Rule 18, Ariz. R. Crim. P.

JURY TRIAL: *Apprendi v. New Jersey* requires jury to find that factors increasing the penalty for a defendant's offense exist beyond a reasonable doubt; Analysis of Arizona cases interpreting *Apprendi*..... ……Revised 3/2010

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant fired several shots into the house of an African-American family and made a statement (which he later retracted) that he did not want the family in his neighborhood because of their race. He was charged with a weapons offense that carried a prison term of five to ten years. Under a New Jersey "hate crime" statute, if the trial judge found by a preponderance of the evidence that the person committed the crime with a purpose to intimidate a person or group because of race (among other things), the authorized term increased to ten to twenty years. After Apprendi pleaded guilty, the trial court held an evidentiary hearing, found by a preponderance of the evidence that Apprendi had acted out of racial bias, and imposed a twelve-year sentence.

Apprendi appealed, arguing that the due process clause of the United States Constitution required the jury to find the fact of bias beyond a reasonable doubt. The United States Supreme Court agreed that allowing a judge to determine this penalty-enhancing factor by a mere preponderance of the evidence was unconstitutional. The Court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 490.

Under Arizona law, "the statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved . . . is the presumptive sentence

established" by statute. *State v. Martinez,* 210 Ariz. 578, 583 ¶ 17, 115 P.3d 618, 623 (2005). If there is one *Apprendi*-compliant aggravating factor, "a defendant is exposed to a sentencing range that extends to the maximum punishment available under section 13-702." *Id.* at 584 ¶ 21, 115 P.3d at 624. In *State v. Gross*, 201 Ariz. 41, 45, ¶ 14, 31 P.3d 815, 819 (App. 2001), the Court of Appeals summarized *Apprendi*'s holding as follows:

> *Apprendi* focuses on a defendant's right to have a jury decide facts that affect the potential punishment. Indeed, with the exception of the fact of a prior conviction, *Apprendi* requires that ***any*** determination exposing a defendant to a penalty exceeding the maximum be submitted to the jury. Under *Apprendi*, it is a defendant's exposure to additional punishment, not the ease or accuracy with which that fact can be determined by a trial court, that is pivotal in triggering a defendant's right to have a jury decide.

Gross, 201 Ariz. at 45, ¶ 14, 31 P.3d at 819 [Emphasis in original, citations omitted]. The *Gross* Court also noted that the same jury that tried the substantive charge should ordinarily determine the enhancements. *Id.* at 46, ¶ 21, 31 P.3d at 820. The Arizona Supreme Court noted in *State v. Schmidt*, "The thrust of the *Apprendi* line of cases is that any fact that the law makes essential to the punishment is the functional equivalent of an element of a greater offense, and is to be treated accordingly." 220 Ariz. 563, 565, 208 P.3d 214, 216 (2009) [internal quotations and citations omitted].

Nevertheless, *Harris v. United States*, 536 U.S. 545 (2002), clarified that *Apprendi* does not require that facts establishing a *mandatory minimum* sentence be alleged in the indictment or proved to the jury beyond a reasonable doubt, so long as the fact found does not increase the sentence above the statutory *maximum*. Further, *Apprendi* error is subject to harmless error analysis – that is, *Apprendi* error is not structural error that always requires reversal. Rather, a reviewing court will reverse for

Apprendi error only if the defendant was harmed by the error. *See State v. Ring*, 204 Ariz. 534, 554-555, ¶ 51, 65 P.3d 915, 935-936 (2003).

Since *Apprendi* was decided, a number of Arizona cases have dealt with various *Apprendi* claims. In *State v. Rodriguez*, 200 Ariz. 105, 32 P.3d 100 (App. 2001), the defendant claimed that he was entitled to a jury trial on the question whether he had prior drug-related convictions for Proposition 200 purposes. The Court of Appeals rejected this argument:

> Because Proposition 200 does not affect the maximum penalty available under Arizona's drug sentencing statutes, a trial court may determine whether a defendant has drug-related prior convictions for purposes of determining his or her entitlement to, or ineligibility for, probation under Proposition 200 without violating the defendant's right to a jury trial.

Id. at 107, ¶¶ 9-10, 32 P.3d at 102. Another Proposition 200 case was *Cherry v. Araneta*, 203 Ariz. 532, 534, ¶ 8, 57 P.3d 391, 393 (App. 2002). Under A.R.S. § 13-901.01, a defendant with a prior conviction for a "violent crime" is ineligible for the mandatory probation provisions of "Proposition 200." The Court of Appeals found that the *Apprendi* exception for prior convictions meant that that the judge rather than the jury could determine as a matter of law if the defendant's prior conviction was for a violent offense. *Id.*

In *State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (App. 2001), the defendant was convicted of kidnapping under A.R.S. § 13-1304. Under A.R.S. § 13-1304(B), kidnapping is a class 2 felony unless the victim is released unharmed and without the defendant accomplishing any of the enumerated offenses, in which case kidnapping is a class 4 felony. The defendant claimed that the question whether the victims were released unharmed had to be submitted to the jury. The State argued that the question

was for the trial court to determine that question as part of sentencing. The Court of Appeals agreed with the State, holding that *Apprendi* was not implicated:

> Conviction by a jury for kidnapping pursuant to section 13-1304(A) authorizes the trial court to sentence a defendant for the commission of a class 2 felony. A determination that the kidnapping victims were released unharmed as defined by section 13-1304(B) simply leaves the range of punishment unchanged or reduces the range to that of a class 4 felony. Thus, the fact of release as found by the court does not expose a defendant to a punishment exceeding that permitted by the verdict; it only offers the possibility of a punishment less than that allowed by the verdict. The resolution of the question whether a victim was safely released has no bearing on the jury's determination that the offense of kidnapping had been committed.

Id. at 433, ¶ 19, 27 P.3d at 337.

In *State v. Flores*, 201 Ariz. 239, 33 P.3d 1177 (App. 2001), the defendant argued that he was entitled to have the jury determine beyond a reasonable doubt an allegation under A.R.S. § 13-604.02(A) whether he was on probation when he committed the offense. The Court of Appeals rejected that argument, noting that A.R.S. § 13-604.02(A) required the trial court to sentence a defendant to a flat term not less than the presumptive authorized for his offense.

> Because Flores's probationary status thus did not increase the penalty for his crime 'beyond the prescribed statutory maximum,' *Apprendi*, 530 U.S. at 490, but merely raised the crime's minimum term, the holding of *Apprendi* is inapplicable to him.

Id. at 241 ¶ 8, 33 P.3d at 1179 (App. 2001) [parallel citations omitted]. In addition, in *State v. Cox*, 201 Ariz. 464, 37 P.3d 437 (App. 2002), the Court of Appeals held that the same reasoning applied to an allegation under A.R.S. § 13-604.02(B) that the defendant was on probation or other felony release when he committed the current offense:

> Because proof of a § 13-604.02(B) allegation increases the statutory minimum penalty but not the statutory maximum, *Apprendi* does

> not require that the allegation be decided by a jury beyond a reasonable doubt; rather, the trial judge can decide the § 13-604.02(B) allegation by clear and convincing evidence.

Id. at 469, ¶ 18, 37 P.3d at 442.

In *State v. Brown*, 209 Ariz. 200, 203, 99 P.3d 15, 18 (2004), the Arizona Supreme Court held that *Apprendi* required a jury trial to determine aggravating circumstances in a noncapital case under A.R.S. § 13-702.

In *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (App. 2001), the Court of Appeals held that *Apprendi* requires the jury, not the court, to determine whether a defendant is on release status for purposes of sentence enhancement under A.R.S. § 13-604(R). That statute provides that if the allegation is proven, the term of imprisonment to be imposed must be increased by "two years longer than would otherwise be imposed for the felony offense committed." The Court stated, "The plain language in *Apprendi* requires that the defendant's release status be submitted to the jury and proved beyond a reasonable doubt." *Id.* at 44, ¶ 9, 31 P.3d at 818; *accord*, *State v. Benenati*, 203 Ariz. 235, 237, ¶**7**, 52 P.3d 804, 806 (App. 2002).

A defendant is also entitled to a jury trial on an allegation of "serious drug offense/significant source of income" under A.R.S. § 13-3410(A). *State v. Nichols [Motley, Real Party in Interest]*, 201 Ariz. 234, 33 P.3d 1172 (App. 2001). In that case, Motley was convicted of possession of dangerous drugs and marijuana for sale. Section 13-3410(A) provides that if a person convicted of a serious drug offense, as defined therein, is found to have received more than $25,000 in a calendar year through a pattern of illegal drug sales, the person shall be sentenced to life imprisonment without possibility of parole for 25 years. The Court reasoned that, because proof of the

allegation increased the penalty far beyond that ordinarily imposable for the drug offenses, "the fact of drug-sale income greater than $25,000 must be found by a jury beyond a reasonable doubt." *Nichols*, 201 Ariz. at 236, ¶ 7, 33 P.3d at 1174. However, the Court rejected Motley's claim that *Apprendi* also required the State to present the allegation to the grand jury:

> Section 13-3410(A) does not define a substantive crime in and of itself; it bears no felony designation and functions only to enhance the sentence resulting from conviction for certain enumerated drug offenses. Although *Apprendi* might have ushered in significant changes in the way various Arizona statutory provisions such as this one, formerly considered to be sentence enhancers, will be proved, it has not dictated a change in how such provisions must be alleged. . . . We do not believe that *Apprendi* has affected Arizona's long-standing practice of permitting the state total discretion to initiate its pursuit of sentence enhancements by the filing of an allegation no later than twenty days before trial pursuant to A.R.S. § 13-604(P) or Rule 16.1(b), Ariz. R. Crim. P., 16A A.R.S., the procedure the state presumably followed here. . . . The state was not constitutionally required to first present the § 13-3410(a) allegation to the grand jury or otherwise include that allegation in the charging document.

Id. at 237-38, ¶ 12, 33 P.3d at 1175-76. The Court reasoned that, as a practical matter, it would be impossible to include the A.R.S. § 13-3410(A) allegation in a charging document because it is not a substantive offense, and it cannot be independently charged unless the person has already been convicted of a serious drug offense. *Id*. at 238, ¶ 13, 33 P.3d at 1176.

A juvenile is not entitled to have a jury determine whether the juvenile is a "chronic felony offender" under A.R.S. § 13-501(D) and (E) and § 13-608. In *State v. Rodriguez*, 205 Ariz. 392, 71 P.3d 919 (App. 2003), the defendant argued that because being prosecuted as an adult subjected him to far more serious consequences than being prosecuted in juvenile court, *Apprendi* required the jury to make that finding. The

Court of Appeals disagreed, stating that § 13-501(E) "is not a sentence enhancement scheme and, therefore, does not implicate *Apprendi*. . . . A judge's finding that a juvenile is a chronic felony offender does not subject that juvenile to enhanced punishment; it subjects the juvenile to the adult criminal system. As such, A.R.S. § 13-501(E) is not constitutionally defective under *Apprendi*." *Rodriguez*, 205 Ariz. at 401, ¶ 33, 71 P.3d at 928.