VIOLATING THE INVIOLATE: THE RIGHT TO A TWELVE-PERSON JURY IN THE WAKE OF *STATE V. SOLIZ*

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INTRODUCTION

The Arizona Constitution provides that criminal defendants facing death or a minimum thirty-year prison term are entitled to a twelve-person jury.[1] However, in a unanimous decision, the Arizona Supreme Court held that this constitutional provision was not violated when an eight-person jury convicted Basilio Soliz of possession of dangerous drugs for sale—a crime carrying a possible thirty-five-year sentence.[2]

The Sixth Amendment of the Federal Constitution guarantees that defendants in criminal prosecutions are tried before an impartial jury.[3] The U.S. Supreme Court, however, has held that a jury of twelve "cannot be regarded as an indispensable component of the Sixth Amendment"[4] and is "not a necessary ingredient of 'trial by jury.'"[5] Juries are necessary to keep the government honest[6] and to form an "interposition between the accused and his accuser of the commonsense judgment of a group of laymen."[7] The specific number of people on a jury does not play a role in reliability of the jury and its ability to carry out its fact-finding function.[8]

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1. ARIZ. CONST. art. II, § 23.
2. State v. Soliz, 219 P.3d 1045, 1049 (Ariz. 2009). Soliz had two prior felonies that would result in a sentence enhancement making his potential maximum sentence thirty-five years. *Id.*
3. U.S. CONST. amend. VI.
4. Williams v. Florida, 399 U.S. 78, 100 (1970).
5. *Id.* at 86.
6. *Id.* at 100 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)) (stating that juries are necessary to "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").
7. *Id.*
8. *Id.* at 100–01.

Historically, Arizona provided greater protection of a criminal defendant's right to a jury trial than the federal Constitution.[9] Although the Arizona Constitution states that "the right of trial by jury shall remain inviolate,"[10] the Arizona Supreme Court's decision in *State v. Soliz*[11] calls the "inviolate" nature of this right into question. By holding that the state waives its ability to seek a sentence of thirty years or more when it requests a jury of less than twelve, the *Soliz* decision drastically narrowed the scope of a criminal defendant's right to a twelve-person jury, bringing Arizona case law more in line with the U.S. Supreme Court's approach to the Sixth Amendment.[12] *Soliz* also clarifies an area of state law that has recently become complicated by technicalities and difficult to decipher.[13]

I. BACKGROUND

Angel Diaz was found guilty of first-degree burglary, aggravated assault, and attempted armed robbery.[14] On the first day of the trial, the judge empanelled

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9. State v. Le Noble, 164 P.3d 686, 688 (Ariz. Ct. App. 2007) ("Arizona closely guards a defendant's right to a jury trial above and beyond that guaranteed by the Federal Constitution."); Derendal v. Griffith, 104 P.3d 147, 150 (Ariz. 2005) ("Arizona Constitution requires greater protection of the right to trial by jury than does the federal constitution."); Benitez v. Dunevant, 7 P.3d 99, 103 (Ariz. 2000) (citing State *ex rel.* McDougall v. Strohson, 945 P.2d 1251, 1252–53 (Ariz. 1997)) ("Arizona operates with a broader jury eligibility standard, providing its citizens with greater access to jury trials than the federal constitution mandates."); *Strohson*, 945 P.2d at 1257 (Ariz. 1997) ("Arizona has a long history of providing its citizens with jury trials beyond those minimally required by the federal courts' interpretation of the federal constitution.").

10. ARIZ. CONST. art. II, § 23.

11. 219 P.3d 1045 (Ariz. 2009).

12. Prior to *Soliz*, Arizona courts consistently reversed convictions where the defendant was entitled to a twelve-person jury but received an eight-person jury. *See* State v. Pope, 961 P.2d 1067, 1069 (Ariz. Ct. App. 1998) (reversed and remanded for new trial based on failure to empanel twelve jurors even though trial court assured defendant that the court would not impose a sentence in excess of thirty years); *see also* State v. Henley, 687 P.2d 1220, 1224 (Ariz. 1984) (finding that the error was not harmless beyond a reasonable doubt), *abrogated by Soliz*, 219 P.3d 1045 (Ariz. 2009); State v. Maldonado, 78 P.3d 1060, 1064 (Ariz. Ct. App. 2003) ("The trial court's failure to impanel the lawful number of jurors was fundamental error requiring reversal and a new trial."); State v. Smith, 4 P.3d 388, 395 (Ariz. Ct. App. 1999) (identifying the error as "fundamental, reversible error"); State v. Luque, 829 P.2d 1244, 1246–47 (Ariz. Ct. App. 1992) (identifying the error as "fundamental error" that was not harmless), *abrogated by Soliz*, 219 P.3d 1045 (Ariz. 2009); State v. Fancy, 676 P.2d 1134, 1136-38 (Ariz. Ct. App. 1983) (reversing based on the presence of the error alone); State v. Miguel, 611 P.2d 125, 127-128 (Ariz. Ct. App. 1980) (reversed and remanded due to trial court's failure to empanel twelve jurors).

13. *Compare* State v. Escobedo, 213 P.3d 689, 703 (Ariz. Ct. App. 2009) (right to twelve-person jury not violated even though defendant was facing maximum sentence of more than thirty years), *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010) *with* State v. Diaz, 211 P.3d 1193, 1202 (Ariz. Ct. App. 2009) (right to twelve-person jury violated when trial transcript reflected that only eleven jurors were polled even though twelve jurors were empanelled), *vacated*, No. CR-09-0189-PR, 2010 WL 476010 (Ariz. Feb. 12, 2010).

14. *Diaz*, 211 P.3d at 1195.

fifteen jurors, three of whom were alternates.[15] At the end of the trial, the judge excused the alternates and the remaining twelve jurors began deliberations.[16] When the jury returned its verdicts, the court polled the jurors to verify that the verdict was unanimous.[17] Although the court noted in the transcript that the jury was present, the trial transcripts showed that only eleven jurors were polled.[18]

Diaz appealed his convictions, alleging that his right to a twelve-person jury was violated because all twelve jurors did not participate in determining his guilt.[19] Division Two of the Arizona Court of Appeals agreed with Diaz, holding that when a defendant qualifies for a twelve-person jury, a conviction based on the deliberations of fewer than twelve jurors is "fundamental, prejudicial error."[20] The court reversed Diaz's convictions and remanded the case for a new trial.[21]

On April 12, 2007, approximately one week after Division Two issued the *Diaz* decision, a grand jury indicted Xavier Escobedo for attempting to cash a fraudulent check, presenting a counterfeit driver's license, identity theft, and possessing burglary tools.[22] The total maximum sentence for these charges was 33.75 years.[23] Escobedo declined the state's plea offer, opting for a jury trial instead.[24] In the pre-trial statement, the parties agreed to schedule a three-day trial and agreed to empanel eight jurors and one alternate.[25]

The jury returned guilty verdicts on all four counts, and the court sentenced Escobedo to ten years.[26] After reviewing the record for reversible error, Division One of the Arizona Court of Appeals requested the parties to submit briefs on whether Escobedo was entitled to a twelve-person jury and to include any relief to which Escobedo was entitled.[27] After considering the briefs, Division One upheld Escobedo's conviction, finding that although the error was subject to fundamental error analysis, this analysis would not apply in Escobedo's case because the error was invited.[28] The court found that because both parties signed the pre-trial statement agreeing to an eight-person jury, Escobedo invited the error and therefore the fundamental error analysis was unnecessary.[29]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1198.
21. *Id.*
22. State v. Escobedo, 213 P.3d 689, 691 (Ariz. Ct. App. 2009), *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010).
23. *Id.* at 692.
24. *Id.* at 691.
25. *Id.* at 703.
26. The court sentenced Escobedo to four concurrent sentences: ten years for each of the first three counts and 3.75 years for the charge of possession of burglary tools. *Id.* at 692 n.1.
27. *Id.* at 691.
28. *Id.* at 703.
29. *Id.*

In response to the contradicting results reached in *Diaz* and *Escobedo*, the Arizona Supreme Court recently held in *State v. Soliz* that no error occurs where the parties fail to request a twelve-person jury when required if a lesser sentence may be imposed for the crime charged.[30] Therefore, if the state does not request a jury of twelve, it waives its ability to seek a sentence of thirty years or more.[31] In *Soliz*, the court simplified the complicated analysis employed by the *Escobedo* court and clarified Arizona's constitutional right to a twelve-person jury.

II. STANDARDS OF ERROR

Historically, Arizona courts recognized two types of error: (1) fundamental error and (2) harmless error.[32] Fundamental error occurred when the error went "to the foundation of the case, or which [took] from a defendant a right essential to his defense."[33] The court could find an error fundamental on its own. The defendant need not object at trial or assign the error on appeal.[34] A harmless error was any error that prejudiced the defendant and affected the outcome of the trial.[35] To preserve a harmless error on appeal, a defendant had to object at trial.[36]

The requirements for harmless error have remained substantially the same. Under the modern approach, harmless error occurs when the defendant "properly objects to non-structural error."[37] For example, courts apply harmless error analysis when a judge fails to submit an element of an offense to the jury.[38] When these errors occur, the burden is on the state to prove that the error was harmless and had no effect on the outcome of the case.[39] Therefore, the conviction will be upheld if the state proves beyond a reasonable doubt that "that the error did not contribute to or affect the verdict or sentence."[40]

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30. 219 P.3d 1045, 1049 (Ariz. 2009).

31. *Id.*

32. Wootan v. Roten, 168 P. 640, 641 (Ariz. 1917) (reviewing the record for both fundamental and prejudicial error); Kinney v. Neis, 127 P. 719, 720 (Ariz. 1912) ("The general rule is that every presumption of this court is in favor of the regularity of the proceedings had upon the trial in the superior court, and it is the duty of appellants to affirmatively show prejudicial error, otherwise the judgment of the superior court will be affirmed, unless, of course, the error is manifest and fundamental."). Today, Arizona courts refer to "prejudicial error" as "harmless error."

33. State v. Pulliam, 349 P.2d 781, 785 (Ariz. 1960*), overruled on other grounds by* State v. Cobb, 566 P.2d 285 (Ariz. 1977).

34. *See id.*; *Kinney*, 127 P. at 720.

35. State v. Miranda, 401 P.2d 716, 719 (Ariz. 1965) (finding no prejudicial error because "failure to permit examination . . . could not have affected the outcome of the case").

36. *Id.*

37. State v. Valverde, 208 P.3d 233, 236 (Ariz. 2009) (citing State v. Henderson, 115 P.3d 601, 607 (Ariz. 2005)).

38. State v. Ring, 65 P.3d 915, 935 (Ariz. 2003).

39. State v. Bible, 858 P.2d 1152, 1191 (Ariz. 1993) (citing Chapman v. California, 386 U.S. 18, 24–26 (1967)).

40. *Henderson*, 115 P.3d at 607 (citing *Bible*, 858 P.2d at 1191).

Unlike harmless error review, fundamental error review has changed from its historical foundations. The first substantial change occurred in 1967 in *Chapman v. California*.[41] In *Chapman*, the Court held that a federal standard of review for federal constitutional violations would apply to the states.[42] The Court also held that a federal constitutional error could be held harmless if a reviewing court could conclude beyond a reasonable doubt that the error was in fact harmless.[43] Thus, the court opened the door to apply the harmless error analysis to fundamental errors.

Arizona courts quickly began incorporating *Chapman* into fundamental error review. The courts turned fundamental review into a three-step process: (1) determining whether there was an error, (2) determining whether the error was fundamental, and (3) determining whether the error was harmless.[44] But in *State v. Thomas*, the Arizona Supreme Court held that a fundamental error could not be labeled a harmless error.[45] Rather the court required a new two-part test: (1) determining whether there was an error and (2) determining whether the error was prejudicial in light of the entire record.[46] The court further defined a fundamental error by stating that "[i]f there is substantial evidence in the record to support the verdict and it can be said that the error did not, beyond a reasonable doubt, contribute significantly to the verdict, reversal is not required."[47] Subsequent courts cited the change in *Thomas* but failed to define prejudice using the "reasonable doubt" standard, resulting in a variety of different standards to determine prejudice.[48]

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41. 386 U.S. 18.

42. *Id.* at 21.

43. *Id.* at 24.

44. State v. Kinslow, 799 P.2d 844, 848 (Ariz. 1990) (finding a fundamental error harmless); State v. Anderson, 517 P.2d 508, 511 (Ariz. 1973) ("Having determined that the cross-examination together with the comments to the jury was fundamental error, we may look to the record to see if the error was harmless beyond a reasonable doubt."); State v. Scarborough, 514 P.2d 997, 1001 (Ariz. 1973) (applying the *Chapman* harmless error rule to a fundamental error); State v. Jackson, 514 P.2d 480, 485 (Ariz. 1973) ("The harmless error rule announced by the United States Supreme Court . . . applied the doctrine of harmless error to constitutional or fundamental error in those cases wherein the error did not contribute to the verdict and was harmless beyond a reasonable doubt."); State v. Shing, 509 P.2d 698, 702 (Ariz. 1973) ("And we believe that it was fundamental error which was not waived by the failure of the defendant to object when the prosecutor commented upon defendant's silence after arrest. Under the facts in this case, however, we believe that said comments were harmless beyond a reasonable doubt."); State v. Martin, 489 P.2d 254, 259 (Ariz. 1971) (applying harmless error review when the co-defendant's admission was admitted into evidence without the co-defendant taking the stand).

45. 636 P.2d 1214, 1218 n.1 (Ariz. 1981).

46. *Id.* at 1218. The error had to "go[] to the foundation of the case or take[] from the defendant a right essential to his defense." *Id.* at 1217.

47. *Id.* at 1218. The new rule announced by *Thomas* produces the same result as the courts applying a "harmless error" review. State v. King, 763 P.2d 239, 244 n.4 (Ariz. 1988) ("We believe the end result is the same. Both analyses mandate reversal where the trial court has committed significant error, a party failed to object to that error, and, in light of the entire record, that error casts doubt on the integrity of the verdict.").

48. *See* State v. Henderson, 115 P.3d 601, 608 (Ariz. 2005) (highlighting the

The Arizona Supreme Court's most recent definition of fundamental error in *State v. Smith* blends the post-*Chapman* three-part test with the prejudice rule from *Thomas*. Under the new test, the defendant must show that "1) error exists, 2) the error is fundamental, and 3) the error caused him prejudice."[49] The court recognized the different standards for prejudice[50] and held that the defendant had the burden of persuasion to show that "a reasonable jury applying the appropriate standard of proof could have reached a different result" absent the error.[51]

In addition to the modern fundamental review analysis, *Chapman* recognized that "some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error."[52] Subsequently, Arizona courts referred to these "per se" harmful errors as fundamental error.[53] In *Arizona v. Fulminante*, however, the U.S. Supreme Court categorized these "per se" harmful errors as structural error.[54] It labeled "structural errors" as errors that affect the "entire conduct of the trial from beginning to end."[55] An error subject to the *Chapman* harmless error analysis was a trial error or an error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[56] Arizona courts subsequently adopted the Court's terminology from *Fulminante*.[57]

Under the current Arizona standard, "[s]tructural error 'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve

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different standards necessary to prove fundamental error); State v. Fulminante, 778 P.2d 608, 610 (Ariz. 1988) ("Whether the standard is called 'beyond a reasonable doubt,' or 'contribute to or significantly affect,' or 'no reasonable probability,' or 'not critical' or some other formulation, the Arizona courts seem to focus on whether there is overwhelming additional evidence sufficient to establish the prosecution's case.").

49. State v. Bearup, 211 P.3d 684, 689 (Ariz. 2009) (quoting State v. Smith, 194 P.3d 399, 403 (Ariz. 2008)).

50. *Henderson*, 115 P.3d at 608 ("We note that prior appellate decisions have not consistently described the showing necessary to establish fundamental error.").

51. *Id.* at 609. This test is no different from the *Chapman* harmless error test. *Id.* at 610 (Hurwitz, J., concurring) ("It is perhaps worth noting, however, that the fundamental error test for prejudice we adopt today—whether any reasonable jury could have disagreed about the presence of an aggravating factor . . . is for practical purposes no different than the harmless error test . . . ."). Thus, it appears the court has come full-circle on this issue.

52. United States v. Chapman, 386 U.S. 18, 23 (1967). The court cited three cases as examples: Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. State of Ohio, 273 U.S. 510 (1927) (impartial judge). *Id.* at 23 n.8. *See* State v. Adamson, 665 P.2d 972, 992 (Ariz. 1983) (Feldman, J., dissenting) ("At one time all constitutional error was thought to require 'automatic reversal—such errors were never to be considered harmless.' In *Chapman v. California* . . . the United States Supreme Court determined, however, that some constitutional error could be considered 'harmless error.'") (internal citations omitted).

53. *See* State v. Ross, 804 P.2d 112, 117 (Ariz. Ct. App. 1990).

54. Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991).

55. *Id.* at 309.

56. *Id.* at 307–08.

57. *See* State v. Henderson, 115 P.2d 601, 608 (Ariz. 2005); State v. Hickman, 68 P.3d 418, 425 n.7 (Ariz. 2003); State v. Bible, 858 P.2d 1152, 1175 (Ariz. 1993).

its function as a vehicle for determination of guilt or innocence.'"[58] Structural errors are subject to automatic reversal.[59] Examples of structural error include: "complete denial of criminal defense counsel . . . denial of self-representation in criminal cases . . . [and] exclusion of jurors of the defendant's race from grand jury selection."[60] There is no need for the proponent of the error to prove that the error was prejudicial.[61]

State v. Henley was decided under the *Chapman* harmless error analysis.[62] The decision was decided before *Fulminante* coined the term structural error. In *Henley*, the court held that the failure to empanel a jury of twelve when required was "fundamental because it violate[d] a state constitutional provision."[63] The court then concluded that because it could not predict that four additional "jurors would have found defendant Henley guilty beyond a reasonable doubt[,] [Henley's] conviction must be reversed."[64] Whether *Henley* applied fundamental review, or today's structural review, is difficult to determine from the face of the case. The court seemingly applied the *Chapman* fundamental error analysis. On the other hand, the court suggests that the error would be deemed structural under today's standards because it could not predict what four additional jurors would have concluded. The decision is ambiguous at best.

III. ERROR ANALYSIS BECOMES INCREASINGLY COMPLICATED AS COURTS ATTEMPT TO AVOID AUTOMATIC REVERSAL RULE

State v. Escobedo was the first case where a defendant's conviction by an eight-person jury was upheld even though the defendant was entitled to a twelve-person jury.[65] Until *Escobedo*, "every reported decision in Arizona involving a defendant who was deprived of the right to be tried by a twelve-person jury ha[d] been granted a new trial."[66] In *Escobedo*, the court held that empaneling a jury of eight when the defendant was entitled to a jury of twelve was fundamental error.[67] In classifying the error as fundamental error, the *Escobedo* court relied on *State v. Henley*—the only Arizona Supreme Court decision at the time that explicitly addressed the issue of twelve-person juries.[68] The *Henley* court held that the failure

58. State v. Escobedo, 213 P.3d 689, 696 (Ariz. Ct. App. 2009) (quoting State v. Ring (*Ring III*), 65 P.3d 915, 933 (Ariz. 2003)) (alteration in original), *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010).

59. *Id.* at 691 (citing *Hickman*, 68 P.3d at 425 n.7 (Ariz. 2003)).

60. *Ring III*, 65 P.3d at 933 (footnotes omitted).

61. *Escobedo*, 213 P.3d at 692 ("If the error is structural, then we need not consider whether the error was invited or whether Defendant has met his burden of showing prejudice.").

62. 687 P.2d 1220, 1223 (Ariz. 1984).

63. *Id.* at 1224.

64. *Id.*

65. 213 P.3d at 706 (Brown, J., dissenting).

66. *Id.*

67. *Id.* at 703 (majority opinion).

68. *Id.* at 701.

to empanel a twelve-person jury when required was fundamental error.[69] Although the *Escobedo* court relied on *Henley* in classifying the error, it did not follow *Henley*'s analysis of the error.[70] Instead, the court combined *Henley*'s fundamental error analysis with the modern fundamental error analysis from *State v. Henderson* to hold that a failure to empanel a twelve-person jury was not fundamental error.[71]

In *State v. Henderson*, the court "place[d] the burden of persuasion in fundamental error review on the defendant."[72] The burden was on the defendant to show, based on the record, that "a reasonable jury, applying the appropriate standard of proof, could have reached a different result."[73] The *Escobedo* court then concluded that synthesizing the holding in *Henley* (that the error was fundamental) with the holding in *Henderson* (that the defendant bears the burden of proof) "argues in favor of upholding a verdict from the eight-person jury rather than vacating it."[74] Because it is impossible to determine what verdict four additional jurors would have reached, most defendants will be unable to prove prejudice.[75] Thus, the Court of Appeals used the very reasoning posited by the *Henley* court to reach a completely different conclusion in *Escobedo*.[76] The *Escobedo* court found that empaneling an eight-person jury was fundamental error but upheld the verdict.[77]

In *Escobedo*, the Court of Appeals adhered to the doctrine that courts should only reverse a verdict if "there is no reasonable probability that the outcome would have been different,"[78] noting that the structural error doctrine is to be applied sparingly.[79] The court saw a need to restrict the use of structural error analysis to rare circumstances, "be[ing] cautious in the errors we designate as requiring automatic reversal."[80] The court also found that the structural error definition presented a conjunctive test, requiring an alleged error to fulfill two requirements in order to qualify as structural.[81] To be structural an error must: (1) affect the conduct of the trial from beginning to end, thus tainting the

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69. State v. Henley, 687 P.2d 1220, 1224 (Ariz. 1984).

70. *Escobedo*, 213 P.3d at 702–703 ("[W]e do not turn the practical outcome of applying a rule of fundamental error into a newly crafted rule of structural error.")

71. *Id.* at 701.

72. 115 P.3d 601, 607 (Ariz. 2005).

73. *Id.* at 609.

74. *Escobedo*, 213 P.3d at 694. Although the burden of persuasion is on the defendant in fundamental error analysis, it is not the controlling factor. Instead, the court should consider whether a reasonable jury could have reached a different conclusion. *Henderson*, 115 P.3d at 611 (Hurwitz, J., concurring) ("In practice, however, because a reviewing appellate court will virtually never be in equipoise about the issue, the burden of proof is of little consequence. In both instances, the reviewing court's analysis will be substantively identical. . . .").

75. *Escobedo*, 213 P.3d at 706 (Brown, J., dissenting).

76. *Id.* at 694 (majority opinion).

77. *Id.* at 703.

78. *Id.* at 694; Lawrence v. State, 240 P.863, 867 (Ariz. 1925) ("[P]rejudice will not be presumed, but must appear probable from the record.").

79. *Escobedo*, 213 P.3d at 697.

80. *Id.*

81. *Id.* at 695.

framework of the trial, and (2) deprive the defendant of a basic protection so that the trial cannot function as a "vehicle for guilt or innocence."[82] Because the defendant failed to prove that the failure to empanel a twelve-person jury met the second requirement of the structural error test, the court concluded that the error was fundamental.[83]

Once the court concluded that the trial court's failure to empanel a twelve-person jury was fundamental error, the next step would have been for the court to complete a fundamental error analysis and determine whether the error was prejudicial.[84] Instead, the court declined to review for fundamental error and upheld the defendant's conviction under the invited error doctrine.[85] "If an error is invited, [the court] do[es] not consider whether the alleged error is fundamental."[86] Noting that the joint pre-trial agreement provided for an eight-person jury, the court found that the defendant participated in the error and held that the error was not reversible.[87] Concluding that fundamental error analysis did not apply, the court upheld the defendant's conviction.[88] By engaging in this complicated analysis, the court was able to avoid the automatic reversal rule, which had been applied consistently in Arizona courts and was supported by decades of caselaw.

IV. ARIZONA SUPREME COURT SIMPLIFIES ERROR ANALYSIS

In *State v. Soliz*, the state charged the defendant with possession of dangerous drugs for sale.[89] After declining the state's plea offer, the case proceeded to trial, and the state notified the defendant that it would allege two historical prior felony convictions at sentencing.[90] Because of his prior convictions, the defendant faced a maximum of thirty-five years in prison.[91] The court empaneled eight jurors, and neither party objected.[92] The jury returned a guilty verdict.[93] On appeal, the defendant argued that his right to a twelve-person jury had been violated and sought to have his conviction reversed.[94] The defendant urged the court to presume prejudice and adopt the rule of structural error announced in *Henley*.[95] The state argued for the fundamental error analysis as

82. *Id.* (quoting State v. Tucker, 160 P.3d 177, 195 (Ariz. 2007)).
83. *Id.* at 696 (quoting State v. Valverde, 208 P.3d 233, 235–36 (Ariz. 2009)) ("Clearly, trying a criminal case to an eight person jury is not 'a criminal trial [that] cannot reliably serve its function as a vehicle for determination of guilt or innocence.'") (alteration in original).
84. *Id.*
85. *Id.* at 703.
86. *Id.* (quoting State v. Logan, 30 P.3d 631, 632–33 (Ariz. 2001)).
87. *Id.*
88. *Id.*
89. 219 P.3d 1045, 1046 (Ariz. 2009).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1047.

defined in *Escobedo* requiring the defendant to prove that he been prejudiced as a result of not receiving a twelve-person jury.[96]

The Arizona Supreme Court upheld the defendant's conviction, holding that the state waived its ability to seek a sentence of thirty years or more once it tried the case in front of an eight-person jury, and thus, no fundamental error occurred.[97] The court found that the parties' "dispute over what category of error should be applied [was] irrelevant" because the "prerequisite to all three categories of error is that error indeed occurred."[98]

In interpreting the right to a twelve-person jury, Arizona courts have consistently held that "a criminal defendant is not 'at risk' in terms of maximum sentence until the case is submitted to the jury."[99] Historically, Arizona appellate courts have upheld convictions where the trial court adjusted the defendant's sentencing scheme *before* the jury began deliberating.[100] The *Soliz* court followed this tradition, noting that "if by the time the case is submitted [to the jury], a sentence of thirty years or more is no longer 'authorized by law,' [then Article II, § 23 of the Arizona Constitution] does not mandate twelve jurors."[101] Following this reasoning, the *Soliz* court determined that once the prosecution allows a trial to proceed with an eight-person jury, a sentence of thirty years or more is no longer "authorized by law."[102] The prosecutor therefore waives her ability to seek a sentence of thirty or more years.[103]

The *Soliz* court noted that its decision departed from previous case law regarding the right to a twelve-person jury.[104] Prior to *Soliz*, Arizona courts consistently treated the failure to empanel a twelve-person jury as a structural error "in practice."[105] Once a defendant proved that he faced a sentence of death or more than thirty years, the appellate court would presume that the error was harmful[106] because "errors in jury composition are not 'amenable to quantitative

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96. *Id.* at 1046.

97. *Id.* at 1048.

98. *Id.*

99. *Id.* (quoting State v. Prince, 689 P.2d 515, 518 (Ariz. 1984)).

100. *Compare* State v. Thompson, 677 P.2d 296, 297 (Ariz. Ct. App. 1983) (holding that reversal was not necessary because sentencing scheme was reduced to under thirty years before the case was submitted to the jury), *and* State v. Cook, 596 P.2d 374, 376 (Ariz. 1979) (holding that empaneling eight-person jury was not error when trial judge allowed state to withdraw allegation of prior conviction in order to bring sentencing scheme under thirty years, and the adjustment took place before jury deliberations began), *with* State v. Fancy, 676 P.2d 1134, 1137 (Ariz. Ct. App. 1983) (holding that reversal was required where eight-person jury was allowed to deliberate the fate of a defendant who was facing more than thirty years at the time deliberations began).

101. *Soliz*, 219 P.3d at 1048.

102. *Id.*

103. *Id.* at 1049.

104. *Id.*

105. State v. Escobedo, 213 P.3d 689, 707 (Ariz. Ct. App. 2009) (Brown, J., dissenting), *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010).

106. *See, e.g.*, State v. Luque, 829 P.2d 1244, 1246–47 (Ariz. Ct. App. 1992), *abrogated by Soliz*, 219 P.3d 1045 (Ariz. 2009); State v. Fancy, 676 P.2d 1134, 1137 (Ariz. Ct. App. 1983).

assessment'"[107] and it is impossible to predict what verdict the four missing jurors would have reached.[108] This created an error that was structural in practice, because even though courts labeled the error as fundamental error, "a per se rule of reversal, based on presumed prejudice, is the fundamental equivalent of finding structural error."[109] In *State v. Fancy*, the Court of Appeals justified this presumption of prejudice stating:

> [I]f we were to approve of the procedure utilized in the instant case, the state could always demand an eight person jury, knowing it could later dismiss some charges if necessary. . . . Such a procedure would encourage overzealous prosecutors to add additional charges to the criminal indictment, hoping to increase the likelihood of a conviction on at least some of the charges.[110]

A presumption of prejudice was necessary in order to discourage prosecutors from abusing their power by inflating the indictment to get a conviction and then later dismissing charges to come under the thirty-year threshold.[111]

The *Soliz* court disagreed with this automatic reversal rule. Rather than focus on potential abuse by the prosecutor, the *Soliz* court held that the state implicitly "waived its ability to obtain a sentence of thirty years or more[,] [a]nd the trial judge affirmed this by failing to empanel a jury of twelve."[112] The court expressed more concern about gamesmanship on the part of the defendant, finding that the presumption of prejudice created a disincentive for defense counsel to request a twelve-person jury.[113] This is similar to the approach taken by the court in *Escobedo*. In *Escobedo*, the court noted that the defendant was not *deprived* of his right to a twelve-person jury, "rather, the right was fully *available* to Defendant and his counsel to exercise at trial, but they did not *invoke* it."[114] Further, the court observed that:

> It was only after a review by this court that the defect was even found. Further, the defect is to a *possibility* in sentencing that no one even considered. A member of the public can justly wonder that an error is of such magnitude that convictions *must, automatically*, be vacated and a new trial be held when (1) neither counsel nor the trial judge even knew the rights was applicable and not met; (2) the trial

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107. State v. Anderson, 4 P.3d 369, 378 (Ariz. 2000) (quoting State v. Smith, 4 P.3d 388, 394–395 (Ariz. Ct. App. 1999), *abrogated by Soliz*, 219 P.3d 1045 (Ariz. 2009)).

108. *Escobedo*, 213 P.3d at 706 (Brown, J., dissenting).

109. *Id.* at 707; *see* State v. Price, 183 P.3d 1279, 1282 (Ariz. Ct. App. 2008) ("[T]he failure to empanel a jury of twelve when required constitutes fundamental, prejudicial error."); *see also Luque*, 829 P.2d at 1247 ("There are no cases in Arizona . . . which have failed to find fundamental error where a jury of less than twelve persons was allowed to deliberate with regard to charges where the maximum cumulative charges could exceed 30 years.").

110. 676 P.2d at 1137.

111. *Id.*

112. 219 P.3d 1045, 1049 (Ariz. 2009) (footnote omitted).

113. *Id.*

114. *Escobedo*, 213 P.3d at 702.

> was conducted fairly in all regards; and (3) the error went to a possibility at sentencing that was never considered, discussed, or contemplated.[115]

Not only would granting the defendant a new trial under these circumstances be "costly to the victims and to the judicial system," it would fuel the public's "cynicism and disrespect for the judicial system."[116] By placing the burden of showing prejudice on the defendant, and requiring the defendant to provide evidence of the prejudice, *Escobedo* encouraged defendants to do their due diligence in fixing errors that could easily be cured at the trial level.[117] The court relied on *Henderson*'s reasoning that the burden of proof should be placed on the defendant in fundamental error analysis to "discourage a defendant from 'tak[ing] his chances on a favorable verdict, reserving the "hole card" of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.'"[118]

The *Soliz* court agreed with this approach noting that an automatic reversal rule would allow defense counsel to "see what verdict an eight-person jury reached, knowing that retrial would always result if the client faced a potential sentence of thirty years or more."[119] Like the *Escobedo* court, the *Soliz* court found that the automatic reversal rule was not in the interest of judicial efficiency.[120] When a court reverses a defendant's conviction and remands the case, the state is prohibited from seeking a longer sentence than the trial court initially imposed.[121] This has the anomalous result of granting the defendant a new trial before an eight-person jury, which is exactly what he received at the original trial.[122]

Thus, the *Soliz* and *Escobedo* decisions used similar reasoning and justifications to come to the same conclusion. The *Soliz* court, however, avoided the complex analysis employed in *Escobedo* by finding that "as long as a lesser sentence may legally be imposed for the crime alleged, we hold that a sentence of thirty years or more is no longer permitted and that the twelve-person guarantee of Article 2, Section 23 is not triggered."[123] Therefore, in many cases, courts will no longer have to sort through the complicated, and sometimes conflicting, case law in an effort to determine which standard of error to apply. The rule announced in *Soliz* is simple and avoids inconsistent results while also "protect[ing] defendants from lengthy imprisonment in cases in which the jury is not comprised of twelve persons."[124]

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115. *Id.* at 701.
116. *Id.* at 697 (quoting State v. Hickman, 68 P.3d 418, 426 (Ariz. 2003)).
117. *See id.* at 702.
118. *Id.* (quoting State v. Henderson, 115 P.3d 601, 607 (Ariz. 2005)) (alteration in original).
119. State v. Soliz, 219 P.3d 1045, 1049 (Ariz. 2009).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

V. HOW WILL COURTS HANDLE CASES THAT FALL OUTSIDE OF SOLIZ?

The *Soliz* decision provides courts with a simple rule for determining when the twelve-person jury requirement is triggered.[125] But the *Soliz* rule does not apply to all criminal cases, only cases where a sentence of less than thirty years may legally be imposed.[126] In its most recent decision on Arizona's right to a twelve-person jury, the court conspicuously did not label the error.[127] Thus, the question remains how courts will respond when a defendant receives an eight-person jury and a sentence of less than thirty years may not be legally imposed. There seem to be two likely answers to this question: (1) courts revert to the *Escobedo* analysis in these situations or (2) courts revert to the automatic reversal rule.

If courts revert to the *Escobedo* analysis for cases where a defendant faces a mandatory sentence of thirty or more years, then the error will not be presumptively prejudicial.[128] Rather than relying on a presumption of prejudice, defendants will have to show that there is substantial evidence in the record that a twelve-person jury would have reached a different verdict than the eight-person jury.[129] Due to the inability to quantify the effect of four hypothetical jurors, this burden is impossible to meet.[130] There will never be sufficient evidence in the record to support the argument that the failure to empanel a jury of twelve individuals was prejudicial.[131]

Thus, under the *Escobedo* analysis, courts will likely affirm convictions even when the presumptive prison sentence is at least thirty years.[132] Like *Soliz*, the *Escobedo* court was wary of the presumption of prejudice.[133] Even in cases

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125. *Id.*

126. *Id.* The court left open the possibility that the implicit waiver rule may conflict with a "crime victim's right '[t]o be heard at any proceeding involving . . . sentencing.'" *Id.* n.3 (quoting ARIZ. CONST. art. 2, § 2.1(4)) (alteration in original). In addition, some crimes carry mandatory consecutive sentences. *See* ARIZ. REV. STAT. § 13-1307(C) (2009) (sex trafficking); *id.* § 13-3212(B) (child prostitution); *id.* § 13-705(M) (dangerous crimes against children). Presumably, failure to empanel a twelve-person jury when the mandated prison term is over thirty years would be a rare occurrence. Unlike instances where complicated sentence enhancements based on prior felonies, aggravating factors, and multiple offenses committed on separate occasions make the sentence calculations difficult, the judge, prosecutor, and defense attorney should all be aware of the need for a twelve-person jury when the presumptive sentence is at least thirty years.

127. State v. Diaz, No. CR-09-0189-PR, 2010 WL 476010, at *4 (Ariz. Feb. 12, 2010) ("We hold that Diaz failed to establish any error, fundamental or otherwise, relating to the number of jurors who determined his guilt.").

128. State v. Escobedo, 213 P.3d 689, 702–03 (Ariz. Ct. App. 2009) *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010).

129. *Id.* at 694.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 701–02. In *State v. Maldonado*, the defendant's attorney stipulated to

where there is not a deliberate attempt to stipulate out of the twelve-person jury, but instead, the parties are simply unaware of the potential sentencing scheme,[134] the court will analyze the error under the invited error doctrine, foreclosing the possibility of a retrial.[135]

Absent a showing of gamesmanship by the defendant, courts should consider returning to the automatic reversal rule and find that the failure to empanel a twelve-person jury for a defendant facing a mandatory sentence of thirty years or more is presumptively prejudicial. *Soliz* sought to prevent gamesmanship by the defendant, conserve judicial resources, and ensure that defendants are not subjected to "lengthy imprisonment in cases in which the jury is not comprised of twelve persons."[136]

The *Soliz* court was troubled by the fact that on remand for a lack of a twelve-person jury the new trial would usually be before an eight-person jury.[137] By rejecting the automatic reversal rule, the court deterred defendants from abusing the criminal justice system and wasting judicial resources.[138] While this rationale is sensible in cases where a sentence of less than thirty years can be imposed, it becomes less compelling when the presumptive sentence is at least thirty years.

In these situations, courts should find that the right to a twelve-person jury outweighs the risk of gamesmanship or misuse of judicial resources, especially because the defendant faces at least thirty years of imprisonment. In fact, the *Soliz* court recognized that "[t]he legislature thus reserved the twelve-person jury only for the most serious offenses and measured seriousness by the potential sentence upon conviction."[139] Given the seriousness of the sentence imposed, courts should revert to the automatic reversal rule and grant these defendants constitutionally mandated twelve-person juries on remand.

CONCLUSION

State v. Soliz clarified an area of Arizona law that had recently become bogged down by complicated analyses. In the past, courts treated the failure to

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an eight-person jury without the defendant's consent. 78 P.3d 1060, 1063 (Ariz. Ct. App. 2003). The court reversed the conviction on appeal because the defendant did not knowingly waive her right to a twelve-person jury. *Id.* at 1064. In *State v. Smith*, the defendant's attorney stipulated to an eight-person jury in return for the prosecution's stipulation to request concurrent sentences. 4 P.3d 388, 392 (Ariz. Ct. App. 1999), *abrogated by* State v. Soliz, 219 P.3d 1045 (Ariz. 2009). Again, the court reversed the defendant's conviction because the defendant did not personally waive his right to a twelve-person jury. *Id.* at 395. The court in *Escobedo* distinguished *Maldonado* and *Smith* because unlike the defendant in *Escobedo*, defense counsel in *Maldonado* and *Smith* were aware that the defendant was entitled to a twelve-person jury. *Escobedo*, 213 P.3d at 702.

134. *Escobedo*, 213 P.3d at 701.

135. *Id.* at 703.

136. *Soliz*, 219 P.3d 1045, 1049 (Ariz. 2009).

137. *Id.* Because a trial court, on remand, cannot impose a new sentence longer than the original sentence, the defendant usually receives an eight-person jury. *Id.*

138. *Id.*

139. *Id.* at 1047.

empanel a twelve-person jury when required as a structural error per se and consistently reversed convictions when the constitutional provision was not followed.[140] However, courts began to worry that defendants would use this automatic reversal rule to game the system, which would not only waste judicial resources but also jeopardize the integrity of the judicial system.[141]

In order to prevent gamesmanship and to preserve the interests of judicial economy, the court in *Escobedo* engaged in a complicated error analysis to circumvent the automatic reversal rule that was supported by the Arizona constitution, state law, and years of case law.[142] The *Escobedo* court conducted a lengthy analysis to determine which standard of error to apply when the parties fail to empanel a twelve-person jury and eventually came to the conclusion that the proper standard was the fundamental error standard.[143]

Subsequently, the Arizona Supreme Court formulated a simple rule for cases where a sentence under the thirty-year threshold may be legally imposed.[144] This rule forces both parties to do their due diligence: prosecutors must request a twelve-person jury or forfeit their ability to seek longer sentences or sentencing enhancements, and defendants are no longer able to wait for a verdict from an eight-person jury and seek an automatic retrial if the verdict comes back guilty.

Although *Soliz* addresses a defendant's right to a twelve-person jury when a lesser sentence is authorized by law, the court did not mention cases where the defendant faces a mandatory sentence of thirty years or more. For these cases, it appears that courts have the option of employing the *Escobedo* analysis or reverting to the automatic reversal rule. There is a reasonable argument for returning to the automatic reversal rule in these cases because defendants will be retried before twelve-person juries on remand since their sentences presumptively meet the thirty-year threshold. Courts could also return to the *Escobedo* analysis in these cases, especially since it appears that the *Soliz* court attempted to move Arizona case law in line with the Supreme Court's approach to the Sixth Amendment, which focuses less on the specific number of jurors and more on the fairness of the jury process.[145] However, because the legislature reserved the twelve-person jury for the most serious criminal offenses,[146] and because there seems to be less risk of gamesmanship and misuse of judicial resources, the better

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140. *See, e.g.*, State v. Price, 183 P.3d 1279, 1282 (Ariz. Ct. App. 2008) (holding that failure to empanel twelve-person jury when required was prejudicial error); State v. Luque, 829 P.2d 1244, 1247 (Ariz. Ct. App. 1992) (noting that there were no Arizona cases in which a defendant's conviction was upheld when the defendant was entitled to a twelve-person jury but received an eight-person jury), *abrogated by Soliz*, 219 P.3d 1045 (Ariz. 2009).

141. State v. Escobedo, 213 P.3d 689, 697 (Ariz. Ct. App. 2009) (quoting State v. Hickman, 68 P.3d 418, 426 (Ariz. 2003)), *vacated*, No. CR-09-0273-PR, 2010 WL 424963 (Ariz. Feb. 4, 2010).

142. *Id.* at 706 (Brown, J., dissenting).

143. *Id.* at 693–701 (majority opinion).

144. *Soliz*, 219 P.3d at 1049.

145. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 100 (1970).

146. *Soliz*, 219 P.3d at 1047.

decision would be to return to the rule of automatic reversal when a defendant faces a mandatory sentence of thirty or more years.