IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. ERICK ANTONIO ESCALANTE, Appellant.	)	No. CR-17-0251-PR Court of Appeals No. 1 CA-CR 15-0684 Yavapai County Superior Court No. V1300CR201580042

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND PIMA COUNTY PUBLIC DEFENDER'S OFFICE IN SUPPORT OF APPELLANT

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INTRODUCTION

In *State v. Escalante*, 242 Ariz. 375 (App. 2017), Division One of the Court of Appeals authored an opinion that first confuses determination of error with whether the error is reversible, and then moves on to confuse and conflate several concepts related to fundamental and prejudicial error.[1] Most critically, by holding that the determination of error depends in part on whether the error might have been the product of trial strategy, *id*. at 384-86 ¶¶ 41-45, the court conflates fundamental error with invited error.

By granting review, this Court can vacate the opinion below and write on a clean slate. *Amici curiae* Arizona Attorneys for Criminal Justice ("AACJ") and Pima County Public Defender's Office ("PCPD") endeavor to provide a standard that is understandable not just for appellate judges and lawyers but especially for the trial judges and prosecutors who will have to incorporate such a standard into their daily practice. The standard set forth in *State v. Henderson*, 210 Ariz. 561 (2005), resolved

[1] Another concern in this case is whether Division One's recent jurisprudence distinguishing "drug courier profile evidence" from "evidence of *modus operandi*," *see id*. at 379-81 ¶¶ 11-24, conflicts with this Court's opinion in *State v. Lee*, 191 Ariz. 542 (1998). Division One first created this doctrine in *State v. Gonzalez*, 229 Ariz. 550 (App. 2012), relying on old Ninth Circuit cases that this Court analyzed and rejected in *Lee*.

As Escalante has not raised this issue in any of his briefs, except to distinguish his case from *Gonzalez* in his Reply Brief, this brief will not argue that issue. In the event this Court vacates the opinion and remands this case for further proceedings, however, *amici* ask this Court to suggest that lower courts address the issue.

some of the inconsistencies in this Court's prior cases, but it created a new one, which the parties have asked this Court to resolve now. Moreover, *Henderson* left another question unresolved: does the prejudice analysis look to how improperly admitted evidence may have affected the trial jury in the case, or does it look to how a hypothetical jury would consider the case after hearing the case without any errors? Amici ask this Court to resolve these thorny questions in a comprehensive manner.

INTERESTS OF *AMICI CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

PCPD is the second largest indigent defense agency in Arizona tasked with defending those accused of felony offenses. Its eighty attorneys represent many thousands of clients every year on felony charges, both in Superior Court and in Juvenile Court. PCPD has a small appellate unit that represents clients in criminal

cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. The appellate courts of this state publish opinions in several of PCPD's cases every year.

Amici offer this brief because identifying and raising fundamental error is the bedrock of protecting all criminal defendants' right to a fair trial. Although criminal cases are conducted as adversarial proceedings, prosecutors have special duties in such cases to ensure that justice is done. *See* Ariz. R. Sup. Ct. 42, ER 3.8 (special duties of a prosecutor); *In re Peasley*, 208 Ariz. 27, 35 ¶ 34 (2004) ("The prosecutor's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.") (internal quotations omitted). Judges who preside over such cases have a similar duty to guard against fundamental error. *State v. Fernandez*, 216 Ariz. 545, 554 ¶ 32 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."). That a criminal defendant may raise a claim of ineffective assistance of counsel in postconviction proceedings does not mean that prosecutors should take advantage of unwitting defense counsel or that trial judges should assume such a glaring error by defense counsel was strategic. All stakeholders in the criminal justice process—especially the defendants and victims of crime—have a great interest in seeing that the trial is conducted fairly the first time. Action from this Court is necessary to affirm that some errors are so clear that trial judges and prosecutors must intervene.

ARGUMENTS

I. What Constitutes Fundamental Error.

A. This Court should give a usable definition for "fundamental error."

In *Henderson*, 210 Ariz. at 567-68 ¶¶ 19-20, this Court recognized several distinct formulations of "fundamental error," and it did not disavow any of them. Instead, the only language disapproved by *Henderson* came from cases that blurred the line between fundamental error and harmless error. *Id*. ¶ 21 (citing *State v. King*, 158 Ariz. 419, 424 (1988)). Although *Henderson* clarified that fundamental error requires the defendant to prove prejudice, it inadvertently compounded the problem by failing to define what exactly is "fundamental error."

In some cases, "fundamental error" is defined as error that "goes to the foundation of his case, takes away a right that is essential to his defense, ***and*** is of such magnitude that he could not have received a fair trial." *Id*. at 568 ¶ 24 (citing *State v. Hunter*, 142 Ariz. 88, 90 (1984)) (emphasis added). Cases in which this formulation is used are cited by the State. *See* Response to Petition at 8.[2] In other cases, rather than use the conjunctive "and," the Court alters the language in *Henderson* to replace "and" with the disjunctive "or." *See* Escalante's Supplemental

[2] Over the last year or so, *amici* have noticed a dramatic uptick in arguments from the Attorney General's Office suggesting that *Henderson* intended to impose a five-step elements test for determining when error is fundamental. *See, e.g.*, *State v. Gonzalez*, 2 CA-CR 2016-0277, Answering Brief at 5-6 ¶ 7.

Brief at 2-7 (citing cases). Whether the conjunctive "and" or the disjunctive "or" was intended may have gone unnoticed—but it is also asking the wrong question.

Defining what constitutes fundamental error is purposefully fuzzy. It calls to mind the famous words of Justice Stewart whose definition of pornography amounted to the maxim: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This Court used this language when confronting the fuzzy meaning of "clear and manifest error" and ultimately concluded that the term was synonymous with "abuse of discretion." *State v. Jones*, 203 Ariz. 1, 5 ¶ 8 & n.2 (2002). *See also Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 524 (1987) ("we cannot define a tort but can recognize one when we see it"). Any kind of a bright-line test would necessarily fail to recognize the delicate consideration of the seriousness of any given error in the context of the case.

Ultimately, "fundamental error" can best be described as "an error that was significant to the case and was so clear that the trial judge and prosecutor had a responsibility to intervene." Whatever words are used, the standard must be easy to understand and easy to apply. Under this formulation, the test to prove fundamental error is two steps. The defendant must show 1) that the error was important to the defense (similar to "goes to the foundation of the case" or takes away a right essential to his defense"); and 2) that the error was clear enough that a trial judge could be

expected to spot the error and take any appropriate remedial action (similar to "clear and egregious").

B. Fundamental error is distinct from invited error.

The court of appeals repeatedly conflated fundamental error with invited error at several points in its opinion in this case. "He has not shown he was deprived of a right essential to his defense by the state's use of the impermissible drug courier profile testimony. Instead, it appears his failure to object to the evidence may have been strategic—allowing the state to run amok with the drug courier profile evidence." *Escalante*, 242 Ariz. at 384 ¶ 38. "[I]f Escalante's failure to object to the impermissible evidence was a defense strategy, under that circumstance, he cannot show prejudice and therefore could not meet his burden under fundamental error review." *Id*. at 385 ¶ 41. "He thereafter used his conclusion about the testimony as a talking point that informed his defense strategy throughout the trial, arguing the evidence (or the 'real evidence') was insufficient to support a finding of guilt." *Id*. ¶ 43. "The possibility that counsel may not have known he could have objected to the drug courier evidence does not foreclose the apparent probability that he did not object to the evidence at trial because he wanted to show that the state did not proffer sufficient 'real evidence' to support a conviction." *Id*. ¶ 44. It then concluded:

> A defendant cannot show prejudice, and thus cannot obtain reversal under fundamental error review, even though the state substantively

> used impermissible drug courier profile evidence throughout the trial, where the record suggests the defendant did not object to the impermissible evidence as part of his defense strategy, and there is otherwise substantial evidence of his guilt.

Id. ¶ 45. The court cited no authority—and all existing authority is contrary.

First, in *State v. Logan*, this Court quoted the longstanding rule that a party may not be heard to complain of error when the error occurred "by his invitation and request." 200 Ariz. 564, 565 ¶¶ 8-9 (2001) (quoting *Sisson v. State*, 16 Ariz. 170 (1914)). "The purpose of the doctrine is to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *Id*. at 566 ¶ 11 (quoting *State v. Tassler*, 159 Ariz. 183, 185 (App. 1988)). "We achieve that purpose by looking to the source of the error, which must be the party urging the error…" *Id*. Thus, for an error to be invited, the defendant must be the one who injected it.

Two cases, both decided by Division One in 2009, show when errors are unreviewable as invited by the defense. In *State v. Fish*, 222 Ariz. 109, 132 ¶¶ 80-81 (App. 2009), because the defendant "expressly informed the superior court he did not want a lesser-included offense instruction on reckless manslaughter . . . . his failure to withdraw his objection to a reckless manslaughter instruction does not take him out of invited error." And in *State v. Lucero*, 223 Ariz. 129, 134 ¶ 11 (App. 2009), the court explicitly ruled that "Lucero's express decision not to object to the court's proposed response to the jury question does not rise to invited error." It distinguished *Fish* and other cases finding invited error because "in each of the above

cases, the crucial fact was that the party took independent affirmative unequivocal action to initiate the error and did not merely fail to object to the error or merely acquiesce in it." *Id*. ¶ 21, 220 P.3d at 256; *see also State v. Edmisten*, 220 Ariz. 517, ¶ 19, 207 P.3d 770, 776 (App. 2009) ("Edmisten himself requested this instruction below. Therefore, to the extent the language to which he now objects was an incorrect statement of law, he invited the error, and we will not consider it on appeal.").

These cases make clear that invited error only applies when a ruling is the product of a defendant's affirmative conduct, not a defendant's failure to act or even acquiescence. Thus, in order to foreclose a defendant's evidentiary claim as invited error, the defendant must actually introduce the evidence. But this is not to say that the defendant suffers no penalty; he waives all claims of error except for fundamental error, and he also bears the burden of proving prejudice. And in some cases, the failure to preserve the issue disables the reviewing court from having a record sufficiently developed upon which it could rule.

No doubt that in some cases, defense counsel's acquiescence to the improper introduction of evidence will be based on trial strategy. and sometimes the strategy will be wise and other times it will be foolish. The fact that the defendant may raise a claim of ineffective assistance of counsel in Rule 32 proceedings, however, does not foreclose the ability to raise a claim for fundamental, prejudicial error. The

Escalante court struggled with the question when to reject a claim of fundamental error based on the possibility of trial strategy, when the answer was already provided in *Logan* and *Lucero*.

C. Fundamental Error Requires the Trial Court to Take Action.

Unpreserved errors that rise to the level of fundamental error can occur at any stage of the case. They can occur in pretrial litigation, such as the failure to file a motion to suppress or to raise all claims for suppression. *See State v. Newell*, 212 Ariz. 389, 398 ¶ 34 (2006); *State v. Kinney*, 225 Ariz. 550, 555 ¶ 11 (App. 2010). They can occur during a police officer's testimony to which the defendant does not object. *State v. Stevens*, 228 Ariz. 411, 417 ¶ 16 (App. 2012). They can occur during jury instructions. *King*, 158 Ariz. at 424. They can occur at sentencing. *State v. McPherson*, 228 Ariz. 557, 559 ¶ 4 (App. 2012). Because one of the purposes of the rules of evidence is to ensure fair trials, *see* Ariz. R. Evid. 102, an evidentiary error may be fundamental if it has a significant impact on the fairness of the trial. This Court has never held that fundamental errors must be of constitutional magnitude, though they often go hand-in-hand.

The defining characteristic of fundamental error is its obviousness. "'The purpose of an objection is to permit the trial court to rectify possible error, and to enable the opposition to obviate the objection if possible.'" *State v. Rutledge*, 205

Ariz. 7, 13 ¶ 30 (2003) (quoting *State v. Hoffman*, 78 Ariz. 319, 325 (1955)). When an objection is made and the record is preserved, appellate courts review under the harmless-error standard in order to incentivize the opposing party to ensure that the trial is free of error. *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)). When a claim of error is unpreserved at trial, however, the State is denied notice that the defendant will later raise the claim. Thus, for an error to be fundamental, it must be clear enough for the prosecutor and trial judge to see even without objection, such that the State can be deemed to have notice.

This Court has long recognized the need "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.'" *Henderson*, 210 Ariz. at 567 ¶ 19 (quoting *State v. Valdez*, 160 Ariz. 9, 13-14 (1989)) (alteration in original). Restricting review of unpreserved errors to those that are fundamental is a deterrence against gamesmanship by clever defense attorneys. This then begs the question: how does a reviewing court know when the failure to preserve an error was part of a clever attorney's gamesmanship and when it was due to incompetence? The *Escalante* opinion struggled with this question because it neglected longstanding case law on the doctrine of invited error as discussed above.

It is virtually axiomatic that no one's interest is served by having a trial that is later reversed for legal error so that everyone can try it again. If it is possible to

reverse a defendant's conviction even absent an objection when error is fundamental, then it follows that the obligation to obviate fundamental error is shared by the prosecutor and the judge. This is an important rule to enforce, because the admonishment against gamesmanship must extend equally to prosecutors.

In Escalante's case, the prosecutor should have recognized that the drug courier profile evidence and the hearsay evidence was inadmissible and thus should have decided not to present it. If in doubt, the prosecutor should have filed a motion *in limine* to admit the evidence, presenting legal authority both supporting and opposing admission, so that the trial judge could make a more informed decision. Similarly, once the trial evidence developed and the trial judge could readily see that the evidence was inadmissible, the court should have held a bench conference or excused the jury for a few minutes to discuss the issue. If, at any time, defense counsel informed the court that it strategically agreed to the introduction of the evidence because it fed into the defense theory that the State had no "real evidence," then any claim of error could be disallowed on appeal as invited by the defense. *See State v. Miller*, 234 Ariz. 31, 39-40 ¶¶ 21-22 (2013) (counsel affirmatively informed trial court its decision to allow inadmissible character evidence was strategic).

If raised in a timely manner, it is possible to design remedies even for egregious errors. The court can strike the offending testimony and instruct the jury to disregard the evidence. *State v. Hardy*, 230 Ariz. 281, 293-94 ¶¶ 61-62 (2012);

see also State Bar of Arizona, *Revised Arizona Jury Instructions* (Criminal) ("RAJI"), Std. 4 (4th ed. 2016) ("Any testimony stricken from the court record must not be considered."). If needed, the parties and court can craft additional instructions. And, although declaring a mistrial is "the most dramatic remedy for trial error," *State v. Adamson*, 136 Ariz. 250, 262 (1983), it is still preferable to reversal on appeal and retrying the case several years later.

D. Bad character evidence may rise to the level of fundamental error.

In some cases, improperly admitted bad character evidence can rise to the level of fundamental error. The most obvious case would involve evidence suggesting aberrant sexual propensity that was inadmissible under Ariz. R. Evid. 404(c). But any kind of bad character evidence, excludable under Rule 404, runs tremendous risk of prejudicing the jury; once the jury has such a picture in its mind, it cannot purge it so readily. *State v. Jacobs*, 94 Ariz. 211, 214 (1963) (quoting *State v. Kellington*, 93 Ariz. 396, 398 (1963)) ("The effect of such testimony, having no relation to the crime charged, was to create in the minds of the jury an impression that the defendant's character was bad, and no admonition by the court could expunge this prejudicial attribute."). Specific to profile evidence, it could be fundamental because it shifts the jury away from considering the evidence of the charged act and toward looking at the defendant as fitting the profile of an offender.

Previous Arizona cases failed to define the evidentiary rules surrounding profile evidence, but in *State v. Haskie*, 242 Ariz. 582, 588 ¶ 27 (2017), this Court held that profile evidence should be filtered through Rules 401-403 and 702. In *State v. Ketchner*, 236 Ariz. 262, 265 ¶ 17 (2014), this Court relied on *Ryan v. State*, 988 P.2d 46, 55 (Wyo. 1999), which explained that the three common evidentiary bases for precluding profile evidence are 1) it lacks of probative value; 2) it constitutes impermissible character evidence; and 3) Rule 403 considerations. Profile evidence is essentially bad character evidence—only it is worse because it is the bad character of others that is being attributed to the defendant and thus it is also irrelevant and highly prejudicial and misleading. Furthermore, when bad character evidence is erroneously admitted without objection from the defense, the error is regularly compounded by the failure of the parties to request and the court to give a limiting instruction pursuant to Rule 105. *See Haskie*, 242 Ariz. at 588 ¶ 26; *see also* RAJI Std. 26A (explaining how jury may and may not use evidence of other acts).

II. What Constitutes Prejudice.

A. Prejudice is a distinct inquiry from identifying fundamental error.

The *Escalante* court's prejudice analysis confusingly substituted the standard for determining sufficiency of evidence. 242 Ariz. at 382 ¶ 27 ("we view the evidence in the light most favorable to sustaining the jury's verdicts, as we are

required to do on appeal") (citing *State v. Nelson*, 214 Ariz. 196, 196 ¶ 2 (App. 2007)). But viewing the evidence in this manner at the outset of a case is not a standard of review for considering any claims of error, except for that of insufficient evidence. *State v. West*, 226 Ariz. 559, 562 ¶¶ 15-16 (2011). Depending on the error, the standard of review might be to "view the evidence in the light most favorable to a defendant's request for a self-defense instruction," *see State v. Carson*, 243 Ariz. 463, 464 ¶ 2 (2018), or to "view the evidence in the light most favorable to upholding the trial court's ruling," *see State v. Peoples*, 240 Ariz. 245, 247 ¶ 7 (2016).[3] By determining that the errors were not prejudicial because there was sufficient remaining evidence to convict, *see Escalante*, 242 Ariz. at 384 ¶ 36, the court committed significant legal error, and thus its holding must be vacated.

Escalante also conflated the analysis concerning whether a claimed error is fundamental with whether it is prejudicial. *Id*. at 383-84 ¶¶ 35-36. Although *Henderson* makes clear that these are two different steps in the analysis, at times this Court has commingled identification of error with prejudice. *See, e.g.*, *State v. Cota*, 229 Ariz. 136, 146 ¶ 33 (2012) ("No fundamental error occurred here in admission of the interrogation after page 40 because the continued questioning did not

[3] For many years this Court has stated at the outset of the Factual and Procedural History section, "[w]e view the facts in the light most favorable to upholding the verdicts." *E.g.*, *Miller*, 234 Ariz. at 36 n.1. *Amici* suggest the Court discontinue this practice, since this section of a case does not impact the standard of review for any claim of error, and it often confuses the lower courts as it did in this case.

prejudice Cota at any phase of the trial."); *State v. Bible*, 175 Ariz. 549, 572 (1993) ("Because this inquiry is fact intensive, the same error may be fundamental in one case but not in another."). In many cases, the determination of error goes hand-in-hand with determining the impact on the case. *See State v. Almeida*, 238 Ariz. 77, 83 ¶ 25 (App. 2015) ("The denial of a properly requested jury instruction under § 13–411 will usually be reversible error, given the prejudice that naturally flows from the refusal to allow a distinct legal theory of defense and from the failure to clarify the state's burden of proof on that issue.") (internal citations omitted).

This Court should clarify that determination of fundamental error is distinct from determining prejudice, even if the same facts apply to both prongs. This is important because some errors have been identified as fundamental by their very nature. *See, e.g.*, *State v. Davis*, 206 Ariz. 377, 390 ¶ 64 (2003) (violation of right to a unanimous jury, protected by article 2, section 23 of the Arizona Constitution, is fundamental error). When a right is considered so important to the integrity of a criminal trial that its violation is considered fundamental error, it should suffice for an appellant to rest on such authority; but the appellant then must prove prejudice.

B. Quantum of proof for prejudice.

According to *Henderson*, 210 Ariz. at 569 ¶ 27, prejudice requires the defendant to "show that a reasonable jury, applying the appropriate standard of

proof, could have reached a different result than did the trial judge." This begs the question: what is the quantum of evidence for "could"? In his concurrence, Justice Hurwitz suggested "that the fundamental error test for prejudice we adopt today … is for practical purposes no different than the harmless error test adopted in *Ring III*" because the difference in the burden of proof—on the State versus on the defendant—is conceptual but will not have much effect in practice. *Id*. at 570-71 ¶¶ 38-39 (Hurwitz, J., concurring). This suggests that the quantum of evidence needed for the defendant to prove prejudice is not that high.

Unfortunately, the lower courts have not uniformly applied the standard and some have morphed the "could" standard into a "would" standard. *E.g.*, *State v. Munninger*, 213 Ariz. 393, 397 ¶ 14 (App. 2006). Such a standard is more akin to the standard used in claims of ineffective assistance of counsel, where the standard for determining prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A 'reasonable probability' is less than 'more likely than not' but more than a mere possibility." *State v. Lee*, 142 Ariz. 210, 214 (1984).

This Court has always been fully aware of the *Strickland/Lee* standard of "reasonable probability," and it purposefully did not use such language in

Henderson. For this reason, the Court should formally adopt the concept of prejudice as stated in Justice Hurwitz's *Henderson* concurrence.

C. Where the fundamental error involves trial evidence or jury instructions, prejudice must be gauged by the impact on the defendant's trial, not on how a hypothetical jury may have assessed the case absent the error.

In assessing whether an error is harmless, "[w]e must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *Bible*, 175 Ariz. at 588. "The inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id*. Arizona cases are not so clear, however, as to whether the same standard applies upon discovering fundamental error. Since a reviewing court determining prejudice considers the impact of the error on the jury that heard the case, it makes sense to apply the same standard as used in harmless-error review. The reviewing court should determining the prejudicial impact of the evidence on the jury that heard the case, rather than substitute a hypothetical jury that hears only the proper evidence.

The error in *Henderson* was denial of a jury trial on aggravating factors, thus making it impossible to consider the effect of the error on his trial jury. When this

Court considered all of the *Ring*[4]-remand cases under the harmless-error standard, it used the same language of what a "reasonable jury" might find. *E.g.*, *State v. Sansing*, 206 Ariz. 232, 237 ¶ 16 (2003) (harmless error because "any reasonable jury would have found that Sansing murdered Trudy in an especially cruel manner"); *State v. Pandeli (Pandeli III)*, 204 Ariz. 569, 572 ¶¶ 9-10 (2003) ("no reasonable jury could fail to find the F.6 factor" but "we cannot say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have assessed the defense expert's testimony as did the judge…"). Lower courts have followed this standard. *See State v. Ortiz*, 238 Ariz. 329, 346 ¶ 79 (App. 2015) ("no reasonable jury would have failed to find…"). Thus, *Henderson* did not intend to create a "reasonable jury" standard in fundamental error cases generally, but it recognized that no other standard could conceivably apply when no jury ever heard the trial or phase of trial.

Other cases suggest that evidentiary and instructional errors should be considered in the context of the jury that heard the case. In *Stevens*, the court deemed that testimony that the defendant reacted to an officer's entry into her home by yelling "search warrant" essentially used her invocation of Fourth Amendment rights as substantive evidence of guilt and thus was fundamental error. 228 Ariz. at 417 ¶¶ 15-16. When evaluating prejudice, the court did not express whether it was

[4] *Ring v. Arizona*, 536 U.S. 584 (2002); *State v. Ring*, 204 Ariz. 534 (2003).

considering the impact of the error on the trial jury or whether a reasonable jury hearing only admissible testimony could reach a different result. *Id*. ¶¶ 17-18, In *Edmisten*, 220 Ariz. at 523 ¶ 18, the court stated, "even were we to conclude fundamental error did result from the instructions, there is no reasonable probability the jury would have reached a different result, and Edmisten has not shown prejudice." This signals that, when considering evidentiary or instructional errors, the impact of the error is measured in terms of the jury that heard the case.

In deciding whether an error was prejudicial, the reviewing court must assess the quality and quantity of improperly admitted evidence. Where a fundamental error involved introduction of improper character evidence, however, the prejudice is more likely to be extreme, because the jury hearing the case cannot help but allow the stink to cover the defendant. *See Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it.").

Only by weighing the impact of the error on the jury that actually heard the case can the reviewing court ensure that the defendant's right to a fair trial by jury is honored. Therefore, this Court should hold that the "reasonable jury" standard is reserved exclusively for cases where the defendant was denied a jury trial.

CONCLUSION

When fundamental error reveals itself in a trial, prosecutors and judges should follow the adage, "if you see something, say something." The alternative is to remain silent and let a trial turn into a runaway train with increased likelihood of an appellate reversal for fundamental and prejudicial error. The requirement that fundamental error be reviewable on appeal incentivizes prosecutors and trial judges to ensure that a trial is fair. The State's requested holding, like the court of appeals' opinion, essentially guts fundamental error review and creates a perverse incentive for prosecutors to inject error into the case in the hope that defense counsel will miss it.

For the above reasons, *amici* ask this Court to enforce the reviewability of unpreserved errors for fundamental, prejudicial error. *Amici* also ask this Court to clarify the process for establishing fundamental and prejudicial error.

RESPECTFULLY SUBMITTED this 19th day of April, 2018.

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