence would not have been admissible to support a claim that Malone was "*incapable*" of reflecting on, or premeditating, the homicide.

Opinion, at ¶ 11 (emphasis added).

This is a clear misapplication of *Mott* and *Christensen*. First, although the majority noted a defendant cannot introduce evidence that he is "incapable of reflecting,"[2] *Mott's* preclusion of mental-defect evidence is not limited to an expert opining that a defendant could not or did not form the *mens rea* for an offense; rather, it applies to "evidence of a defendant's mental disorder short of insanity" introduced "to negate the *mens rea* element of a crime." 187 Ariz. at 541. Thus, when legal insanity is not at issue, *all* mental defect evidence is precluded under *Mott*, not just the testimony of experts who would testify that a defendant is "incapable" of forming the *mens rea*. *See Clark v. Arizona*, 548 U.S. 735, 762 (2006) ("*Mott* is meant to confine to the insanity defense *any* consideration of characteristic behavior associated with mental disease.") (emphasis added, cited with approval in *State v. Miles*, 243 Ariz. 511, 515, ¶ 16 (2018)).

Second, the majority erred when it found the precluded evidence "was admissible to the extent offered *to corroborate* the defendant's claims that he had a character trait of impulsivity." Opinion, at ¶ 11 (emphasis added). Corroborating evidence is generally admissible because it "tend[s] to establish" something at issue. *See State v. Turner*, 92 Ariz. 214, 220–21 (1962) (noting that the definition

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[2] *See Mott*, 187 Ariz. at 544 (emphasizing that the evidence in *Christensen* "was not that [the defendant] was *incapable*, by reason of a mental defect, of premeditating or deliberating" but instead, it was that "he had a tendency to act impulsively").

of "corroborative" includes, "tending to establish a point already proved by other evidence"). But the majority below does not explain how evidence that is inadmissible under *Mott* somehow transmogrifies into admissible evidence simply because a defendant claims it is being used "to corroborate" evidence that is admissible under *Christensen*. Both this Court and the United States Supreme Court have discussed the various compelling reasons why Arizona prohibits diminished-capacity evidence from being introduced to negate *mens rea*. *Clark*, 548 U.S. at 771–79; *Mott*, 187 Ariz. at 540–42. Those reasons apply even if a defendant claims his mental-defect evidence is only "corroborative" of other evidence. Thus, as Judge Brearcliffe stated in his dissent, the majority's ruling provides an end-run around *Mott* for "[e]very defendant," not only in regard to the *mens rea* needed for premeditation *mens rea*, but as to the *mens rea* for any offense:

> "[I]f future juries can now consider brain defect evidence for the improper purpose of negating *mens rea* of premeditation for first-degree murder, what will stop them from considering it for guilt itself?"

Id. at ¶ 41.

IV. CONCLUSION.

For the foregoing reasons, this Court should grant review, or alternatively, order that the opinion below be depublished. *See* Ariz. R. Civ. App. P. 28(e) ("[I]f the Court of Appeals has issued an opinion in a case that comes before the

Supreme Court on a petition or cross-petition for review, before the Court of Appeals opinion becomes final the Supreme Court may enter an order directing that either the entirety, or a specified portion, of the opinion be depublished."); *see also* Ariz. Sup. Ct. Rule 111(c)(1)(C) (prohibiting a party from citing a "depublished opinion or a depublished portion of an opinion").

RESPECTFULLY SUBMITTED this 23rd day of August, 2018.

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ATTACHMENT