James L. Fullin
Pima County Legal Defender
33 N. Stone Ave., 9th Floor
Tucson, AZ 85701
Telephone: (520) 724-5775
Fax (520) 770-4169
LD.MinuteEntries@pima.gov
Jeffrey.Kautenburger@pima.gov
JEFFREY KAUTENBURGER, PCC# 66373, SB# 028310
ATTORNEY FOR PETITIONER

IN THE SUPREME COURT

STATE OF ARIZONA

THE STATE OF ARIZONA,	) NO. _____ – PR
	)
Respondent,	) Court of Appeals
	) No. 2 CA-CR 2016-0274
vs.	)
	)
	) (Pima County Superior Court
STEPHEN JAY MALONE, JR.,	) Cause No. CR-2010-2518-001)
	)
Petitioner.	) **PETITION FOR REVIEW**
_____	)

¶1 The Petitioner, through counsel, respectfully moves this Court, under Ariz.R.Crim.P. 31.21, to grant review of the Court of Appeals' Opinion filed July 24, 2018, and reverse his first-degree murder conviction and sentence

because the lower court has incorrectly decided an important issue of law regarding harmless-error analysis. The accompanying memorandum of points and authorities supports this petition.

RESPECTFULLY SUBMITTED this 22nd day of August, 2018.

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PIMA COUNTY LEGAL
DEFENDER

By: /S/_____
JEFFREY A. KAUTENBURGER
Assistant Legal Defender

Memorandum of points and authorities.

1. Issue presented for review.

Did the court of appeals err in concluding that the incorrectly precluded evidence of Appellant's brain damage—as it informed his character trait for impulsivity in defense of first-degree murder—constituted harmless error?

2. Material facts.

A. Procedural history.

¶2 The Petitioner, Stephen Jay Malone Jr., was convicted of first-degree murder, aggravated assault, and two counts of endangerment and was sentenced to natural-life in prison. RA (238). On appeal, he argued, *inter alia*, that the trial court erred when it precluded him from presenting evidence that he had permanent diffuse brain damage that made it more likely that he acted impulsively, rather than with premeditation, in defense of the first-degree murder charge. Opening Brief (OB) at ¶¶ 28-49, Reply Brief (RB) at ¶¶ 2-10. The court of appeals (COA) affirmed in a July 24, 2018, opinion. 2018 WL 3556119 (Attached). The majority reasoned that the evidence of

Petitioner's permanent diffuse brain damage should have been admitted, but its preclusion was harmless error given that it was "mostly cumulative" to other introduced evidence supporting impulsivity, and buttressed by the fact that the state did not specifically challenge that Petitioner was impulsive. COA Opinion at ¶¶6-22.

B. Factual background.

¶3 Petitioner and the victim, A.S., had been in a romantic relationship for over a decade. They had three children together. Their relationship was often rocky, and on June 11, 2013, friction between the two was high. That evening, A.S, along with her sister E.S., drove to Petitioner's house to return a recent gift of perfume Petitioner had given A.S. Two of Petitioner and A.S.'s children were also in the car.

¶4 When they arrived at the house, Petitioner came up to the car, took the perfume, asked where his other daughter was, and asked A.S. to stay so that his mother, who was at the house, could see the children. A.S. declined and drove off. Petitioner then got into his car and followed her, eventually blocking her from leaving the subdivision. A.S. then called Petitioner's

mother. The mother told A.S. to return to the house, which she did, and the Petitioner followed and pulled in behind them. The mother handed E.S. a bag and they drove off. The Petitioner followed, eventually blocking A.S.'s car again. Petitioner exited his car. As A.S. started to back the car up, Petitioner reached into his car, grabbed a gun and started shooting into A.S.'s car. Two shots hit A.S., killing her. Another shot grazed E.S.

¶5 At trial, Petitioner's defense focused on the element of premeditation—he maintained that he did not premediate the murder given the factual circumstances and his character trait for impulsivity. Petitioner's primary means of establishing his character trait for impulsivity was through the expert testimony of a clinical neuropsychologist, Dr. James Sullivan, who had observed Petitioner and administered a battery of psychological exams to Petitioner. The permissible extent and scope of Dr. Sullivan's proffered expert testimony, however, was the subject of extensive argument before, during, and after the trial—with particular focus on whether, under *State v. Mott,* 187 Ariz. 536, 931 P.2d 1046 (1997), the expert could even mention "brain damage" and specifically that Petitioner suffered

from a type of brain damage that made it difficult for him to reflect and therefore more likely that he acted impulsively. See *e.g.*, RA (109), (114) and RT (3/30/15) (State's motion to preclude "diminished capacity", response, transcript); RA (160), (166) and RT (4/4/16) (motion to reconsider, ruling, transcript); RA (216) (motion for new trial).

¶6 The trial court precluded Dr. Sullivan from testifying about Petitioner's impulsivity "based on findings of brain damage or brain injury" concluding that such testimony would amount to prohibited diminished capacity evidence. RA (133). More specifically, Dr. Sullivan was not allowed to testify that the "[r]esults of [Petitioner's] comprehensive neuropsychological assessment [were] consistent with significant and permanent diffuse brain damage" that in and of itself made it more likely he would act impulsively. RT (5/11/16) 6, 13; RA (114). The trial court also limited the expert's use of "neurological terminology," such as "executive functioning." RT (*Id.*) 5, 10-12, 13, 19-20. 35-36. Dr. Sullivan did testify that based on what he observed and results of exams, that Petitioner "clearly does have a character trait for impulsivity." RT (*Id.*) 46. He also testified

about impulsivity generally and about some of the tests he administered to Petitioner, but not Petitioner's performance on them. RT (*Id.*) 26, 35-37.

¶7 In support of its limitations on Dr. Sullivan's testimony, the trial court pointed out that the state was not challenging the expert's conclusion that Petitioner had a character trait for impulsivity. RT (*Id.*) 17, 40. The state's construct for impulsivity vis-à-vis premeditation, as reflected by its closing arguments, however, was that impulsivity did not matter—"impulsivity" is not in the jury instructions and the thought required to form intent is the same thought required for premeditation or reflection:

> You didn't need a doctor to come and tell you "pre" means before" and "meditate" means to think. That's all the law requires.
>
> * * *
>
> Does it say anything about impulsivity in [the jury instruction]? The answer is no. All you have to do is think about it.
>
> * * *
>
> "Bottom line, once you've come to the conclusion I'm going to kill you or I'm going to kill somebody, I've thought about it. Did I think about it with all the consequences? Oh, my God, no. But it's not part of anything in the instructions that you must follow, not a thing, not a thing. Decided to kill her, he killed her. That's it. That's premeditation. There's nothing more."

RT (*Id.*) 109-10.

¶8 Petitioner's mother also testified about incidents—behavior at school and behavior at home—in Petitioner's life that, in her opinion, demonstrated his impulsivity. She testified that he had poor coping skills as well as difficulty handling stress and his emotions. Petitioner's mother also testified that counseling and residential programs had not helped the Petitioner. RT (5/4/16) 168-89.

¶9 The court of appeals correctly reasoned that although Petitioner's precluded brain-damage testimony could be characterized as both diminished capacity evidence and as evidence demonstrating that Petitioner has a character trait for impulsivity, an analysis of the purpose for which such evidence is sought to be admitted is crucial. Opinion at ¶¶ 7-11. Given that Petitioner's permanent diffuse brain damage independently made it more likely that he acted without reflection, the court recognized that it would be both relevant and probative to not only whether he actually had an impulsivity character trait, but also whether that character trait manifested at the time he shot A.S. *Id.* at ¶8. Moreover, the court understood that the brain damage testimony was not proffered to prove that the

Petitioner was incapable of reflection, but instead, offered as a condition Petitioner had that made it less likely that he reflected—and therefore in accord with *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981) and *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997). Opinion at ¶¶11-14. Thus, the court correctly concluded that the trial court should have admitted Petitioner's brain-damage evidence for the purpose of supporting his defense of impulsivity against premeditated murder. *Id.* at ¶16.

¶10 The court then turned to error analysis, citing the correct standard: prejudicial, reversible, error unless the state can show "beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Henderson*, 210 Ariz. 561,¶18, 115 P.3d 601, 607 (2005). Additionally, the court invoked a harmless error analysis framework of whether the erroneously precluded evidence was "merely cumulative" of other admitted evidence. Opinion at ¶17 (quoting *State v. Carlos*, 199 Ariz. 273, ¶24, (App. 2001)). Here, the court of appeals concluded that the precluded brain-damage evidence was "mostly" cumulative and unchallenged by the state, and therefore constituted harmless error. *Id.* at ¶22

3. Reasons to grant review.

¶11 The court of appeals erred in concluding that the preclusion of Petitioner's permanent diffuse brain damage—as it informed his impulsivity—was harmless. It simply cannot be concluded that preclusion of this probative and reliable scientific and objective evidence of an ingrained condition that increased the likelihood of impulsivity did not contribute to or affect the jury verdict on first-degree murder. While Petitioner's expert was able to testify, that in his opinion, based on observations and testing, Petitioner did have a character trait for impulsivity, the precluded evidence of Petitioner's brain damage, that in and of itself, made it more likely that Petitioner would act without reflection, was not "more of the same." See Opinion at ¶21 (quoting *State v. Romero*, 240 Ariz. 503, ¶17 (App. 2016)). Nor does "mostly cumulative" equate to "merely cumulative."

¶12 The precluded testimony of permanent diffuse brain damage that increased Petitioner's likelihood to act impulsively was his strongest, most

compelling evidence establishing his character trait for impulsivity because it established that a primary source of his impulsivity trait was "ingrained," not a recent creation for the criminal trial, not a biased-opinion of his mother based on anecdotes from his childhood, and not a condition sitting in the abstract. See Opinion at ¶8, Footnote 1 ("[W]e question the logic of allowing defendants to demonstrate a character trait of impulsivity in the abstract or anecdotally while categorically depriving them of objective and scientifically reliable evidence of it."). Even the trial court understood the potential impact of this on the average juror:

> I have to say that logically if a character trait for impulsivity is admissible, then the reasons for that impulsivity should be admissible as well. A full explanation would possibly be something the jury would benefit from hearing.

RT (4/4/16) 11. Moreover, this precluded evidence went to the heart of Petitioner's trial defense against premediated murder and would have significantly and materially corroborated and bolstered his character trait from impulsivity.

¶13 Further, this precluded evidence was not "merely cumulative," but rather independently material and significant because it gave greater

credibility and legitimacy to Petitioner's character trait for impulsivity. If the character trait for impulsivity represents a spectrum of likelihood to act without reflection, Petitioner's permanent diffuse brain damage positioned him towards greater likelihood of non-reflection. No other witness gave this testimony. See *State v. McKinley*, 157 Ariz. 135, 138, 755 P.2d 440, 443 (App. 1998) (proffered testimony from victim's school psychologist about false reporting of molestation cumulative when defendant already called his own expert on the same.).

¶14 Given the independently material, non-cumulative nature of Petitioner's precluded evidence of brain damage—that a source of tendency towards impulsivity was ingrained—the fact that the state did not facially challenge that Petitioner had the trait does not negate the harm of its preclusion. The precluded evidence of Petitioner's permanent diffuse brain damage and how it affected his impulsivity went to the core of his complete defense. Petitioner has a fundamental and constitutional right to present a complete defense and he should have been able to present his *bona fide* diagnosis of brain damage that increased his likelihood of impulsivity to

challenge premeditation. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Moreover, the prosecutor for the state made gross misstatements of the law in his closing that suggested nullification of the impulsivity defense and eliminated the distinction between first-degree and second-degree murder by conflating the thought process for intent and reflection. RT (*Id.*) 109-10; Opinion at ¶28.

¶15 In sum, Petitioner was precluded from presenting the most probative, credible, and compelling evidence that he was less likely to have premediated. This was not harmless error—it cannot be concluded, beyond a reasonable doubt, that preclusion of the brain damage testimony had no effect on the verdict in this case. *Henderson*, 210 Ariz. 561, ¶18, 115 P.3d 601, 607 (2005). Had Petitioner been allowed to present the full picture of his impulsivity, a reasonable jury could have concluded that he had not reflected on killing the victim at the time of the shooting and returned a second-degree murder verdict. *Id*.

4. Conclusion.

¶16 Based on the foregoing, the Petitioner respectfully requests that this Court grant review and reverse his conviction.

RESPECTFULLY SUBMITTED this 22nd day of August, 2018.

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