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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Arizona Rule of
Criminal Procedure 13.5

Supreme Court No. R-26-____

**Petition to Amend Arizona Rule of
Criminal Procedure 13.5**

(Expedited Consideration)

Pursuant to Rule 28, Rules of the Supreme Court of the State of Arizona, the Arizona Attorney General's Office petitions this Court to amend Arizona Rule of Criminal Procedure 13.5 as set forth in the attached Appendix A. This Petition is seeking expedited consideration to be heard at the Arizona Supreme Court's August Rules Agenda. *See* Ariz. R. Sup. Ct. 28(h). No similar proposal to amend Rule 13.5 has been filed in the last five years.

INTRODUCTION

Rule 13.5 contains an ambiguity that has produced inconsistent results and, left unresolved, will cause significant disruption to criminal proceedings statewide. Subsections (a) and (c) of Rule 13.5 share nearly identical language, but they were

adopted for fundamentally different purposes and were never intended to operate identically. However, because the rule’s text does not make that distinction explicit, a divided court of appeals recently held in *Navarro-Figueroa v. State*, 577 P.3d 1025 (Ariz. App. Aug. 25, 2025), that the procedural right to a pretrial probable cause determination for capital aggravating circumstances under Rule 13.5(c) must also apply to all non-capital sentencing allegations under Rule 13.5(a). The decision mandates pretrial “mini-trials” for routine sentencing allegations. A rule change would make clear that this problematic result is not required by Rule 13.5.

The 2002 rule change petition (Appendix B) that created the rule’s modern text irrefutably demonstrates that subsections (a) and (c) were adopted for different reasons, serve different purposes, and were never intended to be procedural twins. Subsection (a) was a narrow, pragmatic change to reflect *Apprendi*’s jury-trial requirement. Subsection (c) was a compromise crafted to address the profound systemic changes required by *Ring v. Arizona* and to provide capital defendants a specific, procedural backstop unique to death penalty litigation. The Rule 13.5(c) right to a pretrial probable cause determination was deliberately fashioned for capital cases; it was not an accidental byproduct of language that happened to appear in both subsections.

This petition asks the Court to exercise its constitutional rulemaking authority under Article 6, Section 5(5) of the Arizona Constitution to resolve any ambiguity.

Because this Court has consistently recognized that the procedural rights afforded by Rule 13.5 are court-created—not constitutionally mandated—this Court is fully empowered to define with precision what the rule requires and to distinguish between capital and non-capital sentencing allegations in the manner the rule’s own history demands.

I. The Rule’s Drafting History Makes Clear That Subsections (a) and (c) Were Adopted for Different Purposes and Were Never Intended to Operate the Same Way.

The language found in current Rule 13.5(a) and (c) originated with a 2002 rule change petition (Appendix B) requesting emergency amendments to the Arizona Rules of Criminal Procedure in response to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and the death penalty statute passed by the Arizona Legislature in those decisions’ wake.

In *Apprendi*, the United States Supreme Court held that the Sixth Amendment’s jury trial guarantee, made applicable to the States by the Fourteenth Amendment, entitles a defendant to have a jury determine any fact that would increase the defendant’s maximum potential punishment. *See* 530 U.S. at 490. Two years later, the court in *Ring* held that the reasoning of *Apprendi* applied equally to capital sentencing allegations and therefore rendered Arizona’s death penalty statute unconstitutional, because Arizona’s statutory scheme allowed a judge, sitting alone,

to determine the existence of aggravating circumstances necessary to impose death. *See Ring*, 536 U.S. at 589.

In response to *Ring*, the Arizona Legislature quickly amended the State's death penalty statute to reflect that a "jury, not the trial court," would "actually determine[] if the death sentence is appropriate." *See* Appendix B, Maricopa County Attorney's Motion to Amend Rules 8.2, 11.2, 13.5, 15.1, 15.2, 15.9, 18.1, 18.5, 18.6, 19.1, 20, 23.2, 24.1, 26.2, 26.3, 26.9, 26.10, Arizona Rules of Criminal Procedure (the "2002 petition"), at 2. Soon after, the Maricopa County Attorney, in consultation with the Arizona Attorney General, submitted a rule change petition to amend several Arizona Rules of Criminal Procedure to "comport with the new sentencing procedures" prompted by the *Apprendi* and *Ring* decisions. *See generally id.*

Because the driving force behind the 2002 petition was the overhaul of the State's capital sentencing structure, the proposed changes to Rules relating to non-capital sentencing allegations were fairly minimal. The 2002 petition proposed adding language to Rule 13.5(a), which already reflected the State's ability to amend a charging document to add allegations of prior convictions, to also allow amendment to add "other non-capital sentencing allegations that must be found by a jury." *Id.* at 3-4, 20. As the 2002 petition states, this change to Rule 13.5(a) was intended solely to reflect that, after *Apprendi*, certain non-capital sentencing allegations "now must be presented to the jury," and that "the prosecutor must add

such allegations within the time limits of Rule 16.” *See id.* at 4. The 2002 petition also proposed moving language from then-existing Rule 19.1(c) to Rule 13.5, “to give fair warning to practitioners that sentencing allegations can be challenged by motion,” but characterized this as “not a substantive change” and said nothing about the bases on which non-capital sentencing allegations might be challenged, or how those challenges should be resolved. *Id.* at 4.

The changes proposed with respect to capital sentencing allegations were, in contrast, much more voluminous. *See, e.g., id.* at 3 (amendments to Rule 8.2, governing time-limits for sentencing-related discovery in capital cases, and Rule 11.2, governing examination of a capital defendant’s mental health); 8-10 (amendments to Rule 15.1(j) and 15.2, governing disclosure related to capital aggravating circumstances). What’s more, although the primary goal and effect of the proposed amendments were to conform the Rules to the constitutional requirements clarified in *Ring*, the proposed amendments related to capital sentencing allegations went a step further in an effort to preemptively address constitutional questions left unanswered by *Ring*.

Specifically, the 2002 petition’s authors observed that language in *Ring* characterizing capital aggravators as the “functional equivalent” of elements of capital murder left open the question whether capital aggravators must be alleged in the charging document. *Id.* at 6-7. The authors urged the Court to decide that

“important question earlier rather than later” and laid out the basis for their position that “the State need not allege in the charging document, the aggravating circumstances to be proved in a capital case.” *Id.* at 7. To bolster their position, the authors explained how their proposed amendment to what would eventually become Rule 13.5(c) could serve as a compromise to “satisfy any concern the Court may have” about the constitutional implications their position presented. *Id.*

As an initial matter, the 2002 petition’s authors encouraged the Court to maintain the then-existing Rule, still in place today, allowing the State 60 days following a defendant’s arraignment to file a notice of intent to seek the death penalty along with a list of aggravating factors relied upon in deciding to do so. *Id.* at 5-6. The authors recognized that maintaining this 60-day delay would mean the aggravating circumstances would not be subject to a probable cause determination before initiation of a case but explained that, under the proposed version of Rule 13.5(c), the State’s notice of intent to seek the death penalty would automatically amend the indictment, and the defendant would be entitled to challenge the legal sufficiency of the aggravating circumstances under Rule 16 at any point thereafter. *Id.* at 6. The proposal, the authors explained, would “allow the defendant to request a determination of probable cause before trial if the defense deems it appropriate,” albeit from the trial judge rather than from a grand jury or a magistrate. *Id.* at 7-8.

The Court accepted the amendments proposed by the 2002 petition and, two years later, announced its agreement that because capital sentencing allegations were not the functional equivalent of elements, neither the U.S. nor the Arizona Constitution required the State to allege them in a charging document and subject them to a determination of probable cause. *See McKaney v. Foreman*, 209 Ariz. 268, 270-73, ¶¶ 9-22 (2004). Notably, for the two dissenting justices who would have held otherwise, the compromise codified in Rule 13.5(c) served as precisely the procedural backstop envisioned by the 2002 petition’s authors. They reasoned that, even if capital aggravators were not included in a charged document, the defendant had an adequate remedy because he could still challenge and obtain a pretrial judicial determination of probable cause for the capital aggravators pursuant to Rule 16. *Id.* at 275-276, ¶¶ 35-38 (Hurwitz, J., dissenting in part and concurring in part).

Finally, in 2009, the staying power of the compromise proposed by the 2002 petition was cemented, when the Arizona Supreme Court in *Chronis* relied on the “unique circumstances surrounding” the promulgation of Rule 13.5(c) to formally recognize that the Rule “allows a defendant in a capital case to request a probable cause determination for alleged aggravating circumstances.” *See Chronis v. Steinle*, 220 Ariz. 559, 563, ¶ 20 (2009). The *Chronis* opinion itself characterized—and *Sanchez v. Ainley*, 234 Ariz. 250, 254, ¶ 15 (2014), affirmed—the protections it announced as judicially created (*not* constitutionally mandated) and made clear that

the protections announced applied only in the capital context, i.e., to challenges made pursuant to Rule 13.5(c). *See Chronis*, 220 Ariz. at 562, ¶ 17 (explaining that *McKaney* did not affect the Court’s holding because *McKaney* did not decide “whether a **court rule** provides a procedural right to a probable cause determination,” and citing Article 6 § 5(5) of the Arizona Constitution for the proposition that the Court has “[p]ower to make rules relative to all procedural matters in any court”) (emphasis added); *see also id.* at 563 ¶ 20 (“Arizona Rule of Criminal Procedure **13.5(c)** allows a defendant **in a capital case** to request a probable cause determination for alleged aggravating circumstances.”) (emphasis added).

II. Arizona Caselaw Has Long Recognized that the Protections Afforded by Rule 13.5(c) Are Judicially Created, Not Constitutionally Compelled, and Unique to Capital Cases—Confirming This Court’s Full Authority to Amend the Rule.

Until recently, caselaw addressing challenges to non-capital sentencing allegations under Rule 13.5(a) proceeded separately and distinctly from *Chronis* and other caselaw interpreting Rule 13.5(c). Cases interpreting Rule 13.5(a) focused narrowly on the defendant’s due process right to notice of non-capital sentencing allegations, not on prejudice to any right to a pretrial adjudication of probable cause. *See State ex rel. Smith v. Conn ex rel. Cty. of Mohave*, 209 Ariz. 195, 198-99, ¶¶ 12-15 (App. 2004) (finding that notice of aggravating factors is necessary for notice purposes and to ensure factfinding by the jury occurs); *State v. Nichols*, 201 Ariz.

234, 238, ¶ 15 (App. 2001) (observing that allegations related to serious drug offenses “need not be alleged in the charging document” if notice of the allegation is properly given); *State v. Nelson*, 2 CA-CR 2022-0086, 2023 WL 6534124, at *8-10, ¶¶ 44-51 (Ariz. App. Oct. 2023) (mem. decision) (assuming without deciding that Rule 13.5(a) applied to State’s allegation of aggravating circumstance during guilt-phase jury deliberations and finding that no due process violation occurred because defendant was not prejudiced). The narrow focus of those cases reflected an implicit acknowledgement that the Supreme Court’s expansive interpretation of Rule 13.5(c) reflects the Court’s policy decision “to afford greater procedural rights to a defendant facing the death penalty.” *See, e.g., Sanchez*, 234 Ariz. at 254, ¶ 15 (2014).

This longstanding recognition of a distinction between the two subsections was eliminated by the recent Arizona Court of Appeals’ decision in *Navarro-Figueroa v. State*. There, the court relied on the shared language and simultaneous adoption of subsections 13.5(a) and 13.5(c) to hold that the extra-constitutional protections afforded to capital defendants under 13.5 and *Chronis* must apply equally to non-capital defendants. *Navarro-Figueroa*, 577 P.3d at 1027, ¶¶ 7-10. But the context provided by the 2002 petition, which was not before the court in *Navarro-Figueroa*, suggests otherwise.

As explained in detail in Section I, *supra*, although the language used in each subsection is the same, the 2002 petition clearly demonstrates that the considerations which drove the adoption of Rule 13.5(c)—namely, an interest in providing capital defendants an opportunity to obtain a determination of probable cause for capital sentencing allegations before trial while maintaining the 60-day grace period to file a notice of intent to seek the death penalty—did not motivate or play any role whatsoever in the adoption of Rule 13.5(a). Instead, the 2002 petition reflects that Rule 13.5(a) was meant only to satisfy the requirement to provide defendants notice of any non-capital sentencing allegations to be submitted to the jury.

A further reason amendment is warranted is that the *Navarro-Figueroa* majority concluded that the U.S. Constitution *required* extension of *Chronis* protections to non-capital defendants. *Navarro-Figueroa*, 577 P.3d at 1028, ¶ 14. That conclusion is difficult to reconcile with this Court’s repeated recognition that Rule 13.5(c) procedures are not constitutionally mandated and that neither the federal nor the state constitution entitles defendants in state prosecutions to a pretrial determination of probable cause for either capital or non-capital sentencing allegations. To the extent the constitutional question remains open, the proposed amendment—grounded in this Court’s own rulemaking authority rather than constitutional mandate—resolves the uncertainty prospectively on a clear and durable basis.

In *McKaney v. Foreman*, this Court addressed whether the Fifth Amendment’s Grand Jury Clause requires that aggravating factors be “preliminarily considered by the grand jury or neutral arbiter.” 209 Ariz. at 270, ¶¶ 10–13. The Court held that “the Fifth Amendment does not require that a grand jury pass on the sufficiency of the evidence supporting an aggravating factor.” *Id.* Because the Fifth Amendment’s grand jury requirement does not apply to state prosecutions, “it would be anomalous for us to require, under the United States Constitution, that a grand jury determine probable cause as a basis for alleging aggravating factors.” *Id.* at 271, ¶ 11; *see also id.* at 273, ¶ 25 (Hurwitz, J., concurring in part and dissenting in part) (agreeing that the constitution does not require a probable cause finding for aggravators but arguing for such a requirement as a matter of court rule).

McKaney thus undermines any argument that the Fifth Amendment requires pretrial probable-cause determinations of either capital or noncapital aggravators. The court of appeals did not rely on the Fifth Amendment directly for its holding in *Navarro-Figueroa*, however. Instead, it cited *Ring v. Arizona* for the proposition that the United States Constitution requires a pretrial probable-cause determination. *Navarro-Figueroa*, 577 P.3d at 1028, at ¶ 14. But the language the court of appeals invoked from *Ring* was a block quote from *United States v. Jones*, 526 U.S. 227 (1999), a case analyzing the Fifth Amendment’s Indictment Clause in a federal carjacking prosecution. *See Ring v. Arizona*, 536 U.S. 584, 600 (2002).

The court of appeals thus grounded its constitutional holding in a federal indictment standard that this Court, in *McKaney*, has already held is inapplicable to state prosecutions. Extending that federal charging standard to state court proceedings would produce precisely the “anomalous” result *McKaney* cautioned against—and one the proposed amendment forecloses by grounding the rule’s text firmly in this Court’s rulemaking authority. 209 Ariz. at 271, ¶ 11.

Separately, and independently of the textual and historical arguments above, any reliance on *Ring* and *Apprendi* to prescribe the timing of a preliminary screening of aggravating factors is unavailing. Those cases establish *what* facts must be found (aggravating circumstances that increase the maximum penalty), by *whom* (juries), and under *what standard* (beyond a reasonable doubt). *See generally* 530 U.S. 466; 536 U.S. 584. They do not prescribe *when* a preliminary screening of those facts must occur. Indeed, *McKaney* expressly recognized that *Apprendi* and *Ring* “are confined to Sixth Amendment jury-trial considerations and do not apply to charging decisions,” 209 Ariz. at 271, ¶ 12, which are matters of state law, not federal constitutional mandate.

In sum, a capital defendant’s rights under 13.5(c) and *Chronis* are not constitutionally rooted but instead derive from “this Court’s policy decision to expand defendants’ rights pursuant to its procedural rulemaking authority.” *Allen v. Sanders*, 240 Ariz. 569, 574, ¶ 28 (2016) (Bolick, J., concurring). Neither the federal

nor the state constitution require, and the more limited history behind the adoption of Rule 13.5(a) does not support, the *Navarro-Figueroa* court's decision to extend the same procedural rights to defendants *not* facing the death penalty. The rule's current text does not make this distinction explicit, and the resulting ambiguity has generated precisely the kind of interpretive confusion this Court's rulemaking authority exists to resolve. Amendment is warranted to bring the rule's text into conformity with its documented history and this Court's own precedent.

III. Policy and Practical Considerations Justify Amending Rule 13.5 to Address the Distinct Interests Served by Challenges to Non-Capital and Capital Sentencing Allegations.

Notwithstanding the language common to Rules 13.5(a) and 13.5(c), the State's notice of non-capital sentencing allegations contemplated by Rule 13.5(a) and the State's notice of intent to seek the death penalty referenced in Rule 13.5(c) serve distinct purposes and have vastly different impacts on the trajectory of a case. Non-capital sentencing allegations governed by Rule 13.5(a) need not be disclosed to the defendant in a particular manner or form. *See* Rules 13.5(a), 16.1(b); *see also State v. Nichols*, 201 Ariz. 234, ¶¶ 10 & 15 (App. 2001) (“*Apprendi*-element equivalents” need not be included in charging documents). The State need only provide a defendant notice and opportunity to challenge the aggravators presentencing. *See State v. Marquez*, 127 Ariz. 3 (1980) (finding “no support for appellant’s argument that the word ‘alleged’” in the then-existing sentencing statute

“was meant to require some formal action by the prosecutor before the trial judge could make a finding that aggravating circumstances exist”); *see also* A.R.S. § 13-702(E) (requiring the court to provide the parties notice of its intent to apply aggravators before sentencing).

In stark contrast, Rule 13.5(c) provides for automatic amendment of the indictment to include capital sentencing allegations when a notice of intent to seek the death penalty is filed—an action that fundamentally transforms the nature of the entire proceeding and activates an elaborate statutory framework governing capital prosecutions. *See* A.R.S. §§ 13–751 to –759. This single filing, which must occur within 60 days of the defendant’s arraignment in a prescribed form, converts a non-capital case into a capital one, thereby triggering unique disclosure obligations and procedural protections at every stage of the litigation.

For example, the Rules require that “[n]o later than 30 days after filing a notice of intent to seek the death penalty, the State ... disclose to the defendant” detailed information about the witnesses, documents, and other material and information the State intends to introduce to support each aggravating circumstances. *See* Rule 15.1(i)(3). The State’s production triggers a deadline for the defendant to make similar pretrial aggravation disclosures, which in turn triggers deadlines for disclosure by either party in rebuttal. *See* Rule 15.1(i)(4), 15.2(h)(2). What’s more, counsel appointed to represent a defendant must meet heightened requirements in

cases where capital aggravators have been alleged. *See* Rule 6.8. And, unless the defendant objects, the Court must appoint a psychological expert in order to prescreen for intellectual disability and a psychologist or psychiatrist to evaluate the defendant’s sanity and competency to stand trial once a notice of intent to seek the death penalty has been filed. *See* A.R.S. § 13-753, 13-754.

In short, “it makes an enormous difference whether a case proceeds with a capital rather than non-capital offense.” *Allen*, 240 Ariz. at 574 ¶ 29 (Bolick, J., concurring). This distinction is not a matter of degree, but of kind, premised on the “qualitative difference between death and all other penalties.” *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). Given this context, the Court’s decision to provide, as a prophylactic measure, the same type of preliminary testing for capital aggravators as for offenses in an indictment—a consideration of probable cause—makes sense. *See Chronis*, 220 Ariz. at 561–62, ¶¶ 11–17. The *Navarro-Figueroa* court’s mechanical application of the identical-language canon to extend *Chronis* protections to non-capital defendants does not, because it equates a routine notice of non-capital sentencing allegations with a death penalty notice that triggers a singular statutory framework—an equation the rule’s own history and the qualitative difference between capital and non-capital cases cannot support.

Rule 13.5 should be amended to leave no question that capital and non-capital sentencing allegations have vastly distinct effects on a case and that challenges to them may therefore be treated differently.

IV. Practical Considerations and the Lack of Constitutional Mandate Justify Amending Rule 13.5 to Reaffirm the Trial Court’s Discretion over Challenges under Rule 13.5(a).

Adopting the interpretation of Rule 13.5 set forth in *Navarro-Figueroa* will have immediate and disruptive consequences throughout Arizona’s criminal justice system by forcing trial courts statewide to conduct pretrial evidentiary hearings for every contested non-capital sentencing allegation, compelling duplicative presentation of evidence, and consuming scarce judicial resources. The opinion mandates inefficient “mini-trials” even where other tools are more appropriate. *See Navarro-Figueroa*, 577 P.3d at 1030, ¶¶ 29, 31-32 (Sklar, J., dissenting). This eliminates a superior court’s ability to use post-verdict, pre-aggravation hearings or Rule 20 motions to resolve such challenges, even when those tools would better serve the interests of justice and judicial economy.

CONCLUSION

For these reasons, the Attorney General’s Office respectfully petitions the Court to adopt the proposed amendment to Rule 13.5, attached as Appendix A.

Respectfully submitted on _____, 2026.

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ATTACHMENT A¹

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 13.5. Sentencing Allegations; Amending Charges; Defects in the Charging Document

(a) **Prior Convictions and Other Noncapital Sentencing Aggravating Allegations; Challenges.** Within the time limits of [Rule 16.1\(b\)](#), the State may amend an indictment, information, or complaint to add allegations of one or more prior convictions and other noncapital sentencing allegations. A defendant may challenge the legal sufficiency of the State's allegations of prior convictions and noncapital sentencing allegations by filing a motion under Rule 16. Allegations of Prior convictions and noncapital sentencing allegations are not subject to determinations of probable cause.

(b) [No Change]

(c) [No Change]

(d) [No Change]

¹ Additions to the text of a rule are shown by underscoring and deletions of text are shown by ~~strike-through~~.