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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Arizona Rule of
Criminal Procedure 13.5

No. R-26-0028

**Reply in Support of Petition to
Amend Arizona Rule of Criminal
Procedure 13.5**

The Arizona Attorney General's Office ("Petitioner") submits this Reply in support of its Petition No. R-26-0028 to Amend Arizona Rule of Criminal Procedure 13.5. This Reply responds to comments submitted by the Directors of the Maricopa County Indigent Defense Agencies (the "Indigent Defense Agency Respondents") and the Arizona Attorneys for Criminal Justice (the "AACJ Respondents").

I. Subsections (a) and (c) Were Motivated by Different Intentions and Serve Different Purposes, Despite Their Common Language.

Respondents characterize the Petition as a plea to ignore the current text of Rule 13.5 in favor of the Rule's legislative history, and insist that "[w]hen the text is clear and unambiguous, we apply the plain meaning and our inquiry ends." *See* AACJ Comment at 8 (citing *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017)). But, as recognized in *Chronis*, the language of Rule 13.5 is not "clear and unambiguous,"

and the interpretation of Rule 13.5(c) adopted in *Chronis* that Respondents seek to preserve derives entirely from that subsection's history, which differs meaningfully from the history behind subsection 13.5(a). If amended as proposed in the Petition, Rule 13.5 would better reflect the longstanding consensus that subsections (a) and (c) were motivated by different intent and serve different purposes.

a. The Broad Interpretation of 13.5(c) Adopted in Chronis Was Rooted in Historical Context That Does Not Apply to 13.5(a).

Petitioner does not deny that the language in subsections 13.5(a) and (c) is similar. But Respondents' focus on the shared language of the two subsections ignores that the *Chronis* interpretation of subsection (c) that *Navarro-Figueroa* applied to subsection (a) can hardly be discerned from the Rule's plain language. The *Chronis* interpretation of 13.5(c) instead derives from the history of that subsection, informed by the 2002 petition. And that history differs meaningfully from the history of subsection (a).

"Because the language of Rule 13.5(c) does not clearly delineate the kinds of challenges it permits," the Arizona Supreme Court in *Chronis* looked to other sources to "give effect to the intent of the rule-makers," to include "the rule's context, the language used, the subject matter, the historical background, the effects and consequences, and its spirit and purpose." *Chronis v. Steinle*, 220 Ariz. 559, 560, ¶ 6 (2009) (quoting *State v. Aguilar*, 209 Ariz. 40, 47, ¶ 23 (2004)). In this regard,

the Court found the 2002 “petition for the adoption of the rule ... useful in considering the rule’s background and context.” *Id.* at 561, ¶ 11.

The 2002 petition shows 13.5(c) was intended to address open constitutional questions in capital cases after *Ring*. See Appendix B to Petition (the “2002 petition”) at 6-7. As the *Chronis* Court emphasized, the 2002 petition “expressly contemplated” that Rule 13.5(c) “would ‘allow the defendant to request a determination of probable cause [as to noticed aggravators] before trial if the defense deems it appropriate.’” *Chronis*, 220 Ariz. at 562, ¶ 15 (quoting 2002 petition at 8). The 2002 petition offered this possibility of pretrial probable cause screening as a “compromise” for maintaining the timing of notices of intent to seek the death penalty. *Id.* at 562, ¶ 14 (citing 2002 petition at 5-7). It is this history, this discussion in the 2002 petition about capital cases in particular, which underpinned the *Chronis* Court’s expansive interpretation of 13.5(c) as affording capital defendants the right to a pretrial determination of probable cause.

Although subsection (a) uses some of the same language as subsection (c), the similarities end there. Unlike for subsection (c), the 2002 petition did not “expressly contemplate” that Rule 13.5(a) would allow a defendant to request a determination of probable cause as to non-capital sentencing allegations before trial. The 2002 petition did not raise concerns about open constitutional questions with respect to non-capital sentencing allegations, as it did with respect to capital aggravators. In

short, the context and history relied on by the Court in *Chronis* to interpret Rule 13.5(c) and to give effect to its intent does not apply to or support a similar interpretation of 13.5(a).

Respondents are correct that courts will construe identical language to mean the same thing, at least where the text is “clear and unambiguous” and there is no evidence of different intended meaning available. Here, however, the text is not “clear and unambiguous,” and the context and historical evidence available shows the two subsections were motivated by different intent. The amendment proposed in the Petition better reflects the “context, ... the subject matter, the historical background” of Rule 13.5(a), *see Chronis*, 220 Ariz. at 560, ¶ 6, and resolves the incongruency caused by the two subsections’ shared language and divergent history.

b. Rule 13.5 Operates Differently and Serves Different Purposes in Capital and Non-Capital Cases.

Despite their shared language, Rules 13.5(a) and 13.5(c) also have different “effects and consequences,” *see id.*, because different procedures and constitutional requirements apply in capital cases.

AACJ Respondents downplay the distinction between capital and non-capital cases by asserting there is only “one distinction between capital aggravating factors and noncapital sentencing allegations: the timing for filing.” *See* AACJ Respondents Comment at 7. Not so. As explained in the Petition, the notice of intent to seek the death penalty referenced in 13.5(c) materially changes the nature of the case, and “it

makes an enormous difference whether a case proceeds with a capital rather than non-capital offense.” See Petition at 15 (quoting *Allen v. Sanders*, 240 Ariz. 569, 574 ¶ 29 (2016) (Bolick, J., concurring)). Notably, this difference became more pronounced following the 2002 changes to Arizona’s capital sentencing statute provoked by *Ring*. The changes required that certain resource-intensive processes that previously occurred after the guilt phase now occur pretrial, thereby increasing the impact of capital allegations on the way in which the case would proceed before trial.

The Arizona Supreme Court has acknowledged that *Chronis* reflects the Court’s choice to “afford greater procedural rights to a defendant facing the death penalty” based on these differences. *Sanchez v. Ainley*, 234 Ariz. 250, 254, ¶ 15 (2014). Indeed, defense counsel in *Allen* argued as much in their appellate brief to the Supreme Court, writing:

The prosecutor’s decision to seek the death penalty in a particular case has significant consequences for the defendant, the courts and for the criminal justice system as a whole. Rule 13.5(c) represents this Court’s determination that there ought to be some pre-trial mechanism by which a capital defendant can challenge a prosecutor’s allegation at an adversarial proceeding.

See Supplemental Brief on Behalf of Sammantha Allen, 2016 WL 6107242, No. CR-16-0234-PR (Sept. 19, 2016) (Appellate Brief). Justice Bolick, concurring in *Allen*, conceded that “Defendants and their *amici* make a convincing argument that an independent, pre-trial probable cause determination of aggravators is essential

because 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). Characterizing *Chronis* protections as extra-constitutional, judicially created, and unique to capital cases is not a “leap of logic” as AACJ Respondents suggest, *see* AACJ Comment at 9, it is consistent with historical statements by appellate courts and litigants in this state.

Other states have adopted procedures for testing the probable cause supporting capital aggravators precisely because of the way in which cases change once the death penalty is sought. In *State v. Ogden*, 118 N.M. 234 (1994), the New Mexico Supreme Court exercised its judicial authority to establish a pretrial procedure for evaluating capital aggravators. The court explained its effort to “curtail unwarranted death-penalty prosecutions stem[med] from the fact that they are qualitatively and quantitatively distinct from other criminal proceedings.” *Id.* at 238. The court recognized that allegations of aggravating circumstances “affect and pervade every stage of the prosecution for murder” and would engender “tremendous costs in terms of time, expense, energy, and emotion”—a practical reality recognized by other states’ high courts. *See id.* at 238-39 (quoting *Ghent v. Superior Court*, 90 Cal.App.3d 944, 153 Cal.Rptr.720, 727 n.10 (Ct. App. 1979) and *State v. Matuleqicz*, 115 N.J. 191, 557 A.2d 1001, 1008 (1989) (Handler, J., concurring)). For that reason, the court chose to exercise its “inherent authority to

establish a pretrial procedure for evaluating [death penalty] aggravating circumstances.” *Id.* at 239.

The roles and burdens placed on the prosecutor, the judge, and the jury differ in capital cases as well. In a capital case, “[t]he decision to offer evidence of aggravation or not offer such evidence is the responsibility of the prosecutor,” and the court “has no authority to interfere with the discretion of the prosecutor in this area.” *State v. Murphy*, 113 Ariz. 416, 418 (1976). The trier of fact in a capital case therefore may find only those aggravating factors the State has formally noticed and met its burden to prove. *Id.*; *see also State v. Marquez*, 127 Ariz. 3, 5-6 (App. 1980).

In contrast, Arizona courts have recognized since at least 1980 that the non-capital sentencing statutes are not “meant to require some formal action by the prosecutor before the trial judge [can] make a finding that aggravating circumstances exist.” *Marquez*, 127 Ariz. at 6 (observing that although the death penalty statute requires a presentence hearing and “imposes upon the prosecutor the responsibility and burden of establishing the existence of aggravating circumstances to support the death penalty,” there “is no similar requirement of a separate sentencing hearing in A.R.S. § 13-702 nor language placing the burden of proof of [non-capital] aggravating circumstances on the prosecution”). Rather, even after *Apprendi*, *Ring*, and resulting rule changes, our courts have continued to recognize that trial courts may find any aggravating factors, even if not alleged. *See State v. Estrada*, 210 Ariz.

111, 119-120 (App. 2005) (“Conversely, the *Munninger* panel's and the dissent's approach would substantially limit a trial judge's sentencing discretion by completely eliminating its fact-finding role as to aggravating circumstances, a result that is neither constitutionally nor statutorily required. Moreover, the imposition of such a judicial straitjacket is contrary to sound sentencing policy.”); *see also Marquez*, 127 Ariz. at 5-6 (under the non-capital sentencing statutes, “the trial judge may base his factual findings upon ‘any evidence or information introduced or submitted to the court prior to sentencing or any evidence previously heard by the judge at the trial’”).

The effects and consequences of the capital allegations contemplated by 13.5(c) have been recognized as a basis for affording greater protection in capital cases. The amendment proposed in the Petition better reflects that the effects and consequences of non-capital sentencing allegations referenced in Rule 13.5(a) are not the same and do not warrant the same heightened scrutiny.

II. Revising the Rule as Proposed Will Not Violate or Restrict Any Constitutional Right, or Rob Non-Capital Defendants of Other Procedural Protections.

a. The Proposed Amendment Does Not Implicate Federal Constitutional Rights Inapplicable to Arizona Defendants.

Apprendi and its progeny have recognized that certain sentencing allegations must be found by a jury. Rule 13.5(a) does not, as currently written or in the revised form proposed by the Petition, conflict with that requirement. Non-capital

sentencing allegations are usually found by a jury and will continue to be regardless of the outcome of the Petition. Neither Arizona's nor the United States Constitution requires more. Respondent AACJ's belief that "[i]t is only a matter of time" before the Fifth Amendment's grand jury right is incorporated to the States does not change that fact and is irrelevant to the decision whether to amend the Rule. The Supreme Court has not applied the grand jury requirement to the states, and if it does so in the future that will be a momentous change for many reasons in Arizona, the least of which will be the proposed revisions to Rule 13.5(a).

b. Ample Procedural Safeguards Independent of Rule 13.5 Exist to Protect Non-Capital Defendants' Rights.

Both Respondents caution that the proposed amendment would eliminate an important safeguard and leave non-capital defendants without adequate protection against overzealous prosecutors. There is no evidence to suggest non-capital defendants historically have viewed or utilized Rule 13.5(a) as the "safeguard" Respondents paint it as, and there is no evidence to suggest separate procedural safeguards have been or will be inefficient to guard against the results Respondents fear.

Although Respondent AACJ insists it is widely accepted that *Chronis* protections extend to both capital and non-capital cases, it can cite as support for that position only a single case tried by one of the AACJ Comment's authors, in which a prosecuting agency "responded on the merits" to a *Chronis* motion in a non-capital

case, and an excerpt from a secondary source co-authored by the same AACJ Comment author. *See* AACJ Comment at 10. Respondent Indigent Defense Agencies similarly insists “courts and litigants have relied on” the “materially identical challenge language” in Rules 13.5(a) and (c) “for years,” but does not cite any data, authority, or even anecdotal evidence to show whether or how courts and litigants have done so. *See* Indigent Defense Agencies Comment at 6. The repeated acknowledgment by Arizona’s appellate courts and litigants that *Chronis* was a judicial choice to afford additional rights in the capital context, combined with the dearth of cases addressing *Chronis* hearings for non-capital aggravating factors, belies Respondents’ unsupported claims.

Respondents also insist that revising the Rule as proposed will have catastrophic effects. Among other things, Respondents suggest the revision might suddenly cause prosecutors to allege non-capital sentencing allegations that lack any basis in fact or law.¹ Aside from the fact that neither Respondent has shown that

¹ This assertion itself suggests a lack of understanding of the law of non-capital sentencing allegations. Since *Marquez* was decided in 1980, the finding of non-capital aggravating circumstances has required no formal allegation by a prosecutor, and the burden of proving non-capital aggravating circumstances is not on the State. In fact, the “the trier of fact shall determine and the court shall consider the following aggravating circumstances” in every non-capital case. A.R.S. 13-701(D)(1)-(27). And one of those mandatory factors is “[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime.” A.R.S. 13-701(D)(27).

defendants regularly rely on 13.5(a) to guard against prosecutorial misconduct, Respondents' arguments also ignore that ample protections exist, outside of Rule 13.5(a), to safeguard the rights of non-capital defendants. Prosecutors must comply with ethical rules. Sentencing allegations are subject to challenge on grounds other than for probable cause, and still must be found by a jury beyond a reasonable doubt in most circumstances. The discovery rules ensure defendants will not be "left to guess" what evidence related to non-capital sentencing allegations will be presented to the jury, by requiring prosecutors to timely disclose to defendants all the evidence they intend to present at trial. And any errors are subject to appellate review.

Additionally, Arizona law requires the court to "inform all of the parties before sentencing occurs of its intent to increase or decrease a sentence to the aggravated or mitigated sentence pursuant this section." A.R.S. 13-702(E). A presentence report must be delivered to all parties at least two days before sentencing. Ariz. R. Crim. P. 26.4(c). Defendants are entitled to presentence hearings, "to show aggravating or mitigating circumstances, to show why the court should not impose a particular sentence, or to correct or amplify the presentence, diagnostic, or mental health reports." Ariz. R. Crim. P. 26.7(b)(2). The parties also have an opportunity to object to presentence reports, including the aggravating factors listed in them. Ariz. R. Crim. P. 26.8(b).

By and large, defendants have litigated cases for years without often resorting to testing the sufficiency of probable cause for non-capital sentencing allegations before trial. The Petition merely seeks to return to this procedural landscape, which was the norm before the Court of Appeals upended matters in *Navarro-Figueroa v. State*, 260 Ariz. 530 (App. 2025). Respondents have offered no evidence of rampant or even measurable occurrences of misconduct by prosecutors in the use of sentencing allegations in the decades before 2025.

CONCLUSION

For the reasons stated in this Reply and in the Petition, Petitioner respectfully request that this Court adopt the proposed amendments in Attachment A of the Appendix to Petition No. R-26-0028.

Respectfully submitted on July 9, 2026.

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