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**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,

Petitioner-Appellee,

v.

MANUEL PEREZ-GUTIERREZ,

Respondent-Appellant.

No. CR-23-0137-PR

Arizona Court of Appeals
No. 1 CA-CR 22-0268

Maricopa County Superior Court
No. CR2020-135003-001

**RESPONSE TO
PETITION FOR REVIEW**

Through Arizona Rule of Criminal Procedure 31.21, Mr. Manuel Perez-Gutierrez respectfully requests this Court to deny the petition for review.

Table of Contents

	<u>Page</u>
I. The Issue Presented for Review.	3
If a trial court does not substantially comply with A.R.S. § 13-711(A) that “The court shall state on the record the reason for its determination” to impose multiple sentences of imprisonment consecutively or concurrently, should the reviewing court remand for the trial court to do so?	
II. The Facts Material to the Issue Presented.	3
A. The Crimes.	3
B. The Sentences.....	3
C. The Appeal.	4
D. The Opinion.....	7
E. The Petition for Review.	7
III. The Reasons that Review Should be Denied.....	8
A. The Merits.	8
1. The remedy of automatic remand complies with <u>State v. Anzivino</u>	8
2. The remedy of automatic remand accords with <u>State v. Henderson</u>	10
3. The remedy of automatic remand does not depend on <u>State v. Vermuele</u>	12
B. The Dissent.....	14
C. The Big Picture.....	18
IV. The Conclusion.....	19

I. The Issue Presented for Review.

If a trial court does not substantially comply with A.R.S. § 13-711(A) that “The court shall state on the record the reason for its determination” to impose multiple sentences of imprisonment consecutively or concurrently, should the reviewing court remand for the trial court to do so?

II. The Facts Material to the Issue Presented.

A. The Crimes.

Between the years 2013 through 2020, Mr. Manuel Perez-Gutierrez had sexual conduct with his wife’s younger half-sister when the victim was between 10 and 17 years old. (Appellant’s Opening Brief at 8-11.)

Two of those times occurred before she was 15 years old, and six were after. (*Id.*)

B. The Sentences.

After a jury convicted him, the trial court held the sentencing. (*Id.* at 12-13.)

For the two crimes of conviction committed before she was 15 years old, the presumptive terms are 20 years of imprisonment, and Arizona law requires them to be imposed consecutively (and flatly). *See* A.R.S. §§ 13-1405; 13-705(E), (K), (P), and (T)(1)(e).

For the six crimes of conviction committed after she was 15 years old, the presumptive terms are one year of imprisonment, and may be imposed consecutively or concurrently. *See* A.R.S. §§ 13-1405; 13-711(A).

The court heard argument on how to impose the six one-year terms (Petition for Review at 4), stated that it considered the record, and ordered all of the sentences to be served consecutively—without stating on the record the reason for its determination. (Appellant’s Opening Brief at 13.)

C. The Appeal.

On appeal through undersigned counsel, Perez-Gutierrez argued that the court’s failure to explain why it determined the sentences to be imposed consecutively violated A.R.S. § 13-711(A):

Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentences imposed by the court may run consecutively or concurrently, as determined by the court. The court shall state on the record the reason for its determination.

A.R.S. § 13-711(A).

After reasoning that this statute should apply to all of the crimes of convictions, he sought the remedy of an automatic remand for the trial court to comply with the statute by stating on the record the reason for its consecutive-or-concurrent sentencing determination. (Appellant’s Opening Brief at 15-21 and 21-24, citing *State v. Holstun*, 139 Ariz. 196, 197 (App. 1983) (recognizing the “value in requiring every sentencing judge to say why he or she is enhancing or reducing a sentence[,]” and concluding that “there are strong policy reasons” why the failure to articulate the aggravating factors “cannot” be considered to be

harmless error, even where “the record will support the sentence imposed”), *cited with approval in State v. Harrison*, 195 Ariz. 1, 3-5 ¶¶ 9-15 (1999) (adding additional reasons for what makes harmless-error review “inappropriate” for a court’s failure to articulate the reason for an aggravated or mitigated sentence), and *State v. Anzivino*, 148 Ariz. 593, 598 (App. 1985) (applying *Holstun* to the consecutive-sentencing determination).)

In its answer, the State maintained that the court did provide “articulation of reason” and “sufficient reasoning for its sentencing determination,” at least through the court’s consideration of the record and statement that the presumptive terms were “appropriate.” (Appellee’s Answering Brief at 2, 7, 11-15, and 19.)

The State also argued that Perez-Gutierrez “failed to meet his burden under fundamental error review”: the error is not “fundamental,” and it cannot be shown that “the trial court would not have imposed consecutive sentences” if the court had complied with the statute and stated on the record the reason for its determination. (*Id.* at 17-19.)

In a two-sentence footnote, the State suggested that the remedy of automatic remand conflicts with review for fundamental error in that a defendant should need to show prejudice to justify remand for a sentencing claim on appeal that was not raised below. (*Id.* at 18 n.3 (citing *State v. Henderson*, 210 Ariz. 561, 567-68 ¶¶ 20-21 (2005)).)

In his reply, Perez-Gutierrez countered that compliance with the statute should require more than a court’s consideration of the record or a stated one-word conclusion. (Appellant’s Reply Brief at 5-13.)

Perez-Gutierrez also defended the automatic-remand remedy against other forms of review for prejudice. (*Id.* at 19- 22.)

Regarding harmless error, he argued that “the statute is directed not at a defendant, but rather toward the trial court as an institution on what the legislature wants for lawful sentencing procedure.” (*Id.* at 19; *see also id.* at 20 (contrasting the claim on appeal from a claim that “*if* the trial court had followed the statute, *then* the trial court would have imposed a different sentence”).)

Regarding fundamental error, he argued that *Henderson* “clarified the meaning of, and showing needed for, fundamental error, and did not purport to supplant every field of law that employs a different standard of review.” (*Id.* at 21-22.)

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D. The Opinion.

On May 9, 2023, the Arizona Court of Appeals filed an opinion and “remanded in part” for the trial court “to explain why it exercised its discretion to impose consecutive sentences.” *State v. Perez-Gutierrez*, No 1 CA-CR 22-0268, ___ Ariz. ___, ___ at ¶ 1, 530 P.3d 395 (App. 2023).

Speaking through the Honorable Paul McMurdie, the court of appeals defended *Anzivino*, addressed the dissenting opinion, and “remanded for the court to satisfy its statutory duty under A.R.S. § 13-711(A) for sentences it had the discretion to impose consecutively or concurrently.” (Opinion at ¶ 16.)

E. The Petition for Review.

On July 6, 2023, the State filed a petition for review. (Petition for Review, filed July 6, 2023.)

Abandoning its argument that the trial court complied with the statute, the State contends that automatically remanding for the court to comply with the statute by stating on the record the reason for its sentencing determination conflicts with this Court’s doctrine of fundamental error. (Petition for Review at 9-12 and n.3.)

On September 6, 2023, Perez-Gutierrez filed this response. (Response to Petition for Review, filed Sept. 6, 2023.)

III. The Reasons that Review Should be Denied.

Neither the merits, the dissent, nor the big picture warrant further review.

A. The Merits.

The court of appeals correctly resolved this case.

1. The remedy of automatic remand complies with State v. Anzivino.

The State's petition for review is based on the faulty premise that a claim on appeal regarding a court's failure to substantially comply with A.R.S. § 13-711 is a claim on appeal for general sentencing error that occurs during or within a valid and complete sentencing (like when what a court articulates on the record an allegedly unlawful consideration for an aggravated sentence or consecutive determination) for which one side or the other is tasked with showing either prejudice or harmlessness and the appropriate standard of review.

On the contrary, a claim on appeal regarding a court's failure to substantially comply with A.R.S. § 13-711 is a claim on appeal for a specific sentencing error that addresses the validity and completeness of the sentencing proceeding itself (like a sentencing without a presentence report based on a personal interview, a sentencing without an opportunity for a defendant's personal allocution, and a sentencing *in absentia* without "a chance for the judge to personally question and

observe the defendant”) involving one of the “minimum requirements” for “a reasonable and rational sentencing.” *Cf. State v. Fettis*, 136 Ariz. 58, 59 (1983).¹

This category of claims on appeal is reviewed *de novo* for substantial compliance, without regard to whether one or more parties raised the issue below. And if not substantially complied with, then the remedy is remand for the court’s compliance with the statute.

The reason why a court’s compliance with the sentence-determination statute should be “exempted” from “typical sentencing error” (Petition for Review at 8)—where the standard of review for an unpreserved claim on appeal is seldom *de novo* review for substantial compliance with the remedy of an automatic remand without regard for prejudice—is threefold: the specificity of the legislative direction that the “court shall state on the record the reason for its determination,” the policy grounds that require compliance by the trial court itself, and the statute’s role as a minimal requirement of a valid and complete Arizona sentencing.

And the remedy should be calibrated to the violation.

¹ Departures from this minimal-requirement doctrine have occurred, though in cases where, unlike here, there was at least substantial compliance. *Compare* Opinion at ¶¶ 13-15 *and* Dissent at ¶ 28 *with State v. Anderson*, 210 Ariz. 327, 350 ¶ 101 (2005) (implying that the capital defendant’s penalty-phase testimony and direct plea for leniency amounted to substantial compliance with the requirement for allocution) *and State v. Allen*, 235 Ariz. 72, 78 ¶ 23 (App. 2014) (listing factors implied as substantial compliance for sentencing the defendant *in absentia* who was still “present for most of the sentencing hearing”).

Too broad might be a remand for a resentencing; too narrow would be a reviewing court's satisfaction that the record could support the determination (whatever the trial court's undisclosed reasons might be). (Opinion at ¶¶ 13-16 and 23.)

The appropriately tailored remedy should be what the majority did: follow *Anzivino* and order a limited remand for the court to “state on the record the reason for its determination.” (Opinion at ¶ 16.)

After that occurs (in this case and in any others), *then* the court of appeals can entertain an appeal or cross-appeal from the then-completed sentencing. And in that context, not before, the parties can litigate the appropriate standard of review that would apply to any of the general sentencing claims raised on appeal or cross-appeal from a validly completed sentencing. *Cf. Fettis*, 136 Ariz. 58, 59

The court of appeals correctly applied and updated Arizona law.

2. The remedy of automatic remand accords with State v. Henderson.

The remedy of automatic remand is consistent with *State v. Henderson*.

When a party advances a not-preserved-below general sentencing claim on appeal *after* a court conducts a legally complete and valid sentencing, then the standard of review is usually fundamental error (unless an exception like *Vermuele* applies, does a court's error that occurs during the court's pronouncement of sentence).

When a party advances a not-preserved-below sentencing claim on appeal that challenges *whether* a court has conducted a legally complete sentencing, then the standard of review is *de novo* review for substantial compliance. *Cf.* Opinion at ¶ 16; *Harrison*, 195 Ariz. at 3-5 ¶¶ 9-15; *Fettis*, 136 Ariz. at 59; *Anzivino*, 148 Ariz. at 598; *Holstun*, 139 Ariz. at 197.

Review for fundamental error applies only to the former kind of claim, not the latter.

Henderson sought to vertically clarify *what* fundamental-error review for general sentencing claims entails (“the showing necessary to establish fundamental error”), not to horizontally expand *when* to apply fundamental-error review where a search for prejudice “does not fit neatly” regarding substantially compliance with § 13-711(A). *Compare Anzivino*, 148 Ariz. at 597-98 *with Henderson*, 210 Ariz. at 568 ¶ 21.

Consistent with this interpretation, the cases that reverse for sentencing errors involve legally complete and otherwise-valid sentencings. *Compare* Petition for Rev. at 13 (citing cases in which this Court reviewed sentencing claims for fundamental error in which there is no indication that the sentencing court failed to state the reason for its consecutive-sentencing determination or otherwise failed to validly complete the sentencing) *with State v. Garza*, 192 Ariz. 171, 175 ¶ 13 (1998) (remanding for resentencing after the sentencing court “gave three reasons” for the

imposed consecutive sentences); *State v. Fillmore*, 187 Ariz. 174, 183-85 (App. 1996) (remanding for resentencing (despite defense counsel’s deficient performance in expressly declining to advocate for concurrent sentencing) after the sentencing court attributed its consecutive sentencing “to the prosecutor’s charging decision”).

3. The remedy of automatic remand does not depend on State v. Vermuele.

The present case is poorly suited to approve or disapprove *Vermuele*.

First, *Vermuele*’s exception to fundamental-error review applies to general sentencing errors made within a completed sentencing (such as an unlawfully articulated factor that would at least be a stated “reason on the record”), not to specific sentencing errors that challenge the sentencing’s underlying validity.

Second, the scope of fundamental-error review should be reviewed in a case in which—unlike here—the doctrine of review for fundamental error itself is a good fit if the *Vermuele* exception is held not to apply. (Opinion at ¶ 16 (citing *Anzivino*, 148 Ariz. at 598); Dissent ¶ 30 (same).) If the doctrine of fundamental-error review does not itself apply in a case, then that weighs against granting review to consider a potential exception to it.

And third, the parameters of fundamental-error review should occur in a case involving the intra-judiciary considerations regarding waiver and the perennial balance between efficiency and justice, not in a case involving inter-branch dialogue and comity on how to remedy a court’s own statutory noncompliance with what the legislature requires that the court “shall” do.

In other words, the case for automatic remand does not derive from or depend on *Vermuele*. It derives from the need to remedy a court’s failure to follow the statute that directs what it “shall” do, the policy grounds that obtain only through compliance by the trial court alone, and the pre-completed nature of the sentencing.

If the Court needs to review *Vermuele*, it should proceed in a case in which a trial court *has* stated the reason for its sentencing determination (and hence issued a sentencing that is valid and complete), not on the back of a case like this one in which the sentencing remains incomplete and the exception’s own general rule does not apply either way. *Contra State v. Martin*, No. 1 CA-CR 22-0140 (Appellant’s Opening Brief at 14, Appellee’s Answering Brief at 11-17, and Appellant’s Reply Brief at 11-20) (conference pending September 26, 2023)).

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B. The Dissent.

Speaking through the Honorable Paul Catlett, the dissent disputes that any remand is needed. The dissenting opinion misses the mark.

The dissent's first argument is that it is fundamental-error review that should apply, not "remanding for resentencing[.]" (Dissent at ¶ 29.)

But the majority did not remand for resentencing. (Opinion at ¶¶ 1, 16, 24, and 27.) Because the court of appeals found specific sentencing error in its *de novo* review for substantial compliance, the remedy of automatic remand without regard to prejudice is justified by the attributes of this statute—the text, the public policy, and the challenge to the sentencing's minimal requirements as a matter of law.

The dissent's second argument is that the automatic-remand practice was not needed because the *Anzivino* defendant did not raise the issue at trial or on appeal. (Dissent at ¶ 32.)

But neither the prosecutor nor the defendant needs to ask a court to follow a statute without which there is not a completed sentence at the risk of needing to show prejudice in a later appeal. The court's duty derives not from the conduct of the parties, but from the mandatory nature of the statute's text, the policy grounds achieved only through the trial court fulfilling the statute, and the need for a valid and complete sentencing. (Opinion at ¶ 19 (citing *Matter of Appeal in Pima County Juvenile Action No. S-933*, 135 Ariz. 278, 280-81 (1982)).)

The dissent’s third argument raises a fair point—why remand automatically, when violations of other laws that are “mandatory” become reviewed for fundamental error? (Dissent at ¶ 33.)

Although all law is mandatory, the judiciary should honor its co-branch of government with a remand for a court’s compliance when the statute specifically directs what a court “shall” state on the record. (Opinion at ¶¶ 16 and 26.)

It is also a law with policy grounds that can only be achieved through the stated actor (the trial court) complying with it. (Opinion at ¶¶ 9-10, 21, and 23.)

And the statute constitutes an indispensable feature of a complete sentencing that precedes any post-completed-sentencing examination of constitutional, statutory, or rule-based errors made either within or after the completed sentencing.

The dissent’s fourth argument is that the reason for automatic remand for a court’s failure to state its reasons for aggravated or mitigated sentences should not apply for a failure to state on the record the reason for the consecutive-or-concurrent sentencing determination. (Dissent at ¶¶ 34-36.) The dissent argues that, unlike the many reasons that animate sentencing on the former, the determination here is different in that it is “binary”—either concurrent or consecutive, or either one act or multiple acts. (*Id.*)

This position conflates the nature of the result (binary) with the nature of the result’s inquiry (nonbinary)—the same broad-ranging, lawful factors are part of both inquiries, so the same *Harrison*-approved *Holstun* reasoning has long applied here under *Anzivino*. Nor is a silent record involving multiple acts itself the unstated reason why a trial court determines the sentences to run consecutively.

In all events, the statute itself does not exempt “binary” determinations, and making an exception for them is not warranted. (*Cf.* Dissent at ¶ 42.)

The dissent also disputes that “anything other than the practice of automatic remand ‘would render the statute a dead letter.’” (Dissent at ¶ 38, quoting *Anzivino*, 148 Ariz. at 598.)

But it would.

And not because defendant-adverse fundamental-error review is allegedly not “meaningful” or “vigorous” (Petition for Review at ¶ 11 and Dissent at ¶ 38, respectively) (though even defendant-favorable *de novo* review for prejudice would never yield reversal either, as the record will always contain some unstated reason to infer the sentencing determination’s unstated reason).

Nor is it a matter of what other trial courts will do (Dissent at ¶ 38) (although each court should lead by example).

It is in the individual case under review for which the statute would become “a dead letter” (*Anzivino*, 148 Ariz. at 598) because the Legislature would find a violation of its statute not remedied, and the statute’s policy benefits would go unrealized, and an Arizona sentencing would remain invalid regardless of the parties’ conduct in a particular case.

Marshaling the judge-created doctrine of review for fundamental error to not remand for compliance with a legislature-to-judiciary statute that clearly directs a court to articulate the reasons would seem to center the judiciary’s institutional appellate interests over remedying a not substantially complied with statute that directs what a court “shall” do. (Opinion at ¶ 18 (“Deference to precedent aside, we cannot defy the legislature’s directives by characterizing them as a mere technicality.”).)

The dissent notes that no other cases applied *Anzivino*’s automatic-remand practice. (Dissent at ¶ 39.) But that is because the courts have relied on *Anzivino*’s logic and, through their conduct, seldom need to cite the case and typically issue sentencings that are complete and valid.

The remaining dissenting opinion begins that “We should not vacate sentences for technical error” or “reverse” the cause on this ground. (Dissent at ¶¶ 40-41.)

But the majority did not vacate the sentence for technical error (or at all), order a new sentence, or “reverse” the cause. (Opinion at ¶¶ 1, 16, 24, and 27.)

Finally, the dissent equates automatic remand with structural error. (Dissent at ¶ 47.) The difference is seen in *State v. Torres*, where this Court held that the remedy for a trial court’s failure to meaningfully address a motion to change counsel (based on the defendant’s allegations alone, for which “the court must make an inquiry on the record”) is not structural error’s automatic reversal for a new trial of what by then was a conviction, but rather an automatic remand for the court to hold the erroneously denied hearing (after which an appeal may be filed). *See State v. Torres*, 208 Ariz. 340, 343-45 ¶¶ 7, 10-14, and 18 (2004).

C. The Big Picture.

Even over a dissent in the tradition of *Holstun* and *Harrison*, the majority in *Perez-Gutierrez* identified and expanded on the applicable precedent, interpreted a new version of an old statute, and fairly applied the three major cases of *Holstun*, *Harrison*, and *Anzivino*.

The issues raised in the petition for review and in the dissenting opinion may await another day.

IV. The Conclusion.

The petition for review should be denied.

RESPECTFULLY SUBMITTED this 6th day of September, 2023

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
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AJMAB9/6/23P