Rule 12, Ariz. R. Crim. P.: Grand Jury:

Response to Motion to Strike Allegation of Release Status under A.R.S. § 13-604(R)

> **Neither *Apprendi* nor any other statute or case law requires the State to present evidence to a grand jury that the defendant was on release status under A.R.S. § 13-604(R), nor for the grand jury to make a finding on that issue. *Apprendi* and its progeny refer only to *trial* jury findings.**

The State of Arizona asks this Court to deny the defendant's motion, for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Facts:

On March 26, 2003, the prosecution presented evidence before a Maricopa County Grand Jury concerning an incident in which the defendant cashed a forged check at a bank. Based on the evidence presented, the grand jury returned an indictment against the defendant for one count of forgery, a class 4 felony.

Whether the defendant was on release status is equivalent to an element of the offense, because a finding that the defendant was on release status when she committed the underlying forgery offense increases the punishment available for the forgery offense beyond the statutory maximum otherwise available for that offense. Therefore, that question must be submitted to and found by the trial jury beyond a reasonable doubt before the defendant can be sentenced under A.R.S. § 13-604(R). *State v. Benenati*, 203 Ariz. 235, 241, ¶ 22, 52 P.3d 804, 810 (App. 2002). Rule 13.5, Ariz. R. Crim. P., allows the prosecutor to amend an indictment to allege "non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b)." Rule 16.1(b) requires all motions to be made "no later than 20 days prior to

trial." On May 15, 2003, more than twenty days before trial, the State filed a timely allegation under A.R.S. § 13-604(R) that the defendant committed the forgery offense while she was on release for a felony charge in a Pinal County case. A.R.S. § 13-604(R) provides in part:

> R. A person who is convicted of committing any felony offense, which felony offense is committed while the person is released … on a separate felony offense…, shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense. ….

Thus, if at trial the State proves to the jury beyond a reasonable doubt that the defendant was on release status when she committed the forgery, § 13-604(R) requires the court to sentence the defendant to an additional two years in prison.

The defendant has moved to dismiss the allegation of release status. She argues that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003), that the grand jury must determine the defendant's release status because release status "operates as an element of a greater offense, resulting in increased penalties above and beyond regular statutory maximums."

B. Law:

1. Because release status is an "element of the offense" that increases punishment beyond the statutory maximum otherwise applicable, *Apprendi* requires the *trial* jury to make that finding beyond a reasonable doubt. However, neither *Apprendi* nor other case law supports the defendant's contention that the *grand* jury must determine the defendant's release status.

Nothing in *Apprendi v. New Jersey* supports the defendant's contention that the state *grand* jury needs to make any finding as to release status. The *Apprendi* Court specifically stated in a footnote that the Court did *not* address any state grand jury question in that opinion. The defendant in *Apprendi* did not assert "a constitutional claim based on the omission of any reference to sentence enhancement … in the indictment."

Instead, he argued that his Fourteenth Amendment due process rights included "the right to a trial by jury and the right to have every element of the offense proved beyond a reasonable doubt" – that is, by the *trial* jury, the ultimate trier of fact. The Court said that the Fourteenth Amendment does *not* extend the federal Fifth Amendment right to presentment or indictment of a grand jury to state court defendants. The Court concluded, "We thus do not address the indictment question separately today." *Apprendi v. New Jersey*, 503 U.S. 466, 476, fn. 3 (2000) [citations and internal quotation marks omitted]. *Apprendi*'s holding is that the defendant is entitled to have the state court *trial* jury determine beyond a reasonable doubt all allegations that increase a sentence beyond the statutory maximum; that case simply does not address any question concerning state court *grand* juries.

The defendant also relies on *State v. Towery*, 204 Ariz. 368, 64 P.3d 828 (2003). However, that case does not deal with any grand jury issue. *Towery* only holds that the procedural rule of *Ring v. Arizona*, 536 U.S. 584 (2002) ["*Ring II*"], does not apply retroactively to those defendants whose cases had become final before *Ring II* was decided. Therefore, those cases are not applicable to the defendant's contention that the State must present evidence of release status to the grand jury before proving that status beyond a reasonable doubt to a trial jury.

2. The defendant's proposed reading of *Apprendi* is contrary to Rule 13.5, Ariz. R. Crim. P., which allows the prosecution to amend an indictment before trial to add "non-capital sentencing allegations that must be found by a jury."

After the United States Supreme Court decided *Ring II* and *Apprendi*, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure, effective October 11, 2002. The Court did not require the State to include all sentencing allegations in the

original indictment; instead, the Court established by rule that the prosecutor may timely amend the indictment to add non-capital sentencing allegations. Rule 13.5(a), Ariz. R. Crim. P., states:

> **a. Prior Convictions and Other Non-Capital Sentencing Allegations.** The prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b).

Thus, Rule 13.5(a) specifically allows the prosecution to amend an indictment to allege non-capital sentencing aggravating factors – such as release status under A.R.S. § 13-604(R) – "no later than 20 days prior to trial" under Rule 16.1(b). The Court could have amended the rule to require all such sentencing allegations to be included in the original indictment, but did not do so. Therefore, the State submits that the Arizona Supreme Court has already considered, and rejected, the defense's argument here.

Further, the defendant's claim is contrary to the reasoning behind the Arizona criminal charging process. The purpose of the grand jury proceeding is to determine if there is probable cause to believe a crime has been committed, not to determine the ultimate issue of guilt or innocence, yet alone the appropriate punishment for a crime. A.R.S. § 21-413; *State v. Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980); *State v. Sanchez*, 165 Ariz. 164, 797 P.2d 703 (App. 1990). Thus, many issues that may be of crucial importance at trial have no relevance at the grand jury level.

> The grand jury's primary function is to determine "whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it." *State v. Baumann*, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980). Simply put, the grand jury is not the place to try a case.

Trebus v. Davis, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Arizona is a "notice pleading" state – that is, the purpose of the indictment or other charging document is to inform the defendant about the charges against him long enough before trial so that he can prepare a defense. *State v. West,* 176 Ariz. 432, 442-43, 862 P.2d 192, 202-03 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *State v. Schwartz*, 188 Ariz. 313, 319, 935 P.2d 891, 897 (App. 1996). That is why Rules 13.5(a) and 16.1(b), Ariz. R. Crim. P., require the State to make any substantive amendments to the indictment at least twenty days before trial. The defendant's reasoning here would bar the State from making any amendments to the indictment in light of facts that might come to light after the original grand jury proceeding. The Rules of Criminal Procedure clearly show that the defendant's position is in error.

In *State v. Sanders*, __ Ariz. __, __. ¶ 16, 68 P.3d 434, 439 (App. 2003), the Court of Appeals construed Rule 13.5(b), Ariz. R. Crim. P., which states, in part, "The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding." The Court of Appeals said that the Sixth Amendment's "notice" component "means that the indictment or information must describe the offense with sufficient specificity so as to enable the accused to prepare a defense and to permit him to avail himself of the protection against double jeopardy." Accordingly, Rule 13.2(a), Ariz. R. Crim. P., requires that the indictment or information be "a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged."

The *Sanders* Court further reasoned that, even *during* a trial, amending an indictment under Rule 13.5(b), Ariz. R. Crim. P., is permissible unless the amendment "changes the nature of the offense charged or prejudices the defendant in any way." *Id*. at __, ¶ 19, 68 P.3d at 440. A proposed amendment "changes the nature of the offense" when it changes the factual allegations of a charge or the legal description of the elements of the offense. *Id*. at __, ¶ 25, 68 P.3d at 441. The *Sanders* Court held that the indictment could not be amended *during* a jury trial in any way that changed the elements of the crime that the State needed to prove, because allowing such amendments would deny the defendant his right to pretrial notice of the actual elements of the crime against which he ultimately had to defend. Instead, Rule 13.5(a) requires the State to make such amendments *before* trial – as the State did here, by adding the allegation of release status.

While the Arizona appellate courts have not directly addressed the precise argument that the defendant makes here, *State v. Nichols*, 201 Ariz. 234, 33 P.3d 1172 (App. 2001), is closely parallel. In *Nichols*, a post-*Apprendi* case, the defendant was indicted on two drug sale offenses. The State then filed an allegation of "serious drug offense (significant source of income)" under A.R.S. § 13-3410(A). That statute requires a life sentence for a defendant convicted of certain drug offenses if the State proves that the defendant received more than $25,000 of income from illegal drug sales in a calendar year. The defendant moved to dismiss the "serious drug offense" allegation "on the ground that it was not a simple sentence enhancement, but rather, constituted a substantive offense" that the State could only pursue by way of a grand jury indictment. *Nichols*, 201 Ariz. at 235, ¶ 4, 33 P.3d at 1173. The *Nichols* Court rejected the

defendant's grand jury argument.[1] The Court held that the facts contained in a serious drug offense allegation did not need to be included in the charging document because A.R.S. § 13-3410 "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." *Id*. at ¶ 12. The Court concluded, "The state was not constitutionally required to first present the § 13-3410 allegation to the grand jury or otherwise include that allegation in the charging document." *Id*. at 238, ¶ 12, 33 P.3d at 1176.

Further, the *Nichols* Court noted that including a § 13-3410 allegation in the charging document "would not be possible as a practical matter," because, its express language, that statute applies only when a person stands *convicted* of a serious drug offense – not when a person merely stands *indicted* of such an offense. The Court concluded:

> In sum, we find no constitutional infirmity in the legislature's enactment of § 13-3410 to define not a substantive offense but, rather, an enhanced penalty for conviction of serious drug offenses when additional facts are proven. Those facts need not be alleged in the charging document provided that the notice of them given the defendant comports with Arizona's traditional notice requirements for alleging sentencing enhancements.

Id. at ¶ 15.

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[1] The Court noted that *Apprendi*'s reference to the need to charge in an indictment any fact, other than a prior conviction, that increases the maximum penalty for a crime, is made only in the context of reciting the holding of an earlier case involving a federal statute. "The federal courts, however, are governed by the Fifth Amendment requirement that serious charges be presented to a grand jury; this is one of the few rights that has expressly been found *not* to be applicable to the states through the Fourteenth Amendment and the selective incorporation doctrine." *Nichols*, 201 Ariz. at 236, ¶ 10, 33 P.3d at 1175 [emphasis in original].

The analysis of *Nichols* should apply equally here. Like A.R.S. § 13-3410, § 13-604(R) does not define a new substantive offense, but instead imposes an enhanced penalty for a substantive offense when additional facts are proven. Moreover, like § 13-3410, § 13-604(R) does not come into play until after the defendant has been convicted of the substantive offense. Therefore, this Court should follow the reasoning in *Nichols* and deny the motion to dismiss the allegation of release status.

3. Other States have also rejected claims that aggravating factors have to be presented to and found by the grand jury and listed in the indictment.

Other State courts that have addressed this issue have concluded that aggravating factors need not be charged in an indictment. For example, in *Terrell v. State*, 276 Ga. 34, 572 S.E.2d 595 (2002), a death penalty case, Terrell argued that under *Apprendi*, it was insufficient for the State to give notice of statutory aggravators by filing a written notice of intent to seek the death penalty. The Georgia Supreme Court disagreed, noting that neither *Apprendi* nor *Ring II* "addressed whether notice of a fact that would be used to support a sentence had to be conveyed to the defendant through an indictment versus some other means." *Terrell*, 276 Ga. at 41, 572 S.E.2d at 602. That Court concluded that, because the United States Constitution's grand jury presentment clause does not apply to the states, neither *Apprendi* nor *Ring II* requires a state grand jury to consider the statutory aggravating factors. Rather, by indicting Terrell for capital murder, "the grand jury authorized the State to seek any penalties that are authorized by statute for that crime, including the maximum penalty of death." *Id*. at 42, 572 S.E.2d at 603.

In *People v. Tomasello*, 329 Ill.App.3d 1053, 769 N.E.3d 79, 263 Ill. Dec. 877 (Ill. App. 2002), another death penalty case, the defendant argued that the indictment in his

case violated *Apprendi* because it failed to charge that the victim was under the age of twelve. Reviewing Illinois case law, the Illinois Court of Appeals said that "the mere invocation of the holding in *Apprendi* does not require the trial courts or this court to disregard decades of well-settled precedent addressing issues concerning charging and sentencing in criminal cases." *Id*. at 1058, 769 N.E.3d at 84, 572 Ill. Dec. at 882.

In *State v. Badoni*, 133 N.M. 257, 62 P.3d 348 (N.M. App. 2002), the defendant was charged with murder and other offenses. Under New Mexico law, use of a firearm while committing certain offenses enhanced the sentence for each offense by one year. The jury found the defendant guilty of second degree murder and other offenses, and also found that he used a firearm in committing them, so the sentencing court enhanced the defendant's sentences. On appeal, the defendant argued that *Apprendi*, coupled with *Jones v. United States*, 526 U.S. 227 (1999)[2], required the prosecution to include the sentencing enhancement allegation in the original charging document. The New Mexico Court of Appeals disagreed, noting that *Jones* was based on a federal statute and did not involve a state indictment or information. Federal law requires great particularity in an indictment, but under state laws, all that due process requires is that the defendant be given notice of the crime with which he is charged, with sufficient detail to allow him to prepare a defense. Thus, neither *Apprendi* nor *Jones*, nor any combination of the two, requires "formal notice in a state charging instrument." *Badoni*, 133 N.M. at 261, 62 P.3d at 352.

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[2] *Jones* held that, because a federal carjacking statute increased the defendant's penalties when "serious bodily injury" occurred during the crime, the fact of such injury was an element of the crime requiring a jury finding beyond a reasonable doubt.

C. Conclusion

For the reasons set forth above, the State asks this Court to deny the defendant's motion to dismiss the allegation of release status.