

Response to defendant's motion that aggravating factors be alleged in the charging document:

Due process does not require that aggravating factors be alleged in the charging document, because the Arizona Rules of Criminal Procedure provide an accused with sufficient notice of aggravating factors that the State intends to prove.

Defendant argues that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), require that the aggravating circumstances listed in A.R.S. § 13-703(F) be alleged in the indictment or information and supported by evidence of probable cause. Defendant relies on the language in *Ring* that because “Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.” 536 U.S. at 609, 122 S.Ct. at 2443.

However, the court rejected the same argument in *McKaney v. Foreman*, 209 Ariz. 268, 100 P.3d 18 (2004). The court stated that the key concern in *Apprendi* and *Ring* was that a defendant be given the benefit of a jury trial on evidence, including aggravating factors, that could result in a sentence beyond the maximum. “The two cases specifically disavow dealing with sufficiency of indictments.” *Id.* at —, 100 P.3d at 21. “[N]o authority requires that aggravating factors be identified and treated as ‘essential elements of the alleged crime’ for the purpose of inclusion in a grand jury indictment or information.” *Id.* It is sufficient that the state give notice of its intention to seek the death penalty and notice of aggravating factors as required by Rule 15.1(i)(1) and (2), Ariz.R.Crim.P. Aggravating factors “need not be alleged in the grand jury indict-

ment or information in order to satisfy constitutional due process,” because an accused “is accorded notice under the rules of criminal procedure that complies with constitutional requirements.” *Id.* at —, 100 P.3d at 23.

Courts in other states likewise have rejected the argument that aggravating factors must be included in the charging documents, e.g., *State v. Crisp*, 362 S.C. 412, 419, 608 S.E.2d 429, 433 (2005); *State v. Roache*, 358 N.C. 243, 267, 595 S.E.2d 381, 398 (2004); *State v. Oatney*, 335 Or. 276, 293, 66 P.3d 475, 485 (2003); *Terrell v. State*, 276 Ga. 34, 40, 572 S.E.2d 595, 602 (2002); *State v. Edwards*, 810 A.2d 226, 234 (R.I. 2002). The court in *McKaney* noted that only New Jersey had adopted the position that aggravating factors are “elements” that must be returned in an indictment, and the court chose not to follow *State v. Fortin*, 178 N.J. 540, 843 A.2d 974 (2004).

We conclude there is a difference between “elements” for purposes of the Sixth Amendment right to trial by jury and the “functional equivalent of an element” for purposes of finding a state constitutional right to have aggravating factors alleged in an indictment or information. In the former, the trial jury addresses the adequacy of proof of the actual elements of the crime and the presence of aggravators to determine the defendant’s guilt or innocence and to fix the sentence. In the latter, we address simply the adequacy of notice. The difference is significant.

McKaney, 209 Ariz. at —, 100 P.3d at 22.

The court after *McKaney* continued to reject the argument that aggravating factors had to be presented to the grand jury. “[N]either the state constitution nor the United States Supreme Court opinions in *Apprendi* . . . and *Ring* . . . require that aggravating factors be presented to the grand jury.” *State v. Roseberry*, 210 Ariz. 360, 111 P.3d 402, 407 (2005). In *State v. Carreon*, 210 Ariz.

54, 107 P.3d 900, 907 (2005), defendant asserted that “permitting the State to amend his indictment to include aggravating factors violated his rights under the federal and state constitutions.” The court stated that it “recently rejected this argument in *McKaney*. . . . Arizona’s method for providing notice to defendants of the aggravating factors that the state will seek to prove at sentencing violates neither the Arizona nor federal constitutional right to a jury trial.” *Id.*

Notice of intent to seek the death penalty is provided to defendant under Rule 15.1(i)(1), Ariz.R.Crim.P., and the list of aggravating factors the state will rely on is provided under Rule 15.1(i)(2). The filing of these notices amends the charging document pursuant to Rule 13.5(c). Defendant argues that Rule 13.5(c) is unconstitutional, because aggravating circumstances are no longer “sentence enhancements” but “elements.” This argument was rejected in *McKaney* and *Carreon*. Defendant also asserts that Rule 13.5(b) limits amendments to technical corrections that do not change the nature of the charged offense. However, the nature and elements of the charged offense — first degree murder — are not changed by providing notice of aggravating factors to be proved at sentencing. In a non-capital case addressing Rule 13.5(b), the court stated that an amendment can change the nature of an offense “either by proposing a change in factual allegations or a change in the legal description of the elements of the offense.” *State v. Sanders*, 205 Ariz. 208, 215, 68 P.3d 434, 441 (App. 2003). The notices provided to defendant under the Rules of Criminal Procedure do not change the nature of the offense but in fact eliminate any possibility that defendant will be surprised or prejudiced.

Defendant has received the State's notice of intent to seek the death penalty and notice of aggravating factors. No additional finding of probable cause is required. As stated in *McKaney*, defendant "could [not] reasonably contend[] that Arizona's rules of criminal procedure afford less than sufficient notice of aggravating factors in satisfaction of the Fourteenth Amendment due process requirement. . . ." 209 Ariz. at —, 100 P.3d at 21. Our courts have rejected defendant's argument that the State must do more than provide this pretrial notice.

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