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5 SUPERIOR COURT OF ARIZONA

6 COCONINO COUNTY

7 STATE OF ARIZONA

8 Plaintiff,

9 vs.

10 TIMOTHY MAX DURAN

11 Defendant.

CR 2019-00338

MOTION FOR NEW TRIAL

13 COMES NOW THE DEFENDANT, by and through his attorney

14 undersigned, and respectfully moves this Court, pursuant to Rule 24.1, Arizona
15 Rules of Criminal Procedure, for an Order granting the defendant a new trial;

16 AS GROUNDS THEREFORE, the defendant asserts the verdict is contrary
17 to law and the weight of the evidence and therefore the defendant was denied a fair
18 trial guaranteed to her by the Fourth, Fifth, Sixth, Eighth and Fourteenth
19 Amendments to the Constitution of the United States as well as Article 2 sections 4
20 and 24 of the Arizona State Constitution.
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22 MEMORANDUM

23 I. THE VERDICT IS CONTRARY TO LAW AND THE WEGHT OF THE
24 EVIDENCE

25 The standard for a motion for a new trial under Rule 24.1 is different than
26 the standard for a motion pursuant to Rule 20. In *State v. Clifton*, 134 Ariz. 345,
27 348, 656 P.2d 634, 637 (App. 1982) the Court of Appeals set forth the standard:
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In passing upon a motion for judgment of acquittal, the trial judge must determine whether upon the evidence, giving full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences therefrom, a reasonable person could fairly conclude the defendant is guilty beyond a reasonable doubt. The evidence must be reviewed in a light most favorable to the state, and all reasonable inferences are to be resolved against the defendant. *State v. Acosta*, 101 Ariz. 127, 416 P.2d 560 (1966); *State v. Mangrum*, 98 Ariz. 279, 403 P.2d 925 (1965). If on this basis reasonable minds could differ as to whether the defendant is guilty beyond a reasonable doubt, the motion must be denied.

In considering a motion for a new trial, the object is to promote justice and protect the innocent. *State v. Chase*, 78 Ariz. 240, 278 P.2d 423 (1954). The decision might be the last made by the trial judge before the defendant is incarcerated. As such, the court's power is significantly broader than it is in considering a motion for judgment of acquittal.

The method by which a trial court must determine whether to grant a new trial upon a claim that the verdict is contrary to the weight of the evidence is a much different than the test used to determine whether to grant a Motion for judgment of acquittal. As the Court of Appeals explained in *State v. Clifton*, *supra*, a trial court's only power when ruling on a motion for judgment of acquittal is to determine whether it was possible for a reasonable person to conclude from the evidence that the defendant is guilty beyond a reasonable doubt. In making that limited determination, the trial court must defer to the jury's right to determine credibility, weigh the evidence, and draw reasonable inferences therefrom. In ruling on a motion for judgment of acquittal, the trial court cannot draw its own conclusions from the evidence, but must view the evidence in the light most favorable to the state, resolving all reasonable inferences in favor of the state.

The restrictions listed above do not, however, apply when the court is called upon to determine whether the verdict is contrary to the weight of the evidence. When considering a Motion for New trial based on a claim that the verdict is

1 contrary to the weight of the evidence, the trial court itself not only may, but
2 should, “weigh the evidence, and act to prevent a miscarriage of justice even
3 though ... there is substantial evidence to support the verdict.” *Clifton*, 134 Ariz.
4 At 348 (quoting *Cano v. Neill*, 12 Ariz. App. 562, 570, 473 P.2d 467, 495 (App.
5 1970)). When deciding whether the verdict is contrary to the weight of the
6 evidence, the trial court is not required to defer to what the jury must have
7 concluded about the evidence, but is instead free to second-guess the jury if the
8 court disagrees with the jury’s factual conclusions. The above quote from *Clifton*
9 makes it crystal clear that the trial judge is free to grant a new trial based on the
10 weight of the evidence even when the case would not warrant a judgment of
11 acquittal: A motion for new trial may be granted “even though ... there is
12 substantial evidence to support the verdict.” *Ibid*.

13 In *State v. Thomas*, 104 Ariz. 408, 454 P.2d 153 (1969), in discussing a
14 Motion for New Trial which argued that the verdict is contrary to the weight of the
15 evidence, the Arizona Supreme Court stated, “The trial judge, so far as this duty is
16 concerned, sits as a thirteenth juror, and he, as well as the jury, just be convinced
17 that the weight of the evidences sustains the verdict, or it is his imperative duty to
18 set it aside...” *Thomas*, 104 Ariz. At 412. In the same case the Arizona Supreme
19 Court cited with approval the proposition that, “In a criminal case the trial judge
20 has an even greater duty than a civil case to see that the trial is just. The verdict
21 must be supported by proof beyond a reasonable doubt.” *Ibid*. In other words,
22 not only must the jury be convinced of the defendant’s guilt beyond a reasonable
23 doubt, the judge must be convinced as well. The judge, sitting as the thirteenth
24 juror can “hang” the jury and give the defendant a new trial.

25 The Court of Appeals explained in the *Clifton* case the reason for the
26 distinction between the standards for judging “weight of the evidence” versus
27 “sufficiency of the evidence.” When granting a motion for judgment of acquittal,
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1 the court explained, the trial court is making a final disposition of the case, thus
2 such a motion should not be granted unless there is no evidence which should
3 allow a reasonable person to conclude the defendant is guilty. “On the other hand,
4 in setting the verdict aside the Court merely grants a new trial and submits the
5 issues for determination by another jury. It is appropriate that in the latter
6 instance, the court should have wide discretion in the interest of justice.” *Clifton*,
7 134 Ariz. At 349 (quoting *United States v. Robinson*, 71 F.Supp. 9, 11 (D.D.C.
8 1947).

9 Further in *State v. Moya*, 129 Ariz. 64, 66, 628 P.2d 947, 949 (1981), the
10 Arizona Supreme Court affirmed the trial court’s decision to grant a Motion for a
11 New Trial where, as a matter of law, there was insufficient evidence of
12 premeditation to constitute a crime of Murder in the First Degree, and any finding
13 of premeditation by the jury was necessarily based up speculation and conjecture.

14 In this case, this Court heard the evidence presented to the jury. This Court
15 heard the testimony from Dr. Sullivan, Ray Duran, Hermie Duran, and others
16 about Tim Duran’s character trait of impulsivity. This Court was able to
17 determine whether the evidence supported a finding that the defendant acted with
18 premeditation with regard to the allegation of First Degree Murder. The
19 defendant is requesting this Court to promote justice and find that the verdict is
20 contrary to the weight of the evidence and grant the defendant a new trial
21 specifically to Count 1 – First Degree Premeditated Murder.

22 III. CONCLUSION

23 Therefore, for all of the above-mentioned reasons, the defendant respectfully
24 moves this Court, pursuant to Rule 24.1, Arizona Rules of Criminal Procedure, for
25 an Order granting the defendant a new trial.
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Respectfully submitted this 4th day of November, 2021.

By /S/ Gregory T. Parzych
Gregory T. Parzych

Original of the foregoing Pleading
mailed/hand-delivered this 4th day
of November, 2021, to:

Clerk of Superior Court – Coconino County
200 N. San Francisco Street
Flagstaff, AZ 86001

Copy of the foregoing Pleading
e-mailed this 4th day
of November, 2021, to:

The Honorable Dan Slayton
Bryan Shea
DEPUTY COUNTY ATTORNEY
Robert Swinford
Arizona Voice for Crime Victims