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**IN THE SUPERIOR COURT, THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF COCONINO**

| STATE OF ARIZONA,<br>Plaintiff,<br><br>vs.<br><br>TIMOTHY MAX DURAN,<br>Defendant. | Superior Court CR2019-00338<br><br>**MOTION TO PRECLUDE DIMINISHED CAPACITY EVIDENCE**<br><br>(Hon. Dan Slayton, Div. 2) |
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The State moves this Court to preclude proposed defense evidence the State would characterize as evidence of the defendant's diminished capacity to premeditate. The defense proposes to have Dr. Sullivan, and perhaps other witnesses, testify about defendant's mental disease or defect to refute the "premeditation" element of the offense alleged in count 1. This type of testimony is commonly referred to as "diminished capacity" evidence, which is not admissible under Arizona Law. *State v. Mott*, 187 Ariz. 536, 541, (1997). This motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 6th day of October, 2021.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### 1. BRIEF FACTS

On March 20, 2019, Timothy Duran threatened his daughter Layla and his wife Crystal. On that same date, he told a friend that he intended to kill Crystal. His friend attempted to talk the defendant out of it. Also in that timeframe, the defendant, upset that Crystal was divorcing him, had an angry conversation with one of his young daughters. During that conversation he accused her of lying to him and told her to hang herself. Crystal contacted the police about that incident. Crystal spoke to the defendant on the morning of 3/21/19 during which conversation he said he was coming to the house. He had moved out of the house days earlier. Crystal filed for divorce and acquired an OOP, which had not been served, but about which the defendant was aware. Crystal had recently changed the locks to the house. Crystal told defendant he was not allowed to come to the house, specifically referring to the terrible thing he had said to his daughter. Defendant showed up at the house anyway. He forced his way into the house and began an argument with Crystal. During that argument, Defendant armed himself with a screwdriver and stabbed Crystal several times. This was witnessed by Louise Lovelace, Crystal's grandmother, and L. D., the victim's and defendant's daughter. Crystal again called police to report that her husband was chasing her with a screwdriver. This call was cut short. Defendant then armed himself with a second weapon. He pulled it from a knife block on the kitchen counter. The knife block fell and hit the floor. The defendant grabbed a large carving fork with a handle that looked like a knife and repeatedly stabbed Crystal until he caused enough damage to kill her. She was able to flee the house but collapsed on her neighbor's yard and shortly thereafter succumbed to her injuries. The defendant also stabbed Louise Lovelace in the process. Louise tried to protect Crystal from Defendant's attack. Louise ended up unconscious outside of the house. The

defendant fled the home, leaving his young daughter alone trying to help her dying mother. The defendant later admitted to his mother and his brother that he had stabbed Crystal. Specifically, he told his brother that he had stabbed Crystal approximately 20 times.

## 2. LAW AND ARGUMENT

The defense has pursued what is commonly referred to as the *Christiansen* defense in this case. *State v. Christiansen*, 129 Ariz. 32 (1981). The argument is that the defendant did not premeditate the killing, rather the killing was an impulsive act. The primary witness for the defense in that regard is Dr. James Sullivan. Dr. Sullivan has produced a report and the State recently conducted an interview with Dr. Sullivan.[1] The State's position is that Dr. Sullivan's testimony should be precluded as diminished capacity evidence, which is not permitted in Arizona. *State v. Mott*, 187 Ariz. 536 (1997).[2]

In *Christiansen*, the defendant was accused of killing his ex-wife. Indeed, he had admitted to a friend after the fact that he had hit her with a bottle, strangled her and left her under a bed. *Christiansen,* at 34. At trial, the defendant did not deny killing his wife, nor did he raise the defense of insanity. Rather, he called a psychiatrist as a witness who would have testified that he had interviewed defendant and reviewed tests which had been administered to defendant, and in his expert opinion, defendant's actions were more reflexive than reflective, due to defendant's difficulty dealing with stressful situations. The court sustained an objection to the testimony by the state, believing that the testimony raised the defense of "diminished responsibility" which Arizona had previously rejected in *State v. Schantz*, 98 Ariz. 200 (1965) and *State v. Laffoon*, 125 Ariz. 484

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[1] A transcript of this interview has been ordered but not yet received.

[2] "Moreover, this court considered and rejected the defense of diminished capacity in *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965), cert. denied, 382 U.S. 1015, 86 S.Ct. 628, 15 L.Ed.2d 530 (1966). There, we recognized that the legislature is responsible for promulgating the criminal law and that it "has not recognized a disease or defect of mind in which volition does not exist ... as a defense to a prosecution for [a crime.]" Id. at 212, 403 P.2d at 529. Furthermore, we found that this Court does not have the authority to adopt the diminished capacity defense. 98 Ariz. at 212–13, 403 P.2d at 529."



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(1980). *Christiansen*, at 34. On appeal, the defense argued that it should have been permitted to present evidence of the defendant's character trait for impulsivity to establish that the killing was not the result of reason or planning. *Id,* at 34. The Arizona Supreme Court agreed.

> The establishment of the character trait of acting without reflection tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide. We therefore hold the court committed error in excluding the psychiatrist's testimony.

*Id,* at 35.

The court further found that "[a]n expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing." *Id* at 35. But agreed that pursuant to Rule 404(a)(1), Ariz.R.Evid,[3] defendant should have been permitted to present expert and or non-expert evidence to establish defendant's pertinent character trait of impulsivity. *Id,* at 34-35. The *Christiansen* court cautioned, however, that an expert witness could not opine as to whether a defendant was acting reflectively or reflexively at the time of the murder. *Christensen*, 129 Ariz. at 35–36. Several cases in Arizona have addressed the issue of diminished capacity evidence. In *State v. Mott*, 187 Ariz. 536 (1997), the Arizona Supreme Court again confirmed that diminished capacity evidence is inadmissible.

> Because the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent. *State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); *State v. Laffoon*, 125 Ariz. 484, 486, 610 P.2d 1045, 1047 (1980); *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). Instead, the legislature has provided the M'Naghten test "as the sole standard for criminal responsibility." *Ramos*, 133 Ariz. at 6, 648 P.2d at 121.5 This test provides:
> A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

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[3] "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith * * * except: * * * Evidence of a pertinent trait of his character offered by an accused * * *. *Christiansen* at 582.



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> A.R.S. § 13–502(A). Consequently, Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime.

*Mott* at 541.

The evidence offered by the defense in the case at bar is diminished capacity evidence rather than evidence of a character trait.

The Arizona Supreme Court has recently thoroughly discussed the distinction in question in *State v. Malone*, 247 Ariz. 29 (2019).

> Although a defendant cannot use evidence of a mental disease or defect to show he did not form a crime's requisite mental state (mens rea), see *State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997); *State v. Schantz*, 98 Ariz. 200, 212–13, 403 P.2d 521, 529–30 (1965), he may use evidence of a character trait for impulsivity to cast doubt on the existence of premeditation, see *State v. Christensen*, 129 Ariz. 32, 35, 628 P.2d 580, 583 (1981), which forms part of the mens rea for first degree murder under A.R.S. § 13-1105(A)(1), see *State v. Boyston*, 231 Ariz. 539, 549 ¶ 50, 298 P.3d 887, 897 (2013). Here, we decide whether a defendant who introduces expert evidence of a character trait for impulsivity to challenge premeditation may also introduce evidence of brain damage to corroborate the existence of that trait. We hold he cannot.

*Id* at 30.

In *Malone*, the state moved pursuant to *Mott* to preclude the testimony of Dr. James Sullivan "that Malone's performance on neuropsychological assessment tests was "consistent with significant and permanent diffuse brain damage," meaning Malone was "more likely to have a character trait for impulsivity."" *Malone,* at 30. The state agreed that *Christiansen* allowed Dr. Sullivan to testify that the defendant had a character trait for impulsivity, but that *Mott* precluded evidence that brain damage made the existence of this trait more likely. The trial court agreed. The Court of Appeals reversed, and the case went to the Arizona Supreme Court.

The *Malone* court recognized the evidence permitted pursuant to *Christiansen* and distinguished it form the evidence of brain damage proposed by the defense. "…evidence of a defendant's behavioral tendencies is not diminished capacity evidence and may be admitted to

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challenge the mens rea of premeditation for a first degree murder charge. *See Christensen*, 129 Ariz. at 35–36, 628 P.2d at 583–84.", but continued its analysis clarifying the type of evidence admissible for that purpose.

> The United States Supreme Court in *Clark v. Arizona*, 548 U.S. 735, 757, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006), coined the term "observation evidence" to describe the type of character trait evidence permitted in *Christensen*. "Observation evidence" is a slight misnomer, however, as the psychiatrist's opinion in *Christensen*, like Dr. Sullivan's proffered brain-damage testimony here, depended on results from diagnostic tests administered to the defendant as well as the psychiatrist's personal observations of him. See *Christensen*, 129 Ariz. at 34, 628 P.2d at 582. A more accurate term for the evidence deemed admissible in *Christensen* is "behavioral-tendency evidence," which is admissible to show a character trait. *See Mott*, 187 Ariz. at 544, 931 P.2d at 1054 (describing *Christensen* as involving "evidence about [the defendant's] behavioral tendencies"); see also Ariz. R. Evid. 404(a)(1) (permitting evidence of an accused's pertinent character trait).

*Malone* at 32.

The Supreme Court in *Malone* rejected the reasoning of the Court of Appeals on whether Dr. Sullivan's testimony about brain damage was admissible to corroborate testimony of the existence of a character trait for impulsivity.

> The court of appeals acknowledged that Dr. Sullivan's proffered brain-damage testimony was diminished capacity evidence. *See Malone*, 245 Ariz. at 106 ¶¶ 7, 9, 425 P.3d at 595, 597. But the court viewed Mott's differentiation of *Christensen* as authorizing admission of mental disease or defect evidence for the purpose of showing a behavioral tendency that negates mens rea. *Id*. at 106–07 ¶¶ 10–12, 425 P.3d at 595–96. Because Dr. Sullivan's test results "were offered to demonstrate a brain condition that rendered it less likely" that Malone premeditated the murder, the evidence was deemed admissible "to corroborate the defendant's claims that he had a character trait of impulsivity." *Id*. ¶ 11. The court noted that the trial court could have facilitated proper use of the evidence with a limiting instruction or other measures. *See id*. at 107 ¶ 15, 425 P.3d at 596.
>
> We reject the court of appeals' purpose-oriented standard for admitting mental disease or defect evidence to negate legislative policy to not permit the admission of mental disease or defect evidence to refute mens rea.

*Malone*, at 33.

In the case at bar, the State contends that the evidence proffered by Dr. Sullivan is not "behavioral-tendency evidence." Rather, it is exactly the type of evidence precluded by *Mott* as

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affirmed by *Malone*, diminished capacity evidence. In his report, Dr. Sullivan described the method he used to draw conclusions. He conducted a limited clinical interview and administered a series of tests. The scoring on those tests indicates, among other things, that Duran has "a moderate to severe degree of brain damage"[4], Duran suffers from "Significant deficits … in verbal fluency, impulse control, and verbal absraction"[5], he persisted in use of clearly erroneous problem solving strategy (perseveration) which, Dr. Sullivan states, is "a generally accepted marker of anterior brain (frontal lobe) dysfunction."[6] Some of the test scores "reflecting the defendant's general ability to maintain appropriate regulatory control of behavior and emotional responses, was in the impaired range…"[7] Sullivan went on to say that "Mr. Duran's performance on self-report measures of executive function and impulsiveness are consistent with significant compromise in executive functions and compromised self-awareness and behavioral regulation. Similar individuals can be expected to encounter frequent difficulties in everyday living; often engaging in spontaneous behavior without adequate prior reflection and deliberation."[8] Dr. Sullivan further reports that the defendant's test scores indicate that he meets the diagnostic criteria for PTSD- with dissociative symptoms, and that PTSD "often includes heightened impulsivity as a primary feature."[9]

It is the state's position that Dr. Sullivan did not make observations of the defendant's own behavioral tendencies. None of the proffered evidence from Dr. Sullivan is the "behavioral-tendency evidence" permitted by *Mott* and *Malone* to show that Duran has a character trait for impulsivity. Rather, Dr. Sullivan's evidence is more fairly described as evidence that the defendant's test scores are consistent with brain damage and/or dysfunction and that similar

[4] Sullivan report page 7
[5] Sullivan report page 8
[6] Sullivan report page 8
[7] Sullivan report page 10
[8] Sullivan report page 10
[9] Sullivan report page 15

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individuals can be expected to encounter relevant difficulties, or that Duran meets the criteria for PTSD, which often includes heightened impulsivity as a primary feature. This proffered testimony is the type that was properly precluded in *Malone*.

**3. CONCLUSION**

The proffered testimony of Dr. Sullivan in this case is prohibited diminished capacity evidence, inadmissible in Arizona. Dr. Sullivan's report does not indicate that his interview and testing yielded observations of the defendant's behavior such that he could conclude that the defendant has a character trait of impulsivity. Unless the defense can show how Dr. Sullivan's testimony would come in the form of "behavioral-tendency evidence" of a pertinent character trait (impulsivity/ inability or diminished ability to reflect), pursuant to Ariz.R.Evid. 404, Dr. Sullivan's testimony should be precluded.

RESPECTFULLY SUBMITTED this 6th day of October, 2021.

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