

**SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,)	Arizona Supreme Court
)	Case No. CR-15-0380-PR
Appellant,)	
v.)	Arizona Court of Appeals
)	Case No. 1 CA-CR 14-0183
ROBERT FISCHER,)	
)	Maricopa County Superior Court
Appellee.)	Case No. CR2012-006869-001
_____)	

**BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS
FOR CRIMINAL JUSTICE IN SUPPORT OF ROBERT FISCHER'S
PETITION FOR REVIEW**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
INTEREST OF AMICUS CURIAE	6
BACKGROUND	6
THIS COURT SHOULD GRANT REVIEW	7
I. The Court of Appeals Improperly Limited the Role of the Trial Judge as a Thirteenth Juror	8
A. The Court of Appeals Mis-stated Arizona Law	9
i. The Court’s Reading of <i>Cano</i> Is Inconsistent With Settled Arizona Law	9
ii. The Court Misread This Court’s Holding in <i>Hutcherson</i>	11
B. Other States That Have Adopted the Thirteenth Juror Standard Give Trial Courts Broad Discretion to Disagree With Juries	13
C. Neither the Federal Nor the Arizona Constitution Prevents the Trial Judge from Substituting His Judgment for the Jury on a Motion for a New Trial	13
II. The Court of Appeals Expanded Its Appellate Review of the Trial Court’s Motion for a New Trial and Improperly Re- Weighed the Evidence	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	14
<i>Brownell v. Freedman</i> , 39 Ariz. 385, 6 P.2d 1115 (1932)	8
<i>Cal X-Tra v. W.V.S.V. Holdings, LLC</i> , 229 Ariz 377, 276 P.3d 11 (App. 2012)	12
<i>Caldwell v. Tremper</i> , 90 Ariz. 241, 367 P.2d 266 (1962)	16
<i>Cano v. Neill</i> , 12 Ariz. App. 562, 473 P.2d 487 (1970)	9, 10
<i>City of Glendale v. Bradshaw</i> , 114 Ariz. 236, 560 P.2d 420 (1977).....	11, 15
<i>Flying Diamond Airpark, LLC v. Meienberg</i> , 215 Ariz. 44, 156 P.3d 1149 (App. 2007).....	16, 17
<i>Grant v. Ariz. Pub. Serv. Co.</i> , 133 Ariz. 434, 652 P.2d 507 (1982).....	16, 17
<i>Hutcherson v. City of Phoenix</i> , 192 Ariz. 51, 961 P.2d 449 (1998).....	9, 11, 12
<i>In re Petition for Writ of Prohibition</i> , 539 A.2d 664 (Md. 1988)	13
<i>Leroy v. Kucharski</i> , 878 N.E.2d 247 (Ind. App. 2007).....	13
<i>McBride v. Kieckhefer Assocs., Inc.</i> , 228 Ariz. 262, 265 P.3d 1061 (App. 2011) ..	14
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	14
<i>Peak v. Acuna</i> , 203 Ariz. 83, 50 P.3d 833 (2002)	8, 10
<i>Reeves v. Markle</i> , 119 Ariz. 159, 579 P.2d 1382 (1978).....	9
<i>Smith v. Moroney</i> , 79 Ariz. 35, 282 P.2d 470 (1955)	11
<i>State v. Busscher</i> , 407 P.2d 715 (Nev. 1965)	13
<i>State v. Clifton</i> , 134 Ariz. 345, 656 P.2d, 634 (App. 1982).....	12
<i>State v. Fischer</i> , 238 Ariz. 309, 360 P.3d 105 (App. 2015)	passim
<i>State v. Fisher</i> , 141 Ariz. 227, 686 P.2d 750 (1984)	14
<i>State v. McKinnies</i> , 171 So.3d 861 (La. 2014)	13
<i>State v. Mendez</i> , 116 A.3d 228 (R.I. 2015).....	13
<i>State v. Moats</i> , 906 S.W.2d 431 (Tenn. 1995).....	13
<i>State v. Saenz</i> , 88 Ariz. 154, 353 P.2d 1026 (1960)	11
<i>State v. Thomas</i> , 104 Ariz. 408, 454 P.2d 157 (1969).....	8
<i>State v. Tubbs</i> , 155 Ariz. 533, 747 P.2d 1232 (App. 1987).....	8, 10, 15, 17
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	14
<i>Tennant v. Peoria & Pekin Union Ry. Co.</i> , 321 U.S. 29 (1944).....	12
<i>Tibbs v. Florida</i> , 457 U.S. 31, 42 (1982).....	10

Young Mines Co. v. Citizens' State Bank, 37 Ariz. 521, 296 P. 247 (1931)15

Rules

Ariz. R. Crim. P. 24.18

Treatises

6A J. Moore, Federal Practice § 59.08(5) (2d ed. 1953)10

Constitutional Provisions

Ariz. Const. art. 2, § 2314

U.S. Const. amend. VII.....13

A trial judge must order a new criminal trial if she feels that a jury's guilty verdict is against the weight of the evidence. This standard, which holds the state to its burden of proving guilt beyond a reasonable doubt, is unique. It is different both from the standard that applies to a trial court's directing a judgment of acquittal and from the standard governing an appellate court's review of a trial court's decision to order a new trial.

In this case, the trial court presided over an eighteen-day jury trial. When the jury returned a guilty verdict, the judge exercised her discretion to order a new trial. In reversing that order, the court of appeals wrongly conflated the standard that a trial court applies in ordering a new trial and the standard that an appellate court applies in reviewing that order.

Because of this legal error, and unless this Court intervenes, Robert Fischer will be denied the new trial that serves the interest of justice. Accordingly, the Arizona Attorneys for Criminal Justice ("AACJ") writes in support of the second issue in Robert Fischer's petition for review. AACJ urges this Court to accept review to clearly delineate the appropriate role for an appellate court reviewing a trial court's order granting a new trial where the verdict is contrary to the weight of the evidence.

INTEREST OF AMICUS CURIAE

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

BACKGROUND

The relevant facts are spelled out in Fischer's petition for review and in the appended minute entry. (PR at 7–8; Appx. to PR at 2–32.) Police responded to the home of Belinda Radder, Fischer's stepdaughter, after receiving a call from a highly-intoxicated Fischer. (PR at 7.) There they found Lee Radder, Belinda's husband, dead from a gunshot wound to the head. (*Id.*) Fischer had a blood alcohol concentration of between .20 and .25. (*Id.*) Fischer was indicted for second-degree murder. (*Id.*)

Fischer's trial lasted eighteen days and the evidence presented was almost entirely circumstantial. (*Id.*) The only eyewitness testimony was from police

interviews of Fischer prior to trial. (ROA 572 at 18.) Contrasting interpretations of the physical evidence were presented by defense and prosecution experts. (*Id.* at 11–13.) There was no direct physical evidence that Fischer fired the gun. (*Id.* at 18.) After the jury returned a guilty verdict, Fischer moved for a new trial under Arizona Rule of Criminal Procedure 24.1(c)(1) on the ground that the evidence was contrary to the weight of the evidence. (ROA 530.) The superior court granted that motion in a thirty-one page minute entry detailing the evidence presented at trial and explaining the court’s reasoning. (ROA 572.) The state appealed.

The court of appeals reversed the superior court’s order granting a new trial. *State v. Fischer*, 238 Ariz. 309, 360 P.3d 105 (App. 2015). Despite acknowledging that “[t]he evidence in this case was circumstantial, and the testimony of the blood spatter experts conflicting,” the court of appeals nonetheless spent forty-seven paragraphs essentially re-weighing the evidence in order to support its finding that the superior court abused its discretion. *Id.* at ¶¶ 30–76.

THIS COURT SHOULD GRANT REVIEW

Although the court of appeals agreed that the trial court acts as a “thirteenth juror” in cases involving motions for new trials, it unnecessarily restricted the trial judge’s role in passing on the weight of the evidence while expanding the power of an appellate court to review and overturn a trial court’s decision to order a new

trial. In short, the court of appeals failed to properly credit the factual findings of the trial court and then proceeded to re-weigh the evidence in order to come to its preferred conclusion. This Court should accept review to explain the discretion that a trial judge has when she sits as a “thirteenth juror” and the deference that an appellate court owes that judge’s decision.

I. The Court of Appeals Improperly Limited the Role of the Trial Judge as a Thirteenth Juror

A trial judge may grant a new trial when, in his discretion, he believes that the verdict is “contrary to . . . the weight of the evidence.” [Ariz. R. Crim. P. 24.1](#). When a trial court considers a motion for a new trial, “its power is significantly expanded.” *State v. Tubbs*, [155 Ariz. 533](#), 535, 747 P.2d 1232, 1234 (App. 1987). “Unlike a motion for a directed verdict, a motion for a new trial is discretionary and as such, in considering the motion for new trial, the trial court may weigh the evidence and consider the credibility of witnesses.” *Id.* Indeed, this Court has stressed that “it is not only the right of the trial court to set [a verdict] aside under such circumstances, but that it is its duty...” *State v. Thomas*, [104 Ariz. 408](#), 412, 454 P.2d 153, 157 (1969).

This Court has often said, in describing the trial court’s role in setting aside a verdict where it is contrary to the weight of the evidence, that the trial judge sits as a “thirteenth juror.” *E.g., Peak v. Acuna*, [203 Ariz. 83](#), 85 ¶ 9, 50 P.3d 833, 835 (2002); *Thomas*, [104 Ariz. at 412](#), 454 P.2d at 157; *Brownell v. Freedman*, [39 Ariz.](#)

385, 389, 6 P.2d 1115, 1116 (1932) . This is so because “[t]he judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.” *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978). And for this reason, the trial judge is granted broad discretion in passing upon the weight of the evidence in a motion for a new trial, for she is the “primary buffer against unjust verdicts.” *Id.*

A. The Court of Appeals Mis-stated Arizona Law

But the court of appeals has sharply narrowed the ability of the trial judge to sit as a thirteenth juror through its misinterpretation of the law. The court reasons that describing the judge as a thirteenth juror “overstates the judge’s role” because a judge may not set aside a verdict merely because “he would have reached a different result,” and he may not “substitute his own judgment for that of the jury.” *Fischer*, 238 Ariz. at ¶ 19. The court of appeals relies primarily on two cases for this proposition: *Cano v. Neill*, 12 Ariz. App. 562, 473 P.2d 487 (1970) and *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998).

i. The Court’s Reading of *Cano* Is Inconsistent With Settled Arizona Law

In *Cano* the court of appeals affirmed a trial court’s order granting a new trial where the verdict was against the weight of the evidence. *Cano*, 12 Ariz. App at 568, 473 P.2d at 493. While acknowledging that “[t]he concept of the trial judge

as a ‘thirteenth juror’ is set forth in clear, Affirmative terms” in Arizona law, and that “we would not suggest that the federal authorities are closely apposite in the area of new trial orders,” the court cited favorably from a treatise on federal practice:

But while he has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of the fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict. And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury’s province to grant a new trial merely because the evidence was sharply in conflict.

Id. at 494 (citing 6A J. Moore, Federal Practice § 59.08(5) (2d ed. 1953)). But *Cano*’s enunciation of *federal* law conflicts with Arizona law on two fronts.

First, this Court has said that “when reversal of a conviction is based on the weight of the evidence . . . the reversal is ordered because the trial judge simply disagrees with the jury’s resolution of conflicting facts.” *Peak*, 203 Ariz. at 85 ¶ 9, 50 P.3d at 835; *see also Tibbs v. Florida*, 457 U.S. 31, 42 (1982) (court sitting as a thirteenth juror “disagrees with the jury’s resolution of the conflicting testimony”). Thus, even if federal law says that a judge may not set aside a verdict “if he had acted as trier of the fact,” this is not a correct interpretation of Arizona law.

Second, Arizona law clearly permits a trial court to weigh independently the credibility of witnesses in passing on a motion for a new trial. *Tubbs*, 155 Ariz. at 535, 747 P.2d at 1234 (“the trial court may weigh the evidence and consider the

credibility of witnesses”); *see also City of Glendale v. Bradshaw*, 114 Ariz. 236, 238, 560 P.2d 420, 422 (1977) (“The judge saw the witnesses, heard the testimony, knew the issues, and had a perspective on the relationship between evidence and verdict that we can never achieve by a bare reading of the record”); *Smith v. Moroney*, 79 Ariz. 35, 39, 282 P.2d 470, 472 (1955) (“the quality of the testimony must also be considered by the trial judge”). Thus, the statement in *Cano* that “the credibility of the witnesses is peculiarly for the jury” and that considering such credibility is an invasion of the jury’s province conflicts with well-established Arizona law. To the extent that this passage of *Cano*, and by extension the opinion of the court of appeals here, conflicts with clearly-established Arizona law, it ought to be disapproved.

ii. The Court Misread This Court’s Holding in *Hutcherson*

The court of appeals likewise cannot rely on *Hutcherson* to back up a more narrowly circumscribed thirteenth-juror rule. In *Hutcherson*, a civil jury returned a verdict in a negligence case and the trial court refused to grant a motion for a new trial.¹ *Hutcherson*, 192 Ariz. at 53 ¶ 10, 961 P.2d at 451. The court of appeals reversed the trial court’s order denying a new trial. *Id.* at 53 ¶ 11, 961 P.2d at 451. The Supreme Court reversed the court of appeals and reinstated the trial court’s

¹ “[T]he scope of review of an order granting a new trial is essentially the same in both civil and criminal proceedings, taking into consideration the differences in the applicable burdens of proof.” *State v. Saenz*, 88 Ariz. 154, 156, 353 P.2d 1026, 1028 (1960).

verdict, holding that “the court of appeals’ majority improperly substituted its view of the evidence for that of the jury and the trial court.” *Id.* at 56 ¶ 27, 961 P.2d at 454. Later in the same paragraph, the court says that “[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because . . . judges feel that other results are more reasonable.” *Id.* (quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)). But it is clear from the context of the paragraph that the admonition is against appellate, and not trial court, judges.

Hutcherson stands for the proposition that an *appellate* court may not “substitute its view of the evidence for that of the jury *and of the trial court.*” *Hutcherson*, 192 Ariz. at 56 ¶ 27, 961 P.2d at 454 (emphasis added). The standard a trial court applies when exercising its discretion on a motion for a new trial is different from the standard that an appellate court applies when passing judgment on the trial court’s decision. *See* Part II, *infra*. Thus, *Hutcherson* does not support the court of appeals’ assertion that a *trial* judge may not substitute his own judgment for that of the jury.²

² The court of appeals also cites to *Cal X-Tra v. W.V.S.V. Holdings, LLC*, 229 Ariz 377, 403 ¶ 88, 276 P.3d 11, 37 (App. 2012) and *State v. Clifton*, 134 Ariz. 345, 349, 656 P.2d, 634, 639 (App. 1982), to support this assertion. *Cal X-Tra* relies on the same misreading of *Hutcherson*. *Clifton*, on the other hand, does not support the asserted proposition. On the contrary, it says that a trial judge “may . . . weigh the evidence, and act to prevent a miscarriage of justice even though . . . there is substantial evidence to support the verdict.” *Clifton*, 134 Ariz. at 348, 656 P.2d at 637.

B. Other States That Have Adopted the Thirteenth Juror Standard Give Trial Courts Broad Discretion to Disagree With Juries

Other states that have adopted the thirteenth juror standard have granted their trial courts broad discretion to disagree with the verdict of a jury and order a new trial, including the power to order a new trial “if it does not agree with the jury’s conclusion.” *State v. Busscher*, [407 P.2d 715](#), 716 (Nev. 1965); *see also Leroy v. Kucharski*, [878 N.E.2d 247](#), 250 (Ind. App. 2007); *State v. McKinnies*, [171 So.3d 861](#), 869 (La. 2014); *State v. Mendez*, [116 A.3d 228](#), 247 (R.I. 2015); *State v. Moats*, [906 S.W.2d 431](#), 434 (Tenn. 1995).

Not surprisingly, states with a rule similar to the one that is urged by the court of appeals here have not adopted the thirteenth-juror rule. *See, e.g., In re Petition for Writ of Prohibition*, [539 A.2d 664](#), 686 (Md. 1988) (“We do not embrace the thirteenth juror rule [A] trial judge is not at liberty to set aside a verdict of guilt and to grant a new trial merely because the judge would have reached a result different from that of the jury’s.”).

C. Neither the Federal Nor the Arizona Constitution Prevents the Trial Judge from Substituting His Judgment for the Jury on a Motion for a New Trial

The court of appeals decision also rests its analysis on a constitutional ground, holding that the basis for the judge’s limited role in ruling on a motion for a new trial is “the right to a jury trial, which includes the right to have a jury determine issues of fact.” *Fischer*, [238 Ariz. at ¶ 20](#) (citing *U.S. Const. amend.*

VII; [Ariz. Const. art. 2, § 23](#))³. But in Arizona, a judge may consider the weight of the evidence, including the credibility of witnesses, without usurping the function of the jury. *State v. Fisher*, [141 Ariz. 227](#), 251, 686 P.2d 750, 774 (1984).

Reading such a prohibition into the Arizona constitution would conflict with the ample body of law permitting the trial judge to “evaluate the credibility of witnesses and weigh the evidence” in ruling on a motion for a new trial. *McBride v. Kieckhefer Assocs., Inc.*, [228 Ariz. 262](#), 266 ¶ 18, 265 P.3d 1061, 1065 (App. 2011).

Furthermore, this reading of the constitutional right to a jury trial misapprehends its historical purpose. The framers clearly desired “to guard against a spirit of oppression and tyranny on the part of the rulers.” *Apprendi v. New Jersey*, [530 U.S. 466](#), 477 (2000) (internal citations omitted). Thus, while a judge may direct a verdict for a defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict of guilty, no matter how overwhelming the evidence. *Sullivan v. Louisiana*, [508 U.S. 275](#), 276 (1993). The court of appeals’ use of this provision, which is clearly meant to protect defendants from an overbearing state, to deny a defendant a new trial in the interest of justice strains credulity.

³ The Seventh Amendment is inapplicable here for two reasons: it applies only to civil jury trials and it has never been applied to the states. *McDonald v. City of Chicago*, [561 U.S. 742](#), 784 n.30 (2010). But even the sixth amendment provides no impediment to a trial judge substituting his judgment for that of a jury.

At the very least, the tension created between *Cano*, a court of appeals decision, and the various cases from this court that permit a trial judge to consider the credibility of the witnesses and weigh the evidence independently militates in favor of this Court granting review. But the court of appeals' misapplication of *Hutcherson* and the accused's constitutional right to a jury trial require correction as well. This Court ought to grant the petition to correct these misapplications of the law and announce the correct standard that a trial court should apply when ruling on a motion for a new trial.

II. The Court of Appeals Expanded Its Appellate Review of the Trial Court's Motion for a New Trial and Improperly Re-Weighed the Evidence

Because an order for a new trial “involves weighing evidence and determining the credibility of witnesses, the trial court's ruling on [a motion for a new trial] will not be reversed on appeal absent an abuse of discretion.” *Tubbs*, 155 Ariz. at 535, 747 P.2d at 1234. A new trial granted on these grounds is “the least susceptible to appellate scrutiny.” *City of Glendale*, 114 Ariz. at 238, 560 P.2d at 422. When reviewing a trial court's decision to grant a new trial where the verdict is contrary to the weight of the evidence, an appellate court must “resolve every conflict in the evidence in support of the order.” *Young Mines Co. v. Citizens' State Bank*, 37 Ariz. 521, 526, 296 P. 247, 249 (1931). An appellate

court must be “more liberal in sustaining an order for new trial than where it is denied.” *Caldwell v. Tremper*, [90 Ariz. 241](#), 246, 367 P.2d 266, 269 (1962).

As we have seen, the court of appeals confused the standard that a trial court applies when granting a new trial and the standard an appellate court employs when reviewing that grant. *See* Part I, *supra*. A trial court abuses its discretion when it reaches a conclusion without considering the evidence, *Flying Diamond Airpark, LLC v. Meienberg*, [215 Ariz. 44](#), 50 ¶ 27, 156 P.3d 1149, 1155 (App. 2007), or where the record fails to provide substantial evidence to support the trial court’s finding, *Grant v. Ariz. Pub. Serv. Co.*, [133 Ariz. 434](#), 456, 652 P.2d 507, 529 (1982). But the record shows that the trial court both considered the evidence and supported its findings with substantial evidence.

Despite the fact that the trial court considered the evidence and provided a thirty-one page order detailing its findings, the court of appeals re-weighed the evidence under the guise of explaining how the trial court “reache[d] a conclusion without considering all the evidence.” *Fischer*, [238 Ariz. at ¶ 26](#). For example, the opinion complains that the trial court “seemed to discount” certain blood evidence, *see id. at ¶ 40*, “overstated the importance” of other evidence, *see id. at ¶ 37*, and failed to “weigh the incriminatory nature” of yet other evidence, *see id. at ¶¶ 47, 49, 56*. The opinion also explains why the trial court should have made certain inferences, *see id. at ¶¶ 45, 48*, and should have given greater weight to the

prosecution's expert, *see id.* at ¶¶ 51, 60, 69. For instance, the court of appeals writes that “the trial court failed to consider [the prosecution expert's] testimony concerning the blood drain patterns on [the decedent's] right hand.” *See id.* at ¶ 69. But in the very next paragraph, it explains that the defense's expert disagreed with the prosecution expert's analysis. *Id.* at ¶ 70.

On appeal, a court reviewing a new trial order may only ask whether the trial court considered the evidence, *Flying Diamond Airpark*, 215 Ariz. at 50 ¶ 27, 156 P.3d at 1155, and whether the record provides substantial evidence to support the trial court's finding, *Grant*, 133 Ariz. at 456, 652 P.2d at 529. But what the court of appeals documents here is that it has independently considered the evidence. In other words, it has “weigh[ed] the evidence and determin[ed] the credibility of witnesses.” *Tubbs*, 155 Ariz. at 535, 747 P.2d at 1234.

For forty-seven paragraphs, the court of appeals explained the inferences that the trial court should have made, pointed out evidence to which it did not give proper weight, and discussed why crediting the defense's expert over the prosecution's was wrong. This is the very definition of re-weighing the evidence. This Court's guidance is necessary not only to explain the proper standard of review, but to ensure that those courts tasked with applying them are doing so in good faith.

CONCLUSION

This Court should grant review of the petition, vacate the court of appeals' opinion, and affirm the trial court's order granting a new trial.

RESPECTFULLY SUBMITTED this 30th day of December, 2015.

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