MCKANEY V. FOREMAN: AN ODD DEPARTURE FROM THE *APPRENDI* LINE

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BACKGROUND

On August 2, 2001, Kerby McKaney ("McKaney") was indicted on two counts of first-degree murder, one count of first-degree burglary, one count of sexual assault, and two counts of kidnapping.[2] These charges arose from events that were committed more than fifteen years earlier. The events remained unresolved until 1999, when a DNA match implicated McKaney.[3] The State gave notice, on October 1, 2001, of its intent to seek the death penalty on the two murder charges.[4] On October 22, 2002, the State gave notice of its intent to prove three aggravating factors: (1) McKaney's prior conviction of a serious offense, (2) the offense was committed in an especially heinous, cruel or depraved manner, and (3) the conviction of one or more other homicides, committed during the commission of the offense.[5]

McKaney moved to dismiss the State's notice of intent and notice of aggravating factors on November 5, 2003.[6] McKaney argued that the aggravating factors are elements of the capital crime of first-degree murder.[7] In light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*[8] and *Ring v. Arizona*,[9] McKaney contended that these aggravating factors were not specifically alleged in the charging document and were unsupported by an initial finding of

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1. The Author thanks Professor Marc Miller, Ralph W. Bilby Visiting Professor of Law, University of Arizona James E. Rogers College of Law, for his insightful comments about this Case Note.

2. McKaney v. Foreman, 100 P.3d 18, 19 (Ariz. 2004).

3. *Id.* at 19 n.1.

4. *Id.* at 19.

5. ARIZ. REV. STAT. § 13-703(F)(2), (6), (8) (2006).

6. *McKaney*, 100 P.3d at 19.

7. *Id.*

8. 530 U.S. 466 (2000) (holding that any fact that increases a criminal penalty beyond the prescribed statutory maximum, other than the fact of prior conviction, must be submitted to a jury and proven beyond a reasonable doubt).

9. 536 U.S. 584 (2002) (holding that Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense and the Sixth Amendment requires that aggravating factors be found by a jury).

probable cause by the grand jury.[10] On December 19, 2003, the trial court denied McKaney's motion.[11] In response, McKaney filed a petition for special action at the Arizona Supreme Court, which accepted jurisdiction because the issue was of first impression and applicable to every capital case in the state.[12] Distinguishing the unincorporated Fifth Amendment[13] right to indictment by a grand jury from the Sixth Amendment right to trial by jury addressed in *Apprendi* and *Ring*, the Arizona Supreme Court held that aggravating factors essential to imposing a capital sentence do not need to be alleged in the charging document and supported by evidence of probable cause.[14]

I. THE U.S. SUPREME COURT'S MODERN SENTENCING ANALYSIS: THE IMPORTANCE OF THE JURY AND THE ELEMENTS RULE

A. McMillan*,* Jones*, and* Apprendi*: Sentencing Cases that Define Sentencing Factors, Elements, and the Functional Equivalent of an Element*

In developing sentencing law prior to *Apprendi*, the Supreme Court drew the distinction between "sentencing factors" and elements of a crime. In *McMillan v. Pennsylvania*,[15] the Court coined the term sentencing factor as "a fact that was not found by a jury but that could affect the sentence imposed by the judge."[16]

McMillan received its first significant limitation almost a decade later, in *Jones v. United States*, [17] where the Supreme Court observed that "[o]ther 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 a jury, and proved beyond a reasonable doubt."[18] Thus, under *Jones* and subsequent cases, sentencing factors that increase the maximum penalty for an offense began to be understood as elements or the functional equivalent of elements.

The *Apprendi* Court relied on *Jones* and distinguished another category of facts. The Court wrote that the term "sentence enhancement," used to describe an increase in the maximum sentence, is the "functional equivalent of an element of a greater offense."[19] This category of facts "fits squarely within the usual definition of an 'element' of the offense."[20] In his concurrence, Justice Thomas also discussed aggravating facts:

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact [sic] the core crime and the aggravating fact

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10. *McKaney*, 100 P.3d at 19.
11. *Id*.
12. *Id*.
13. "No one shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.
14. *McKaney*, 100 P.3d at 21–22.
15. 477 U.S. 79 (1986).
16. Apprendi v. New Jersey, 530 U.S. 466, 485 (2000).
17. Jones v. United States, 526 U.S. 227 (1999).
18. *Apprendi*, 530 U.S. at 490.
19. *Id.* at 494 n.19.
20. *Id*.

> together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.[21]

The Court cautiously mentioned the Grand Jury Clause of the Fifth Amendment but declined to discuss whether it requires a "functional equivalent of an element of a greater offense" to be included in the indictment.[22] Yet, the Court also provided guidance for state courts:

> "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." The Fourteenth Amendment commands the same answer in this case involving a state statute.[23]

The Court's statement that these facts must be charged in an indictment, seems to suggest that the federal rights at stake in the *Apprendi* line go beyond the right to a petit jury. But *Apprendi* and *Jones* both involved sentencing, and perhaps the statement that the *Apprendi* elements must be charged in an indictment is dicta.

B. Blakely v. Washington*: Jury's Findings Serve as the Basis for a "Statutory Maximum"*

In *Blakely v. Washington*,[24] the defendant pleaded guilty to kidnapping and admitted facts which, standing alone, supported a sentence of fifty-three months.[25] Relying on aggravating factors discussed in an evidentiary hearing, the trial judge found that the defendant acted with "deliberate cruelty" and imposed a ninety-month sentence.[26] While this sentence did not exceed the statutory maximum that could be imposed when an aggravating factor justifies departure from the standard sentence, the facts supporting the judge's finding were not admitted by the defendant nor found by a jury.[27] Following *Jones* and *Apprendi*, the Court found that the State's sentencing procedure did not comply with the Sixth Amendment and the defendant's sentence was invalid.[28]

The *Blakely* Court also defined "statutory maximum," for *Apprendi* purposes, as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[29] Put another way, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

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21. *Id*. at 501.
22. *Id*. at 477 n.3.
23. *Id.* at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (emphasis added)).
24. 542 U.S. 296 (2004).
25. *Id*. at 298.
26. *Id*.
27. *Id*. at 303.
28. *Id*. at 305.
29. *Id.* at 303.

additional findings."[30] The Court diminished the distinctions between facts that lead to an enhanced sentence: "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence."[31] Therefore, any fact that increases the defendant's maximum penalty is an element of the offense under the Sixth Amendment and must be submitted to a jury and proven beyond a reasonable doubt.

C. The Elements Rule in the Capital Context: The Logical Application of Apprendi *to* Ring

Two years after *Apprendi*, the U.S. Supreme Court decided *Ring v. Arizona*,[32] a case that reconciled the logical inconsistency between *Apprendi* and *Walton v. Arizona*,[33] and confirmed that the *Apprendi* line of cases applies equally in the capital and noncapital contexts. *Ring* dealt specifically with Arizona's capital criminal statute, which allowed a judge to determine whether aggravating factors existed once a jury found that a defendant was guilty of first-degree murder.[34] As the presence of at least one aggravating factor must be found in order to impose the death penalty in Arizona, the logic of *Apprendi* was applicable and successfully argued by the defendant in *Ring*. Justice Ginsburg, writing for a seven-to-two majority, plainly explained: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[35]

To reach the *Ring* holding, the Court overruled *Walton*, where aggravating factors were understood as "'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."[36] The majority found that Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense."[37] The Court, therefore, held that the Sixth Amendment requires that enumerated aggravating factors be treated as elements and found by the jury beyond a reasonable doubt.[38] Because Ring did not contend that his indictment was constitutionally defective, the Court again did not broach the issue of whether the functional equivalent of an element of a greater offense must be charged in the indictment.[39]

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30. *Id*. at 303–04.
31. *Id*. at 305.
32. 536 U.S. 584 (2002).
33. 497 U.S. 639 (1990).
34. *Ring*, 536 U.S. at 592–93.
35. *Id.* at 609.
36. 497 U.S. at 648 (citing Poland v. Arizona, 476 U.S. 147 (1986)).
37. *Ring*, 536 U.S. at 609.
38. *Id.*
39. *Id*. at 597 n.4.

II. *MCKANEY V. FOREMAN*: ARIZONA CONFRONTS THE ISSUE OF WHETHER AGGRAVATING FACTORS MUST BE INCLUDED AS A PROBABLE CAUSE FINDING IN THE GRAND JURY INDICTMENT

A. The Majority Decision

The Arizona Supreme Court denied McKaney's argument that, following *Apprendi* and *Ring*, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and article II, section 30 of the Arizona Constitution[40] require that aggravating factors be alleged in the indictment and supported by evidence of probable cause.[41] The court first distinguished *McKaney* from *Apprendi* and *Ring* as cases that center on the right to trial by jury under the Sixth Amendment.[42] According to the court, the key concern in both decisions was whether the defendant was afforded the benefit of a jury trial on the evidence that could result in a sentence greater than the maximum for the charged offense.[43] The court found that *McKaney* was not a case that falls within the Sixth Amendment, nor does it present the issue of sentencing beyond the prescribed maximum without the benefit of a jury's consideration.[44]

The court emphasized the dearth of federal constitutional requirements in regard to the grand jury[45] and suggested that this supported its argument that a defendant does not have a right to have all elements of a crime charged and assessed at a probable cause hearing. Given that the Grand Jury Clause of the Fifth Amendment is unincorporated, the court argued, it would be "anomalous" for the court to require, under the U.S. Constitution, that grand juries find that probable cause exists for the aggravating factors alleged in the charging document.[46] The court also reiterated that *Apprendi* and *Ring* addressed the Sixth and Fourteenth Amendments, not the Fifth Amendment.[47] The court wrote that the only federal

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40. "No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." ARIZ. CONST. art. II, § 30.

41. *McKaney*, 100 P.3d at 19.

42. *Id*. at 20.

43. *Id*.

44. *Id*.

45. While the Fourteenth Amendment to the U.S. Constitution makes most provisions of the Bill of Rights applicable to the states, the U.S. Supreme Court has ruled that the federal requirement of indictment by grand juries for charges involving "capital or infamous crimes" does not pertain to state courts. Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (citing Hurtado v. California, 110 U.S. 516, 538 (1884)). While state and federal laws generally require a probable cause hearing, it is not constitutionally compelled. Gernstein v. Pugh, 420 U.S. 103 (1975); Ocampo v. United States, 234 U.S. 91 (1914). Consequently, only about half of the states in the nation require grand juries to bring charges for felonies. The American Bar Association, *Courts and Legal Procedure: Grand Juries*, http://www.abanet.org/publiced/courts/grandjury_role.html (last visited Jan. 9, 2006). Other states hold a preliminary hearing where a judge determines whether there is sufficient evidence to proceed to trial.

46. *McKaney*, 100 P.3d at 20.

47. *Id*. at 21.

mandate applicable to McKaney was the notice requirement of the Due Process Clause of the Fourteenth Amendment.[48] McKaney did not contend insufficient or unfair notice in the special action.[49]

In assessing Arizona's constitutional requirements, the court noted that the state constitution requires an information or indictment before a person may be prosecuted for a felony or misdemeanor.[50] The charging document must fairly indicate the crime charged, state the essential elements of the alleged crime, and must be sufficiently definite, a requirement echoed in the Arizona Rules of Criminal Procedure.[51]

The court reasoned that even if proof of an aggravating factor is the "functional equivalent" of an element of an offense in capital cases, no authority requires treating aggravating factors as essential elements in a grand jury indictment or information.[52] With adequate notice of the State's intention to seek the death penalty and of the aggravating factors the State intends to prove, it becomes "irrelevant" that aggravators are not based on evidence of probable cause found by the grand jury and specified in the indictment.[53] Requiring such proof is "an unduly expanded and non-essential due process standard" outside of the scope of the "information or indictment" clause of the Arizona Constitution.[54] Further, the court suggested that allowing grand juries this power would expand their statutory role. Such a change could perhaps require the judge to conduct voir dire and rearrange process by presenting aggravating factors to the grand jury before these jurors find the defendant guilty of any crime, a disclosure that could prove unduly prejudicial.[55]

B. The Dissent

The *McKaney* decision bucks the trend developing in federal courts.[56] Prosecutors began submitting aggravating factors to federal grand juries even before *Blakely* was decided. The majority in *McKaney* is consistent with most state courts' opinions on this issue,[57] but nearly all of those decisions were made pre-

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48. *Id*.
49. *Id*.
50. ARIZ. CONST. art. 2, § 30.
51. ARIZ. R. CRIM. P. 13.2.
52. *McKaney*, 100 P.3d at 21.
53. *Id*.
54. ARIZ. CONST art. II, § 30.
55. *McKaney*, 100 P.3d at 22–23.
56. *See* State v. Fortin, 843 A.2d 974, 1034 (N.J. 2004) (citing United States v. Haynes, 269 F. Supp. 2d 970, 973 (W.D. Tenn. 2003); United States v. Church, 218 F. Supp. 2d 813, 814 (W.D. Va. 2002); United States v. Matthews, 246 F. Supp. 2d 137, 140 (N.D.N.Y. 2002); United States v. Lentz, 225 F. Supp. 2d 672, 675 (E.D. Va. 2002); United States v. Regan, 221 F. Supp. 2d 672, 677 (E.D. Va. 2002)).
57. *See, e.g.*, People v. McClain, 799 N.E.2d 322, 336 (Ill. App. 2003); Soto v. Commonwealth, 139 S.W.3d 827, 841–43 (Ky. 2004); Stevens v. State, 867 So.2d 219, 227 (Miss. 2004); Primeaux v. State, 88 P.3d 893, 899–900 (Okla. Crim. App. 2004); State v. Oatney, 66 P.3d 475, 487 (Or. 2003); State v. Edwards, 810 A.2d 226, 234 (R.I. 2002).

Blakely.[58] New Jersey has held that its constitution requires submitting aggravating factors to the grand jury and including these factors in the indictment.[59] The *McKaney* dissent, which concurred in part, conceived of the issue in a manner similar to the New Jersey Supreme Court's decision. The dissent also characterized *McKaney* as the first time the Arizona Supreme Court has concluded that the "information or indictment clause" of the Arizona Constitution provides less protection than the corresponding federal clause.[60]

The dissent and the New Jersey Supreme Court's decision present a straightforward reading of *Ring* and *Apprendi* in relation to the grand jury indictment requirements. Both the dissent and the New Jersey Supreme Court cited the Court's holding in *Ring*: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."[61] The dissent suggested that the requirement extends to grand juries and noted that every federal court of appeals that has considered this issue has concluded that the Fifth Amendment requires that aggravated factors be alleged in an indictment.[62]

While federal courts' interpretations related to grand juries in particular and charging instruments in general are not binding on states, the dissent cited a recent Arizona Supreme Court case that acknowledges that federal courts' interpretations of a federal constitutional clause similar to an Arizona constitutional clause has "great weight in accomplishing the desired uniformity between the clauses."[63] The Arizona Supreme Court has portrayed federal constitutional law as "the benchmark of minimum constitutional protection."[64] The language of the Fifth Amendment and Arizona's indictment clause are indistinguishable, and no historical evidence indicates that the framers viewed the state and federal constitutional protections as materially different.[65] The dissent stressed that the intention of the Arizona indictment clause is not simply to provide

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58. State court decisions made after *Blakely* tend to cabin the focus of *Apprendi*, *Ring*, and *Blakely* on the Sixth Amendment right to trial by jury. *See, e.g.*, State v. Berry, 141 S.W.3d 549, 560 (Tenn. 2004). Some of these decisions also suggest that "in both *Apprendi* and *Ring*, the Court expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States." *Id*. And, these lower courts are "unwilling to do what the U.S. Supreme Court would not." *Id*. As discussed in this Case Note, the Supreme Court declined to address whether a probable cause hearing require in both *Apprendi* and *Ring* because the defendants did not make a constitutional claim that their indictments were defective or that they were entitled to a probable cause hearing on the aggravating factors. *See supra* Part II.A.

59. *Fortin*, 843 A.2d 974.

60. *McKaney*, 100 P.3d at 23.

61. Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

62. *McKaney*, 100 P.3d at 24.

63. State v. Casey, 71 P.3d 351, 362 (Ariz. 2003).

64. Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986).

65. *McKaney*, 100 P.3d at 23.

the defendant with notice but also to ensure that the grand jury "finds that probable cause exists *before* the State can bring charges."[66]

The dissent also discussed the anomalous result the decision has on capital defendants. State prosecutors decide whether the State has sufficient probable cause for the alleged aggravating circumstances that can elevate the punishment to death. Yet it is, "unthinkable," for example, "that we would allow the State, after obtaining from a grand jury an indictment charging a defendant with simple assault, to unilaterally amend the indictment to allege aggravated assault."[67] The dissent also saw little merit in the argument that costs to law enforcement would arise from requiring that aggravating circumstances be part of the grand jury indictment.[68] Federal practice provides the model.[69]

Finally, the dissent observed that the real complaint in this case is not sufficiency of notice but rather the fact that the State alleged elements of the offense without a probable cause finding by a grand jury.[70] To address this problem, the dissent suggested that before McKaney went to trial he should file a Rule 16 motion, using Rule 13.5(c) of the Arizona Rules of Criminal Procedure, to obtain a judicial determination of the legal sufficiency of the aggravating factors.[71] Since the Rule 13.5(c) remedy was still available to him, the dissent concurred in part with the majority in finding that special action relief was inappropriate at that time.

III. ANALYSIS AND CONCLUSION

McKaney was decided on November 2, 2004, more than four months after the U.S. Supreme Court decided *Blakely*. Surprisingly, *McKaney* does not make reference to *Blakely*, even though its relevance is evident. The *Apprendi* Court recognized that the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt."[72] The *Blakely* Court found that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[73] Indeed, in *Ring*, the Court explicitly found that Arizona's enumerated aggravating factors are "the functional equivalent of an element of a greater offense" [74] and thereby recognized the constitutional significance of capital aggravating factors, which are unmatched

66. *Id*. at 25.
67. *Id*.
68. *Id*.
69. State v. Fortin, 843 A.2d 974, 1034 (N.J. 2004).
70. *McKaney*, 100 P.3d at 26.
71. *Id*. The *Apprendi* line suggests that there is a federal right to have some way to challenge the probable cause finding of each "element" and to have each element tried. It could be argued that Arizona provides this in regard to grand juries through Arizona Rule of Criminal Procedure 12.9, but that would be a strained implementation.
72. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (emphasis added).
73. Blakely v. Washington, 542 U.S 296, 303–04 (2004) (emphasis added).
74. Ring v. Arizona, 536 U.S. 584, 609 (2002).

in their effect of exposing a defendant to the possibility of being sentenced to death. More recently, in *Sattazahn v. Pennsylvania*, the Court reiterated the *Ring* holding and clearly stated that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'"[75]

Under Arizona's own law and the Supreme Court's case law on sentencing, when the crime committed is capital murder, it should follow that aggravating factors are "essential elements" for which probable cause must be proven and included in a grand jury indictment or information.[76] Amending the grand jury indictment beyond the maximum of noncapital murder should be deemed a violation of a defendant's state constitutional right to due process under article II, sections 4 and 24 and the "indictment or information" clause in article II, section 30 of the Arizona Constitution.

The Arizona Supreme Court has recognized that "the indictment method by a grand jury is recognized as a fundamental element of the accusatory process under the United States and Arizona Constitutions."[77] Given that Arizona provides a state constitutional right to a grand jury,[78] it is curious that the court used the fact that the grand jury right is unincorporated as a premise for the decision against McKaney. The absence of a federal constitutional requirement that states provide a grand jury is used to justify not following U.S. Supreme Court sentencing law and not providing state constitutional protection. Such reasoning diminishes the state's constitutional requirements and also ignores the fact that probable cause hearings may involve incorporated rights.[79]

The Arizona Supreme Court also does not draw any distinction between a grand jury indictment or information. The court concludes that the difference between "elements" in relation to the Sixth Amendment jury trial right and the "functional equivalent of an element," assessed for the purpose of finding a state constitutional right, is that, 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" and, in the latter, the court "address[es] simply the adequacy of notice."[80] In framing the issue this way, the court focuses on notice, the incorporated federal due process right.

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75. 537 U.S. 101, 111 (2003) (plurality opinion).

76. *See* State v. Kelly, 597 P.2d 177, 179 (Ariz. 1979) (holding that a trial court, without the consent of the defendant, may not amend an indictment for armed robbery to robbery since such a change is a matter of substance); State v. Rogers, 545 P.2d 930, 932 (Ariz. 1976) ("It is basic that a person cannot be convicted of an offense not charged against him by indictment or information.").

77. State v. Bojorquez, 535 P.2d 6, 10 (1975).

78. Further, as the Arizona Supreme Court discusses on its website, Arizona has also been a forerunner in recognizing the importance of the jury system and has been progressive in enabling jurors to perform their important role. *See* Arizona Supreme Court, Jury Service, http://www.supreme.state.az.us/nav2/jury.htm. (last visited May 6, 2006).

79. In *County of Riverside v. McLaughlin*, for example, the U.S. Supreme Court defined what "promptly" means in regard to the Fourth Amendment requirement that a person arrested without a warrant be promptly brought before a magistrate for a probable cause determination. 500 U.S. 44 (1991).

80. *McKaney*, 100 P.3d at 23.

Yet notice was not, as the dissent recognized, the real issue in *McKaney*.[81] The court states that evidence of probable cause is "irrelevant" because the defendant receives notice and the trial jury determines whether the aggravating factors exist beyond a reasonable doubt. This reasoning downplays the very purpose of the grand jury or information, which is not simply to serve as mechanisms that provide notice but also to determine independently whether probable cause exists to support the State's allegations.[82] The petit jury's determination of aggravating factors is distinct from the grand jury's or a judge's probable cause assessment: the presence of one should not be used to justify the absence of the other.

If the U.S. Supreme Court's recent sentencing decisions only address what trial juries assess, then any pre-trial document or procedure will not be subject to the specificity/element requirements in the *Apprendi* line. But the Arizona Supreme Court has recognized that *Blakely* implicates Arizona's general felony sentencing schemes[83] and, presumably, will recognize *Blakely*'s effect on capital sentencing. The odd consequence of *McKaney*, then, is that Arizona now follows two sentencing systems. When a defendant is charged with an indictment or information, the State does not adhere to the *Apprendi* line of cases. Once the defendant reaches the trial stage, the State follows the *Apprendi* line and, in doing so, adopts a different understanding of the statutory maximum and aggravating factors.

The Arizona Supreme Court ignores the U.S. Supreme Court's findings that Arizona's enumerated aggravating factors are "the functional equivalent of an element of a greater offense" [84] and that the Due Process Clause of the Fifth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt."[85] Arizona should follow federal law and provide a probable cause hearing for defendants on par with the federal system.

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81. *Id*. at 26.

82. *See* ARIZ. REV. STAT. § 21-413 (2006) ("Indictment upon probable cause: The grand jury shall return an indictment charging the person under investigation with the commission of a public offense if, from all the evidence taken together, it is convinced that there is probable cause to believe the person under investigation is guilty of such public offense."); *see also* 17 ARIZ. R. CRIM. P. 12.1(d)(4); State v. Baumann, 610 P.2d 38, 43 (Ariz. 1980) ("[T]he grand jury's primary function" is "determining whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it.").

83. State v. Brown, 99 P.3d 15, 18 (Ariz. 2004).

84. Ring v. Arizona, 536 U.S. 584, 609 (2002).

85. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (emphasis added).