

**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

RESPONDENT'S SIMULTANEOUS SUPPLEMENTAL BRIEF

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Table of Contents

Introduction	1
I. Remand for a trial court to substantially comply with § 13-711(A)'s requirement that "The court shall state on the record the reason for its determination" without regard to prejudice accords with review for structural error.	5
A. The failure to substantially comply with § 13-711(A) affects the sentencing proceeding's framework.	6
B. The failure to substantially comply with § 13-711(A) cannot be quantitatively assessed.	8
C. The failure to substantially comply with § 13-711(A) affects other protected interests.	10
D. The failure to substantially comply with § 13-711(A) affects the reliability of the truth-finding process.	11
E. Remand without prejudice does not depend on fundamental fairness or the entire trial process.	13
II. Review without prejudice complies with related Arizona caselaw.	15
III. Review for fundamental error does not apply.	18
IV. Going forward.	19
Conclusion	22

Introduction

In the State of Arizona, a trial court's decision to supplement its underlying ruling with an explanation, reason, or finding is largely left to judicial custom.

A mid-trial ruling on a party's objection made during a witness's still-ongoing testimony, for example, rarely includes a stated reason at that time.

The omission of a ruling's reason can also be tolerated in a court's written ruling, often when the claim is barely developed, the claim has been roundly rejected by the reviewing court or a higher one, or the claim is "almost too ridiculous for words." *See* Ludwig Wittgenstein, *LECTURES AND CONVERSATIONS ON AESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF* at 11 (C. Barrett (ed.), Oxford: Blackwell) (1966) (disparaging the idea of Aesthetics as a science "telling us what's beautiful" in that "I suppose it ought to include also what sort of coffee tastes well").

On the other hand, a pre-trial ruling, or a post-trial decision, on a thoughtful and well-developed claim, made by "a judge, in the relative calm of chambers" (*Huminski v. Corsones*, 396 F.3d 52, 87 (2nd Cir. 2005)), frequently includes a reason for the court's ultimate ruling.

When a ruling’s explanation is required by the Arizona Legislature, however, then custom gives way to statute. Spanning diverse fields of law across civil litigation and criminal appeals, a trial court’s omission of a ruling’s statutorily required reason prompts the Arizona courts to remand for the trial court’s second chance to fulfill its “statutory duty” (*Aguirre v. Indus. Comm’n of Arizona*, 247 Ariz. 75, 78 ¶ 15 (2019)) to state on the record the ruling’s reason—regardless of whether one or both parties previously requested it, and regardless of whether one or both parties can show prejudice from its absence.

In this case, it is no longer disputed that the trial court failed to follow A.R.S. § 13-711(A) that directs that, “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.” (Petition for Rev. at 9 n.3; Op. at ¶¶ 12-16; Dissent at ¶ 28.)

Through a standard of review with the suggested nomenclature of *de novo* review for substantial compliance, the Arizona Court of Appeals kept the trial court’s consecutive-sentencing determination intact, but remanded for the court to comply with the statute and state its reasons without conditioning that remand on

whether the prosecution or the defense first showed prejudice from the trial court’s initial omission of the required reason.¹

As the dissenting judge below correctly recognized, the panel majority’s act of remanding the case without a showing of prejudice makes the review on appeal a form of review for structural error. (Dissent at ¶¶ 47 and 49; *see also* Response to Petition for Rev. at 8-9 (comparing the statutorily mandated statement on the record of the reason for the sentencing determination to “one of the ‘minimum requirements’ for ‘a reasonable and rational sentencing’”) (citing *State v. Fettis*, 136 Ariz. 58, 59 (1983)); *cf. State v. Harrison*, 195 Ariz. 1, 1 ¶ 1 (1999) (“the error was structural”).

The question here is whether that kind of review is justified.²

¹ The first and only time that the Arizona Court of Appeals has ever conditioned remand in this context on a showing of prejudice occurred seven months after the opinion below. *See State v. Zazueta Garcia*, No. 1 CA-CR 22-0377, ___ Ariz. ___ ¶¶ 23-27, 2023 WL 8430421, ** 4-5 (Ariz. App. Div. One Dec. 5, 2023), *petition for rev. filed* Jan. 19, 2024; Notice of Acknowledgment (filed Jan. 22, 2024) (evincing unawareness of the unwritten custom of filing a response to a petition for review from a published opinion or a split memorandum decision).

² With apologies to California Chief Justice Roger Traynor, “the riddle of structural error” is three-fold. *See generally* Roger J. Traynor, *THE RIDDLE OF HARMLESS ERROR* (Columbus: Ohio State University Press) (1970).

First, the origins of structural-error review emerge in cases that involve a trial’s conviction stage, not its sentencing stage, leading some courts to believe that review for structural error cannot apply to a sentencing proceeding as a matter of law. *See, e.g., State v. Dunbar (“Dunbar II”)*, 2023 WL 126419, * 8 ¶ 34

(Ariz. App. Div. Two Jan. 6, 2023) (Brearcliffe, J., concurring in part and dissenting in part) (citing *United States v. Walters*, 309 F.3d 589, 592-93 (9th Cir. 2002), *reaffirmed in United States v. Maness*, 566 F.3d 894, 896-97 (9th Cir. 2009)), *petition for rev. granted Aug. 22, 2023, oral arg. held Dec. 12, 2023; but see Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (Rehnquist, C.J., concurring) (suggesting that the author’s five-Justice opinion for the Court in *Arizona v. Fulimante*, 499 U.S. 279, 306-12 (1991) applies “be it at trial or sentencing”); *Fettis*, 136 Ariz. at 59 (listing examples of minimum requirements for an Arizona sentencing); *State v. Asbury*, 145 Ariz. 381, 385 (App. 1984) (describing a timely filed request for a mitigation hearing as an “absolute right”).

Second, the courts identify and apply structural error in different ways, requiring the selection and application of multiple tests. *See* Maj. Jeremy S. Watford, NOT HARMLESS: C.A.A.F.’S FLAWED APPROACH TO PLAIN ERROR REVIEW IN *UNITED STATES V. TOVARCHAVEZ*, 229 *Military Law Rev.* 49, 55 n.41 (2021); *State v. Estrada*, 210 Ariz. 111, 129 n.24 (App. 2005) (Kessler, J., dissenting).

Third, review for structural error can apply differently to different parts of the same claim. A reviewing court’s analysis of whether a trial court substantially complied with a statute (through *de novo* review for substantial compliance) is structural-error review because it is occurring without regard to whether one or the other side can show prejudice. But if the reviewing court finds that the trial court did not substantially comply with the statute, then the remedy is not structural error’s outright reversal and remand for an entirely new sentencing proceeding.

On this point, the majority and the dissent speak over each other.

The majority follows this Court’s practice of denying that it is engaging in structural-error review in light of the limited nature of the remedy that departs from structural error’s outright reversal of the conviction, sentence, or even sentencing determination. *Compare* Op. at ¶ 24 (rejecting the dissent’s structural-error-review characterization of the majority’s act of remanding without a showing of prejudice based on the nature of the limited-remand remedy) *with State v. Torres*, 208 Ariz. 340, 343 ¶¶ 10-14 (2004) (reviewing the claim on appeal that the trial court failed to conduct an inquiry into the defendant’s motion to change counsel by remanding without a showing of how the defense was prejudiced by the missing inquiry, but denying that its review was for structural error in light of the nature of the remedy of remand); *but see State v. Espada*, No. CR-23-0316-PR, *Petition for Review at 16-17* (distinguishing *Torres*) (citing *State v. Perez-Gutierrez*, No. CR-23-0137-PR, *Response to Petition for Review at 18*).

For its part, the dissent maintains that the majority’s analysis entails some version of structural-error review, in light of the panel’s initial determination of

I. Remand for a trial court to substantially comply with § 13-711(A)'s requirement that "The court shall state on the record the reason for its determination" without regard to prejudice accords with review for structural error.

To obtain relief from a claimed violation of the law, proof of the violation is always necessary—but whether a person needs to show that they were actually harmed, or “prejudiced,” by the violation depends on the claim and depends on how the opposing party responds to it.

If a person proves a violation of the law, then in a criminal proceeding it is the prosecution that shoulders the burden of proof to prove that the error was harmless (if the prosecution claims that the violation of the law did not prejudice the person or the proceeding in which the violation occurred).

substantial compliance without regard to prejudice. (Dissent at ¶¶ 47 and 49.)

In all events, the first part of the analysis that proceeds without regard to prejudice should be examined for whether it satisfies review for structural error, and the second part of the analysis on the appropriate remedy would not seem to change that (even as the narrow nature of the limited-remand remedy actually accounts for the concerns about why some errors should not require a new proceeding at that time). *See generally State v. Sajna*, No. 1 CA-CR 12-0797, Appellee’s Answering Brief, 2012 WL 10100311, * 42 n.30 (2012) (counsel for the State collecting cases for the proposition that “limited remand is the remedy employed to determine whether the defendant suffered violation of other constitutional rights, including those the violation of which amounts to structural error”); *State v. Innes*, No. 1 CA-CR 09-0865, Appellee’s Answering Brief, 2009 WL 9052212, * 9 (2009) (counsel for the State agreeing that “the failure of a defendant to knowingly, intelligently, and voluntarily waive a jury trial constitutes structural error” but maintaining that the structural-error outcome “is not mutually exclusive with a limited remand to determine *whether* the defendant did, in fact, knowingly, voluntarily, and intelligently waive the right to a jury trial”).

If a person proves a violation of the law but does so for the first time in a court of review, then in a criminal proceeding it is the affected person who would usually shoulder the burden of proof (if the prosecution claims that the violation of the law did not prejudice the person or the proceeding in which the violation occurred).

For some violations of the law, however—known as “structural error”—proof of the violation is sufficient unto itself, without regard to prejudice, without regard to who raised it, and without regard to the level of the court hierarchy in which the claim is advanced.

A. The failure to substantially comply with § 13-711(A) affects the sentencing proceeding’s framework.

In *Fulminante*, the Supreme Court established a test for whether to review a claim on appeal without regard to prejudice. *See* 499 U.S. at 307-09.

Under *Fulminate*, relief can be conditioned on a showing of prejudice if the claimed violation occurred within the trial’s framework (“during the presentation of the case”) at which the error can be “quantitatively assessed in the context of other evidence presented,” other aspects of the ruling, and so on. *See Fulminante*, 499 U.S. at 307-08 (characterizing within-system error as “trial error”).

On the other hand, relief can be granted without a showing of prejudice if the claimed violation occurs against the “framework” of the proceeding (“structural defects in the constitution of the trial mechanism”) that “defy analysis by ‘harmless-error’ standards[,]” *Fulminante*, 499 U.S. at 309.

Stated another way, relief can be granted for a “structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. The Court has subsequently identified this effect on the proceeding’s framework as structural error’s “defining feature.” *Weaver v. Massachusetts*, 582 U.S. 286, 294-95 (2017).

In this case, a court’s failure to comply with its obligation to state on the record the reasons for its sentencing determination affects the framework through which the sentencing proceeds, not the substantive validity of the sentencing determination to order all or some of the sentences to run consecutively or concurrently.

This can be seen by examining the statute’s text. Unlike a constitutional or statutory right that would typically use the passive voice to protect in general terms the right at stake, this statute uses the active voice by directing how the court should proceed. Unlike a constitutional or statutory right that would typically be held by the defendant or affected person personally, this statute speaks of a judicial obligation.

By directing how a court should proceed, without addressing what the court should determine in substance, the complete omission of any reason for the § 13-711(A) sentencing determination affects “the framework within which” the sentencing proceeds, “rather than simply an error” in the resulting sentence or sentencing determination “itself.” *Fulminante*, 499 U.S. at 310.

B. The failure to substantially comply with § 13-711(A) cannot be quantitatively assessed.

Consistent with the statute’s role as a procedural mechanism, the error from a trial court’s failure to comply with § 13-711(A) cannot be substantively or “quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 307-08; *see also McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) (offering examples of error that “may be ranked as structural,” including that the error’s effects “are too hard to measure”); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (acknowledging that *Fulminante* can be read to suggest that all errors that affect the framework are structural, but additionally resting the Court’s structural-error conclusion on “the difficulty of assessing the effect of the error”).

For example, if a court substantially complies with § 13-711(A) by stating on the record its reasons for the sentencing determination but, in doing so, relies on an unlawful or invalid reason, then the reviewing court can examine the trial court’s

other stated reasons for the sentencing determination, if any, in order to weigh whether the unlawful or invalid factor influenced the sentencing determination.

If a trial court says nothing at all about the reason for ordering the sentences to be served concurrently or consecutively, however, then a reviewing court “can’t discern what the effect might have been” (*cf. State v. Dunbar*, No. CR-23-0029-PR, Rec. Oral Arg. at 17:16-18:41 (Justice Montgomery on *Fulminante*)) if the court had followed the statute. (Op. at ¶ 24). Rather, “the effects of the error are simply too hard to measure.” *Weaver*, 582 U.S. at 295, *reaffirmed in McCoy*, 584 U.S. at 427.

Because a trial court’s failure to state the reason for its consecutive-or-concurrent sentencing determination affects the outer framework mechanism in which the sentencing proceeds, not the substantive, internal validity of the particular sentencing determination or the sentencing determination’s reason (the statute is wholly agnostic on that point), the panel below correctly determined that remand is required without regard to whether the prosecutor or the defense can first show how they were harmed by the absence of the legislatively mandated requirement in § 13-711(A) for the court to state on the record the still-undisclosed reasons for why it determined that the sentences should be served consecutively.

C. The failure to substantially comply with § 13-711(A) affects other protected interests.

Another reason that a trial court's error in failing to state on the record its reason for the sentencing determination "may be ranked as structural" is because § 13-711(A) "'is not designed to protect the defendant . . . but instead protects some other interest[.]'" *McCoy*, 584 U.S. at 427 (quoting *Weaver*, 582 U.S. at 295).

As the opening brief documents, those extra-defendant interests include promoting meaningful appellate review, ensuring that judges give thought to whether the sentencing determination is appropriate, explaining to the community why the sentenced defendant's sentence may be different from a similarly situated defendant, fulfilling a victim's and the public's right to know why a Government actor made its decision, and promoting respect for the Rule of Law. (Appellant's Opening Brief at 22-24.)

Without an automatic remand for the legislatively mandated duty, reliance on a reviewing court's inference of what reasons for the sentencing determination could support a trial court's undisclosed reasons "would, in effect, be making appellate courts factfinders when it comes to sentencing"—in contravention of the statute's clear language and yielding "bad policy." *Compare State v. Harrison*, 195 Ariz. 28, 36 ¶ 37 (App. 1998) (following *State v. Holstun*, 139 Ariz. 197 (App. 1983) (detailing the policy reasons that support remanding for resentencing for "the failure to articulate the aggravating factors" even where "the record will

support the sentence imposed’’)), *cited with approval in Harrison*, 195 Ariz. at 3-5 ¶¶ 9-15 (rejecting a potential “harmless error rule” that “would essentially affirm the judge’s decision so long as the record contains facts that may support the result” as “inappropriate” and against the statute’s purpose of requiring the articulation of the facts and reasons for an aggravated or mitigated sentence to be expressed through the trial court itself) *with State v. Anzivino*, 148 Ariz. 593, 598 (App. 1985) (applying *Holstun*’s reasoning to § 13-711(A)’s predecessor statute), *reaffirmed in Op.* at ¶¶ 8-9 and 16-19.

D. The failure to substantially comply with § 13-711(A) affects the reliability of the truth-finding process.

Remanding without prejudice for the court to state on the record the reason for the § 13-711(A) sentencing determination also enhances the reliability of the truth-finding process.

Even if a trial court makes its consecutive-or-concurrent sentencing determination at the end of all of its other sentencing-based deliberation (Dissent at ¶ 44), the failure to state on the record the reasons for the sentencing determination undermines the truth-finding process.

For a judge on the trial court, the act of documenting the determination’s reason helps ensure that the ruling (in this case, the sentencing determination) satisfies more than the judge’s internal sense of law and justice alone, as the judge is aware that the decision’s reasons are being publicly put to paper and exposing

“the process by which they reached it.” *United States v. Merz*, 376 U.S. 192, 199 (1964), cited in *Logan B. v. Department of Child Safety, J.B., I.B.*, 244 Ariz. 532, 538 ¶ 18 (App. 2018).

Like the sentencing determination to depart from the presumptive term, the legislature’s requirement for the court to state on the record its reason for the consecutive-or-concurrent sentencing determination “tends to assure that judges will give thought to whether or not each sentence, even a stipulated one, is appropriate.” Cf. *Holstun*, 139 Ariz. at 197, cited with approval in *Harrison*, 195 Ariz. at 3-4 ¶ 10.

For a judge on the reviewing court, the trial court’s written reason or expressed finding facilitates appellate review by disclosing the determination’s justification for a more searching examination of whether the trial court correctly applied the law and rightly avoided treating the sentencing as rote or mechanical.

That the myriad cases cited by the panel majority endorse part or all of this interpretation is evidence of the opinion’s correctness. (Op. at ¶¶ 9-10, 14-16, 21, and 23, citing *Aguirre*, 247 Ariz. at 78 ¶ 15; *Harrison*, 195 Ariz. at 3-5 ¶¶ 6-17; *State v. Meeker*, 143 Ariz. 256, 266 (1984); *Francine C. v. Department of Child Safety*, 249 Ariz. 289, 298 ¶¶ 16, 19, and 25 (App. 2020); *Ruben M. v. Arizona Dep’t of Econ. Sec.*, 230 Ariz. 236, 240 ¶ 24 (App. 2012); *Anzivino*, 148 Ariz. at 598; *Holstun*, 139 Ariz. at 196-97; see also *Logan B.*, 244 Ariz. at 538 ¶¶ 18-19

(“We have long emphasized that the purpose of requiring written findings is to aid appellate review. . . . It is improper for this court to determine the first instance what ultimate facts the juvenile court would have reduced to writing to support its conclusions of law.”).

E. Remand without prejudice does not depend on fundamental fairness or the entire trial process.

If the source of the structural error is not within a proceeding’s outer procedural framework, and instead derives from a substantive error within the proceeding, then there are various tests for determining whether even an in-system error should nonetheless be reviewed for structural error. In the opinion below, the dissent disputes that a court’s failure to state the reason for a consecutive-or-concurrent sentencing determination should be reviewed for structural error, quoting this Court’s early embrace of the formulation that “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 and no criminal punishment may be regarded as fundamentally fair.” (Dissent at ¶ 47, quoting *State v. Ring* (“*Ring III*”), 204 Ariz. 534, 552 ¶ 45 (2003), quoting *Neder v. United States*, 527 U.S. 1, 8-9 (1999).)

The majority’s limited-remand remedy substantively accounts for this concern, as it declines to completely unwind the sentencing or even the sentencing determination.

Regardless, Justice Scalia’s subsequent opinion for the Court rejected this very reasoning as a ground to avoid review for structural error because the test has broadened:

The dissent would use “fundamental unfairness” as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoted by the dissent, *post*, 2569.). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness, see *McKaskle v. Wiggins*, 465 U.S. 168, 177, n.8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (“Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis”). Thus, it is the dissent that creates a single, inflexible criterion, inconsistent with the reasoning of our precedents, when it asserts that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural, *post*, at 2570.

Gonzalez-Lopez, 548 U.S. at 148-49 n.4, *reaffirmed in Weaver*, 582 U.S. at 296 (emphasizing that an error’s categorization as structural can derive from more than one rationale, but that “one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case”); *accord State v. Dunbar*, No. CR-23-0029-PR, Rec. Oral Arg. at 08:06-09:08 (Justice Lopez recognizing that *Weaver* “does not involve violation of a right designed to prevent a wrongful conviction,” and positing that it “seems to be something that goes beyond merely an analysis of whether the error infected the entire trial process”).

II. Review without prejudice complies with related Arizona caselaw.

Remanding without prejudice under § 13-711(A) is “intertwined with the body” (*Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390, 1436 (2020) (Alito, J., dissenting)) of Arizona case law that executes statutes that require its decisionmakers to make on-the-record findings or reasons by remanding for those missing findings, without regard to a showing of prejudice.

Consider the closest inter-statutory comparison to a § 13-711(A) sentencing determination. Without a statutory command to explain the reason for a presumptive sentence under § 13-702(A), no reason needs to be provided. *See Harrison*, 195 Ariz. at 37 ¶ 42 (Noyes, J., concurring in part and dissenting in part).

But in the presence of a statute that requires for an aggravated or mitigated term that “factual findings and reasons in support of such findings are set forth on the record at the time of sentencing” (A.R.S. § 13-701(C)), this Court remands for those missing, record-based “findings and reasons” that justify an aggravated or mitigated term without requiring either the prosecution or the defense to show prejudice from the trial court’s initial failure to substantially comply with the statute. (Op. at ¶ 10, citing *Harrison*, 195 Ariz. at 3-5 ¶¶ 6-17 and *State v. Holstun*, 139 Ariz. 196, 197 (App. 1983); accord *State v. Brearcliffe (Johnson)*, 254 Ariz. 579, 584 ¶ 18 (2023) (declining to require the trial courts to “find that a defendant expressly waived the right to appeal” where the statute did not require it).

The same analysis applies in civil proceedings to formally sever a parent's legal relationship with their child. Without a statutory command to explain a severance motion's denial, no findings are needed. *See Arizona Department of Economic Security, S.L. v. Matthew L.*, 233 Ariz. 547, 549-50 ¶ 10 (App. 2010).

But in the presence of a statute that requires a court that grants this kind of motion that the court must include an order that "shall recite the findings on which the order is based" (A.R.S. § 8-538(A)), this Court remands for those missing findings without requiring either side to show prejudice from the trial court's failure to substantially comply with the statute. (Op. at ¶ 19, citing *Matter of Appeal in Pima County Juvenile Action, No. S-933*, 135 Ariz. 278, 280-81 (1982) (remanding without a showing of prejudice based on the statutory directive); *see also Logan B.*, 244 Ariz. at 538 ¶ 17 (remanding for the statutorily required findings without a showing of how the litigant was affected by their absence, and declining to "simply search the record to uncover ultimate facts the court may have relied upon, or infer findings the court may have made" because doing so would "nullify" the statute).)

The same analysis applies to a juvenile-dependence petition. There is no independent obligation of a trial court to supplement its juvenile-dependency ruling with any findings if the court denies that the juvenile is dependent.

But in the presence of a statute that requires a court that finds the allegations to be true that “the court shall . . . [m]ake the following findings as to each parent” (A.R.S. § 8-444(A)(C)(1)), the Arizona Court of Appeals remands for those statutorily required findings without requiring either side to show prejudice from the trial court’s failure to substantially comply with the statute. (Op. at ¶¶ 11 and 15-16, citing *Francine C.*, 249 Ariz. at 296-96 ¶¶ 16, 19-20, and 25.)

The same analysis applies to administrative proceedings. In the presence of a statute that requires that an Administrative Law Judge’s “final decision shall include findings of fact and conclusions of law, separately stated” (A.R.S. § 41-1063), this Court remands for those statutorily required findings without requiring either side to show prejudice from the trial court’s failure to substantially comply with the statute—even when a party does not raise the issue on appeal. (Op. at ¶ 16, citing *Aguirre*, 247 Ariz. at 78 ¶ 15 (“Here, the ALJ made no material findings at all. Thus, because he failed to fulfill his statutory duty, we cannot, as a practical matter, review his decision on appeal. As a result, the award is legally deficient and must be set aside regardless of whether the claimant has raised the issue.”) (citation omitted).)

True, these civil statutes (unlike the closest criminal-statute analogue of § 13-701(C)) require “findings” alone, not “reasons” (Dissent at ¶ 50), but the cases that interpret them turn on the mandatory language that directs what a court “shall”

do, not based on any distinction between what is being legislatively compelled (a finding versus a reason). (Op. at ¶¶ 20-21.)

Because A.R.S. § 13-711(A) “requires the superior court to explain reasons” for its sentencing determination (Dissent at ¶ 49), the 40-year practice of the Arizona Court of Appeals should be affirmed. (Op. at ¶¶ 8-9 and 16; *State v. Anzivnio*, 148 Ariz. 593, 597-98 (App. 1985); *State v. Collins*, 133 Ariz. 20, 24 (App. 1982).)

III. Review for fundamental error does not apply.

Review for fundamental error here is ill-suited. Initially, this Court’s flagship case that clarified the doctrine excluded structural error from its ambit. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 17 (2005). Long before that, the court of appeals independently recognized that the doctrine “does not fit neatly” when the error involves the total absence of any stated reasons. *See Anzivnio*, 148 Ariz. at 54-55, *reaffirmed in* Op. at ¶ 16.

Even on its own terms, fundamental-error review would not reveal the trial court’s reason for its sentencing determination, regardless of the separate issue of whether there happens to be support in the record for it. *See Anzivnio*, 148 Ariz. at 54-55; *cf. McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991) (“Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.”);

Anthony v. Louisiana, 598 U.S. ___, 143 S.Ct. 29, 34-36 (Mem.) (Nov. 7, 2022) (Sotomayor, J., dissenting from the denial of certiorari) (distinguishing review for the sufficiency of the evidence from review for the prosecutorial misconduct’s effect on that evidence).

Finally, a court’s omission of the stated reasons will always cause prejudice because it improperly shields the challenged determination from appellate review. *See* Ariz. Const., Art. 2 Sec. 24 (guaranteeing “the right to appeal in all cases”); Op. at ¶¶ 16 and 21-23; *cf. Holstun*, 139 Ariz. at 197, *cited with approval in Harrison*, 195 Ariz. at 3-4 ¶ 10.

IV. Going forward.

When the Court crafts its opinion, the Court is respectfully asked to consider the following two issues.

First, all of the prior judges before the opinion below who have sought to apply a harmless-error standard over substantial compliance in this context have done so when the issue turned on the quality of the trial court’s stated reasons, not on the wholesale absence of them—a “readily distinguishable” and “very different” kind of error that even the *Harrison* dissent allowed could support reversal on this record. *Cf. Harrison*, 195 Ariz. at 6 ¶ 22 (McGregor, J., dissenting).

Second, the Court should refrain from making statements about issues that are not before the Court and are not squarely presented: how much or how little explanation would satisfy the statute if the trial court *had* stated on the record its reason for the § 13-711(A) determination, whether a potential exception to the inapplicable fundamental-error doctrine applies (*State v. Vermuele*, 226 Ariz. 399, 401-03 ¶¶ 6-14 (App. 2011)), and whether a trial court can satisfy the statute through the court’s act of citing other documents instead of doing the articulation itself. *Contrast Op.* at ¶ 15 *and Dissent* at ¶ 28 *with cf. State v. Rodriguez*, 126 Ariz. 104, 107 (App. 1980) (finding no substantial compliance with § 13-702(C) where the court pronounced the sentence and then stated: ““The reasons for my sentence in this case, while they may seem harsh, certainly, to the family, I’m sure are set forth in the pre-sentence investigation report””).

Conclusion

This Court should affirm opinion of the court of appeals and remand for the trial court to follow § 13-711(A) by stating on the record its reason for ordering the sentences to be served consecutively.

RESPECTFULLY SUBMITTED this 12th day of February, 2024.

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
Aaron J. Moskowitz
Deputy Maricopa County Public Defender