ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. MANUEL PEREZ-GUTIERREZ, Appellant.	CR–23–0137–PR Court of Appeals No. 2 CA–CR 22–0268 Maricopa County Superior Court No. CR2020–135003–001

STATE OF ARIZONA’S SUPPLEMENTAL BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred when it declined to apply fundamental error review to a sentencing claim raised for the first time on appeal.

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ARGUMENT

I. Absent an objection, a trial court's failure to provide on-the-record reasons for imposing consecutive sentences is reviewed for fundamental error.

This Court has routinely applied fundamental error review to sentencing errors raised for the first time on appeal. *See State v. Smith*, 219 Ariz. 132, 136, ¶ 20 (2008). Ignoring this precedent, the court of appeals majority relied on its own case law to conclude that the failure to state reasons for the imposition of consecutive sentences requires automatic remand. *State v. Perez-Gutierrez*, 255 Ariz. 232, ___, ¶¶ 16, 27 (App. 2023). The court of appeals case law that the *Perez-Gutierrez* majority relied upon is flawed and inconsistent with this Court's precedents. This Court should reverse and hold that failure to provide on-the-record reasons for imposing consecutive sentences is reviewed for fundamental error when the claim is unpreserved below. *See Perez-Gutierrez*, 255 Ariz. at ___, ¶¶ 28–54 (Catlett, J., dissenting) (noting that "Arizona appellate courts have consistently reviewed legal sentencing errors for fundamental error even when there has not been an objection below") (quoting *Smith*, 219 Ariz. at 136, ¶ 20); *see also State v. Garcia,* ___ Ariz. ___, 2023 WL 8430421, at *5, ¶ 25 (App. 2023) (agreeing with *Perez-Gutierrez*'s dissent that fundamental error analysis applied to defendant's unpreserved sentencing claim). Accordingly, this Court should vacate the *Perez-Gutierrez* decision and affirm Appellant's sentences.

A. The court of appeals majority's reliance upon *Anzivino*'s automatic remand practice is inconsistent with *Henderson* and its progeny.

Twenty years ago, this Court clarified that, except in rare cases involving structural error, unpreserved sentencing errors are reviewed for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 12, 19 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Since then, "Arizona appellate courts have consistently reviewed legal sentencing errors for fundamental error [] when there has not been an objection below." *Smith*, 219 Ariz. at 136, ¶ 20; *see also State v. Carlson*, 237 Ariz. 381, 400, ¶ 78 (2015) (noting that the failure to object to the imposition of consecutive sentences at trial resulted in fundamental error review on appeal). Although in *State v. Escalante* this Court refined the general fundamental error framework set forth in *Henderson*, this Court did not depart from it. 245 Ariz. 135, 140–42, ¶¶ 12–21 (2018) (clarifying, *inter alia*, the showing necessary to establish fundamental error and that a defendant must "make a separate showing of prejudice").

Instead of applying the *Henderson/Escalante* framework, the court of appeals majority disregarded this Court's precedent in favor of its own pre-*Henderson* decision in *State v. Anzivino*, 148 Ariz. 593 (App. 1985). In addressing the trial court's failure to state reasons on the record for consecutive sentences in accordance with a former version of A.R.S. § 13–711(A), the majority below

reasoned that the failure to state reasons for sentence imposition did not "fit neatly" into fundamental error review and instead, based upon "strong policy reasons," required automatic remand, essentially a resentencing. *See Perez-Gutierrez*, 255 Ariz. at ___, ¶¶ 9, 16 (referencing *Anzivino*).

Anzivino contradicts *Henderson* and *Escalante*, and should be explicitly overruled. *See Henderson*, 210 Ariz. at 568, ¶ 21 ("To the extent that any prior decisions are inconsistent with today's holding, we disapprove of them.").

Henderson clearly provides the dictates of the proper standard of review. There, this Court made clear that fundamental error review applies "when a defendant fails to object to alleged trial error." *Id.* at 567, ¶ 19; *see also id.* at 565–66, ¶ 12 (explaining difference between trial errors and structural errors). The Court noted that the trial error at issue—a sentencing claim—would be reviewed under a fundamental error standard "*because* [the appellant] did not object at trial." *Id.* at 568, ¶ 22 (emphasis added). It is therefore hard to imagine a clearer statement of when and how to apply fundamental error review. *Contra* Response to Petition for Review at 11 (claiming *Henderson* "vertically clarif[ied]" *what* fundamental error review entails not *when* to apply it).

Yet the *Perez-Gutierrez* majority incorrectly held that this error is subject to automatic remand without regard for prejudice because of the reasoning in *Anzivino*. In order to understand *Anzivino*, we must first begin with *State v.*

Holstun, 139 Ariz. 196 (App. 1983). There, the court of appeals addressed a statute that required a judge to state the aggravating circumstances which justified imposing a sentence greater than the presumptive term. *Id.* at 197. *Holstun* determined that based upon certain policy reasons, and an exchange between the court and the defendant which raised questions regarding the weight the court gave to the plea agreement, the matter should be remanded for resentencing. *Id.* at 198–99 (finding as much despite "[a] review of the record leav[ing] no doubt that the trial judge was well aware of [the aggravating and mitigating] circumstances]").

Anzivino adopted wholesale the policy reasons the court of appeals established for requiring on-the-record reasons when imposing an aggravated sentence. *See* 148 Ariz. at 55 (referencing *Holstun*). Those policy reasons include: ensuring the sentencing judge 1) understands the facts and proper factors to be considered, 2) thoughtfully considers an appropriate sentence, and 3) affirms the defendant's individuality. *Holstun*, 139 Ariz. at 197. The court also noted the importance of explaining to the community the sentence imposed and ensuring the process was not "purely mechanical." *Id.*

While all of those policy reasons are undoubtedly laudable, the fact remains that each is equally applicable to a wide-swath of decisions we entrust trial courts with which are nevertheless still reviewed for harmless or fundamental error. *See, e.g.*, *State v. Bush*, 244 Ariz. 575, 595, ¶ 88–90 (2018) (reviewing claim that trial

court sentenced defendant contrary to law for fundamental error); *State v. Prince*, 226 Ariz. 516, 536–37, ¶¶ 79–80 (2011) (reviewing claim that jurors failed to consider mitigating evidence particular to defendant for fundamental error); *State v. Mann*, 188 Ariz. 220, 228 (1997) (reviewing sentencing error claim for harmless error and presuming court will follow the rules and ignore irrelevant information in sentencing); *see generally Henderson*, 210 Ariz. at 567, ¶¶ 18–19 (noting trial errors, depending upon whether an objection was made, are either reviewed for harmlessness or fundamental error).

This is for good reason. The United States Supreme Court has explained the purpose behind requiring a defendant to object to errors in the trial court. "In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *United States v. Olano*, 507 U.S. 725, 734 (1993). The standard is meant "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). This Court has similarly noted the value of encouraging timely objections to provide the trial court the opportunity to correct an alleged error. *Henderson*, 210 Ariz. at 567, ¶ 19 (stating review is limited "to discourage a defendant from taking his chances on a favorable verdict, reserving the 'hole card' of a later appeal on a matter that was curable at trial, and then seeking appellate reversal" (cleaned up)).

As a result, "important constitutional errors" and other "mandatory" provisions are likewise subject to typical trial error review. *See State v. Hickman*, 205 Ariz. 192, 198–99 ¶ 29 (2004) (listing constitutional errors reviewed for harmless error); *see also, e.g.*, *State v. Murray*, 250 Ariz. 543, 547, ¶ 11 (2021) (reviewing prosecutor's misstatement of the reasonable-doubt standard for fundamental error). By forbidding a requirement to show prejudice here, the court effectively "elevat[ed] [] this type of error to a status not enjoyed even where error of constitutional dimension is involved[.]" *State v. Harrison*, 195 Ariz. 1, 6, ¶ 21 (1999) (McGregor, J., dissenting).

Harrison does not save *Anzivino*. *Id.* There, this Court addressed a split panel in favor of *Holstun*, repeating the policy reasons and adding that the judge's "articulation of factors will enable an appellate court to determine whether the trial judge has correctly considered the specific aggravating or mitigating circumstances." *Id.* at 3–4, ¶¶ 9, 11 (analyzing *Holstun* and *State v. Ybarra*, 149 Ariz. 118 (App. 1986)). But *Harrison*, like *Anzivino*, is a pre-*Henderson* case,[1] and it addressed a different statute which expressly required a finding of aggravation. *See* A.R.S. § 13–701(C) (formerly A.R.S. § 13–702(B)) (noting

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[1] Although *State v. Bonfiglio*, 231 Ariz. 371, 374 (2013), a post-*Henderson* case, cites *Harrison*, it does not address whether such claims are reviewed under fundamental error review if no objection is made.

aggravated or mitigated term "may be imposed only if the circumstances alleged to be in aggravation or mitigation of the crime are found to be true by the trial judge . . . and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing"). Conversely, here, the trial judge's discretion to impose either a consecutive or concurrent sentence is not limited by the presence of a statement of reasons. A.R.S. § 13–711(A).

Anzivino, and in turn *Perez-Gutierrez*, also determined automatic remand was necessary because the error did not "fit neatly" into fundamental error review. *See Anzivino*, 148 Ariz. at 597–98. *Perez-Gutierrez* found fundamental error review was inappropriate "because the statutory requirement can neither be inferred from a court's order nor waived by a party." 255 Ariz. at ___, ¶ 16. But neither of these characteristics obviates fundamental error review.

First, a trial court's failure to fulfill statutory or rule-based duties can still be reviewed on appeal. *See, e.g.*, *State v. Morales*, 215 Ariz. 59, 61, ¶ 10 (2007) (reviewing trial court's failure to conduct colloquy to support an admission to a prior conviction or, alternatively, hold a hearing, for fundamental error); *State v. Smith*, 250 Ariz. 69, 91, ¶¶ 95–98 (2020) (reviewing trial court's failure to comply with Rule 19.1(d)(7)–(8) in a capital case for fundamental error); *State v. Delahanty*, 226 Ariz. 502, 504–05, ¶¶ 7–12 (2011) (reviewing claim that trial court's failure to follow mandatory statute to appoint a psychologist or psychiatrist

to conduct a prescreening competency evaluation in a capital case for fundamental error only); *State v. Armstrong*, 218 Ariz. 451, 457–58, ¶¶ 14–16 (2008) (reviewing trial court's failure to order statutorily mandated evaluation prior to resentencing in capital case); *cf. Perez-Gutierrez*, 255 Ariz. at ___, ¶ 16 ("If the court failed to fulfill its statutory duty, we cannot, as a practical matter, review its decision on appeal." (cleaned up)).

This error in particular—where a trial court maintains wide discretion—is especially capable of fundamental error review. *See Garcia*, ___ P.3d at ___, ¶ 27 (analyzing the failure to provide reasons under A.R.S. § 13–711(A) for prejudice by looking at number of distinct counts and presence of factor that warranted consecutive sentences); *see also* A.R.S. § 13–116 (noting circumstances where sentence must be concurrent). And the trial court's decision is not made in a vacuum. As seen here, the Court was presented with a presentence report with sentencing recommendations that accurately reflected the law regarding the court's discretion on each count, a victim impact statement, the State's written recommendation, the defendant's criminal history, and argument by both parties. *See generally State v. Moody*, 208 Ariz. 424, 443, ¶ 49 (2004) ("We presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling."); *see also Jones v. Mississippi*, 593 U.S. 98, 114–15 (2021) (rejecting contention that an "on-the-record explanation" is necessary to ensure a sentencing court considers

a relevant mitigating factor).

Turning to the second factor cited by the majority below to support its automatic remand rule, "non-waivable errors" in the criminal context do not necessarily lead to automatic remand—instead, as urged in the instant case, fundamental error applies. *See Perez-Gutierrez*, 255 Ariz. at ___, ¶ 51 (Catlett, J., dissenting) (juxtaposing criminal and civil cases by observing the middle ground available in criminal cases). The error may be not be waivable, but it is forfeited. *See Escalante*, 245 Ariz. at 138, ¶ 1 ("When a defendant fails to object to trial error, he forfeits appellate relief absent a showing of fundamental error.").

Therefore, there is nothing so unique about the error in this case that warrants exemption from typical harmless or fundamental error review. *See Hickman*, 205 Ariz. at 198, ¶ 29 ("[V]irtually any error, under particular circumstances, can be harmless.") (cleaned up); *see also infra* Part I(B) (discussing inconsistency of *Vermuele* exemption from fundamental error review).

Nevertheless, Perez-Gutierrez operates under the faulty premise that the failure to provide reasons on the record renders the sentence completely deficient, and therefore, must be subject to de novo review because there is no "valid" sentence. *See* Response to the Petition for Review at 8–9. But this is not true. Foremost, stating reasons for a consecutive sentence cannot be a minimum requirement for sentence validity where a defendant could conceivably be

sentenced to consecutive sentences under this Court's rules without a trial court pronouncement thereof.[2] *See* Ariz. R. Crim P. 26.13 ("If the court imposes separate sentences of imprisonment on a defendant for two or more offenses, the sentences run consecutively unless the judge expressly directs otherwise."); *Perez-Gutierrez*, 255 Ariz. at ___, ¶¶ 7–16 (finding A.R.S. § 13–711(A) procedural in nature, and never suggesting that the sentences were invalid).

The examples provided by Perez-Gutierrez provide no greater support as post-*Henderson* precedent shows that similar errors can still be reviewed under a fundamental error analysis. *See, e.g.*, *State v. Allen*, 235 Ariz. 72, 78–79, ¶¶ 21, 24 (App. 2014) (reviewing sentence imposed *in absentia* for fundamental error); *State v. Tucker*, 215 Ariz. 298, 318, ¶ 77 (2007) (failure to provide allocution reviewed for fundamental error).

Even assuming, *arguendo*, the sentence was "incomplete" by the failure to state reasons on the record for consecutive sentences, this alone would still not result in exemption from fundamental error review under *Henderson*. *Cf.* Response to the Petition for Review, at 9. The United States Supreme Court has

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[2] The State does not argue that the rule controls over the statute; instead, they can be viewed in harmony. *See State v. Brearcliffe*, 254 Ariz. 579, 585, ¶ 22 (2023) (encouraging harmonization between court rules and statutes). But the fact that Rule 26.13 does not require findings regarding a consecutive sentence refutes any suggestion that a sentence is not "valid" without such findings.

rejected a similar, yet more substantial, argument in concluding that errors which render a *verdict* incomplete can still be subject to harmless-error analysis. *Neder v. United States*, 527 U.S. 1, 11–13 (1999) (citing cases) (rejecting argument that absence of complete verdict on all elements could not be reviewed for harmless error). Thus, the error is not exempt from fundamental error analysis based on the contention that the sentence was not "complete" or "valid."

As a result, the court-created "practice" espoused in *Anzivino* is incorrect in light of *Henderson* and independently flawed. The application of mandatory remand incorrectly elevates this error to that of structural error. *See Garcia*, ___ P.3d at ___, ¶ 25 (stating that automatic remand "amounts to structural error review, where prejudice is presumed"). Structural errors "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence[.]" *State v. Ring*, 204 Ariz. 534, 552, ¶ 45 (2003) (cleaned up). The failure to state reasons on the record for a consecutive sentence is not structural error. Indeed, as noted, a rule approved by this Court does not even require it. *See* Ariz. R. Crim P. 26.13.

Thus, because *Anzivino*'s judge-created practice of automatic remand is contradictory to this Court's precedent, this Court should vacate the opinion below and expressly overrule *Anzivino*.

B. *Vermuele*'s exemption from fundamental error review is equally unavailing as it conflicts with this Court's precedent, is inconsistently applied, and defies trial practicalities.

The majority below, citing *State v. Vermuele*, 226 Ariz. 399 (App. 2011), also effectively held that a defendant is not obligated to object to a sentencing error in order to raise a claim on appeal. *Perez-Gutierrez*, 255 Ariz. ___, ¶ 25. Not only is there nothing inherent about the error warranting special status in appellate review, but the timing of this error at sentencing also does not exempt it from fundamental error review. Because *Vermuele* contradicts *Henderson*, is inconsistently applied, and defies trial practicalities, this Court should overturn it.

Vermuele established a post-*Henderson* exemption for errors that "did not become apparent until the trial court pronounced sentence." 226 Ariz. at 403, ¶ 14. The import behind this, the court reasoned, was because the litigant should not be expected to interrupt the "solemn event" of sentencing. *Id.* at 402, ¶ 8. But this Court has routinely applied fundamental error review on appeal to alleged sentencing errors that are unknown until the trial court pronounces sentence. *See, e.g.*, *State v. Allen*, 248 Ariz. 352, ¶ 58 (2020) (reviewing claim regarding imposition of greater-than-presumptive sentences for fundamental error); *see also* Petition for Review at 13 (citing cases). Thus, the exemption contradicts this Court's precedents.

Vermuele's exemption also defies the reality of a sentencing hearing. For example, it cannot be ignored that in the instant case, there are at least two remedies short of automatic remand that could cure the error before formal appellate review that, in effect, provide "an opportunity" to object. *Contra Vermuele*, 226 Ariz. at 402, ¶ 9. First, the defendant could seek modification of the sentence under Rule 24.3 contending that the sentence was "imposed in an unlawful manner." Ariz. R. Crim. P. 24.3.

Second, more practically, the defendant could simply ask the court to provide the reasons for consecutive sentences after sentence is pronounced but before the sentencing hearing has concluded. *Cf.* Ariz. R. Crim. P. 26.11(a)(1) & (2) (requiring trial court to provide certain information to a defendant after pronouncing judgement and sentence). Here, for example, the sentencing hearing continued even after the court imposed sentence. R.T. 5/18/22, at 10–13. Moreover, the court specifically asked the parties if there was "[a]nything else." *Id*. at 12. Therefore, there is no reason to believe that making an objection at this proceeding—or any other sentencing proceeding—would somehow interfere with the solemnity of sentencing. Instead, objections at sentencing should be

encouraged to preserve valuable judicial resources and allow the trial court, or possibly the State, to remedy the error in a timely manner.[3]

Vermuele, notably, has led to confusing outcomes. Take pretrial incarceration credit for example: some decisions note that the existence of the presentence report provides an "opportunity" to object, whereas other decisions find no such opportunity. *Compare State v. Torrance*, No. 1 CA-CR 19–0167, 2020 WL 3095859, at *3, ¶ 14 (Ariz. Ct. App. June 11, 2020) (mem. decision) (finding a "sufficient opportunity to raise the issue" based upon information contained in the presentence report), *with State v. Goodyear*, No. 2 CA-CR 2016-0291, 2017 WL 4817354, at *6–*7, ¶¶ 27–28 (Ariz. Ct. App. Oct. 25, 2017) (mem. decision) (seeing no opportunity to raise issue with trial court's miscalculation in presentence incarceration credit). So too with a trial court's closing remarks: some decisions find a trial court's final statements provide an "opportunity" to object, while others do not. *Compare State v. Lewis*, No. 2 CA-CR 2013-0323, 2014 WL 6985977, at *2, ¶ 6 (Ariz. Ct. App. Dec 10, 2014) (mem. decision) (finding

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[3] Here, an objection likely would have prompted the trial court to state reasons pursuant to A.R.S. § 13–711(A), which would not have provided any discernible benefit as to the length of the sentence itself. But in other situations, particularly where a defendant did not receive a lengthy sentence, a timely objection might be the defendant's only practical opportunity to remedy an error given that the defendant may have served his sentence by the time his appeal is resolved.

Vermuele did not apply because court asked at the end of sentencing: "Anything else, counsel?"),[4] *with Perez-Gutierrez*, 255 Ariz. at ___, ¶ 25 (concluding *Vermuele* applied despite trial court's inquiry after sentencing: "Anything else?"). These examples are hardly the only sentencing errors with varying interpretations of a litigant's "opportunity" to object. *See, e.g.*, *State v. Martin*, No. 1 CA-CR 22-0140, 2023 WL 8084364, at *2, ¶ 11 (Ariz. Ct. App. Nov. 21, 2023) (mem. decision) (concluding defendant "could have raised [an objection to discussion about remorse] before, during, or after the court's pronouncement of sentence").

As with *Anzivino*'s court-created "practice" of automatic-remand, *Vermuele's* court-created exemption from fundamental error review should be overruled because it is inconsistent with this Court's precedents.

C. Presuming prejudice from trial errors is inconsistent with Arizona's harmless error doctrine.

Presuming prejudice for the failure to state reasons on the record for consecutive sentences also contravenes the Arizona Constitution and Arizona's harmless error statute.

Article VI, section 27, of the Arizona Constitution provides that "[n]o cause

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[4] These cases are cited for the purpose of encouraging the Court to publish an opinion concerning the continued viability of *Vermuele*. *See* Ariz. R. Sup. Ct. 111(c)(1)(B).

shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." The original, plain meaning of "reversed" at the time of our constitution's ratification was "to set aside; to annul; to vacate." *Black's Law Dictionary* (2d ed. 1910); *see also Matthews v. Indus. Comm'n of Arizona*, 254 Ariz. 157, 163, ¶ 29 (2022) ("When construing a constitutional provision, we seek to give terms the original public meaning understood by those who used and approved them."). Accordingly, the practice adopted by the majority below—requiring a de facto resentencing—is addressed by this provision. *Perez-Gutierrez*, 255 Ariz. at ___, ¶ 16 (relying on *Anzivino* for remand order, which, in turn, remanded for resentencing).

Additionally, this Court has previously noted that "technical error" is error "which [does not] affect the substantial rights of the accused." *State v. Lane*, 72 Ariz. 220, 227 (1951). The failure to state reasons on the record for consecutive sentences is technical error. *See Garcia*, ___ P.3d at ___, ¶ 25 (citing *Perez-Gutierrez*, 255 Ariz. at ___, ¶¶ 40, 47 (Catlett, J., dissenting) (characterizing the error as a technicality). When a trial court imposes multiple sentences, they must be served either consecutively or concurrently, and the trial court maintains wide discretion in that decision. *See* A.R.S § 13–711(A). The statement of reasons does not procedurally allow the consecutive or concurrent sentence, nor is it required for a sentence to be valid. *See* Ariz. R. Crim. P. 26.13. Thus, the court-created

practice of vacating a sentencing decision for such technical error necessarily violates the Arizona Constitution.

A near century old case, *Lawrence*, illuminates the background behind article VI, section 27. There, in two opinions, this Court addressed the then-prevailing legal theory that all error in criminal cases was presumed prejudicial. *Lawrence v. State*, 29 Ariz. 247, 254–55 (1925), *reh'g*, 29 Ariz. 318 (1925). But, in the early 1900s, there was a growing feeling that needless reversals in cases where "substantial justice" had been done was "defeating the entire purpose of [the] penal laws." 29 Ariz. at 320. Because of this, "many statutes and some constitutional provisions [were] adopted, particularly in the Western states, in an attempt to remedy the undoubted evil." *Id.* One such provision was Arizona's. *See* Ariz. Const. art. VI, § 22 (1910). That provision, the Court explained, "was undoubtedly inserted for the express purpose of avoiding the many miscarriages of justice occasioned by strict adherence to the old rule of presumption that error is prejudicial." *Lawrence*, 29 Ariz. at 256; *see also Albert Steinfeld & Co. v. Wing Wong*, 14 Ariz. 336, 342 (1912) (noting purpose of provision was to "put an end to litigation" when "it can reasonably be done").

As a result, this Court, steadfast in its adherence to "the people, the highest authority in our state, speaking through their Constitution," held to its duty and concluded that "in Arizona no cause, civil or criminal, will be reversed for formal

error, when upon the whole case it appears that substantial justice has been done, and that prejudice will not be presumed, but must appear probable from the record." *Lawrence*, 29 Ariz. at 256–57; *see also Lawrence*, 29 Ariz. at 320. That principle stands as true today as it did when it was first pronounced.

Indeed, harmless error as a doctrine has even earlier roots in Arizona. The mandate for harmless error review dates back to at least 1873 where the territorial court refused to reverse the judgment because the errors at issue did not prejudice the defendant. *See Territory v. Hargrave*, 1 Ariz. 95, 96–97 (1873) (citing earlier version of A.R.S. § 13–3987); *see also* A.R.S. § 13–3987 ("Neither a departure from the form or mode prescribed in respect to any pleadings or proceedings, nor an error or mistake therein, shall render the pleading or proceeding invalid, unless it actually has prejudiced, or tended to prejudice, the defendant in respect to substantial right."). Taken together, both provisions "obligate [the Court] to review trial error in criminal cases under a harmless error standard." *Hickman*, 205 Ariz. at 198, ¶ 28.

Accordingly, if Arizona courts are required to determine for harmlessness when an objection is properly made, there is even more reason to require a showing of prejudice to require reversal when an objection was not made in the first instance. *See Turley v. State,* 48 Ariz. 61, 84–85 (1936) (explaining application of constitutional provision is determined by whether error had effect on

verdict); *see also* *State v. Rodriguez*, 112 Ariz. 193, 195 (1975) ("When the insubstantial nature of the error is coupled with the complete failure of counsel to object or bring the omission to the trial court's attention so that it could have been corrected, we find no basis for reversal."). And in criminal cases where technical error is found, but not raised below, fundamental error review appropriately strikes the balance between providing meaningful review while also avoiding reversal for technical infirmities that do not impact the fairness of the trial. This Court should adopt *Garcia* in lieu of *Perez-Gutierrez*, and find that *Perez-Gutierrez*'s decision does not comport with the Arizona Constitution.[5]

II. Perez-Gutierrez cannot show fundamental error, let alone prejudice from the error.

Perez-Gutierrez cannot show fundamental error from the trial court's failure to state reasons for the imposition of consecutive sentences. *See Henderson*, 210 Ariz. at 567, ¶ 20 (explaining the defendant, "not the State, bears the burden of establishing fundamental error occurred and that the error caused him prejudice."); *Perez-Gutierrez*, 255 Ariz. at ___, ¶ 53 (Catlett, J., dissenting) ("[The defendant] makes no effort to establish fundamental error, and he couldn't do so if he tried.").

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[5] To be sure, the practice of automatic remand also frustrates a victim's constitutional rights, including the right to finality in the sentence. *See* Ariz. Const. art. II, § 2.1(A)(10).

The error is not fundamental because it did not go "to the foundation" of the sentencing hearing, take away a right essential to a fair sentencing, and was not "error of such magnitude that the defendant could not possibly have received a fair [sentence]." *Henderson*, 210 Ariz. at 567 ¶ 19; *see Trantor v. Fredrikson*, 179 Ariz. 299, 300–01 (1994) ("Although findings of fact and conclusions of law are certainly helpful on appellate review, they do not go to the foundation of the case or deprive a party of a fair hearing.").

Perez-Gutierrez has also not met his burden of showing prejudice. Under A.R.S. § 13–711(A), the trial court retains complete discretion to sentence a defendant to either consecutive or concurrent sentences. Based upon this record, which shows eight distinct separate acts spanning over a decade of time, it would be pure speculation that the trial court would not have imposed consecutive sentences had it not more fully stated its reasons. Thus, as more fully explained in the State's Answering Brief and its Petition for Review, Perez-Gutierrez cannot show prejudice where the basis from the record is clear and the consecutive sentences were not arbitrary or capricious.

CONCLUSION

For these reasons, the State respectfully requests that this Court vacate the decision below and affirm Perez-Gutierrez's convictions and sentences.

Respectfully submitted,

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