IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO
Plaintiff/Petitioner

Case No. 31,909

v.

RUDY B

Defendant/Respondent

ON WRIT OF CERTORARI TO THE NEW MEXICO COURT OF APPEALS
APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE MONICA ZAMORA, DISTRICT JUDGE, PRESIDING

BRIEF OF JUVENILE LAW CENTER, THE CHILDREN'S LAW CENTER OF MASSACHUSETTS, THE JUVENILE JUSTICE PROJECT OF LOUISIANA, THE NATIONAL JUVENILE DEFENDER CENTER, THE NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION, THE SOUTHERN JUVENILE DEFENDER CENTER AND PROFESSOR BARBARA FEDDERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/RESPONDENT

Marsha L. Levick
Katherine E. Burdick
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia, PA 19107
(215) 625-0551
Fax: (215) 628-2808
Counsel for *Amici Curiae*

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF PROCEEDINGS 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. The Sixth Amendment Protects the Right to a Jury Trial in Juvenile Court Sentencing Hearings that Result in Serious Adult Sentences 9

II. The Court of Appeals Correctly Determined that the Juvenile Court Violated the Sixth Amendment When, Based on Judicial Fact-Finding Alone, it Sentenced Rudy as an Adult 14

A. *Apprendi* and its Progeny Establish a Bright-Line Rule that Any Fact Increasing a Sentence Beyond the Statutory Maximum Triggers the Right to a Jury Trial 15

B. *Apprendi* Applies to New Mexico Amenability Hearings Because the Judge is Mandated to Find Certain Factors Before Imposing an Adult Sentence 22

III. *Ice* Does Not Change the Application of *Apprendi* to the Judicial Fact-finding that Led to Rudy's Sentence 23

A. *Ice* Does Not Apply to "Offense-Specific" Sentencing Determinations 24

B. "Offense-specific" Sentencing Determinations Categorically Encroach on the Traditional Role of the Jury 28

C. Even if this Court Finds *Ice* Established a New Historical Test, That Test Should Not Control Here Because Amenability Hearings Did Not Exist At Common Law 29

IV. Rudy's Twenty-five Year Adult Sentence Exceeded the Statutory Maximum 31

CONCLUSION 34

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico v. Rudy B., 2009-NMCA-104, 216 P.3d 810 (N.M. Ct. App. 2009) .... passim

State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776 (N.M. 2000) 6, 8, 15

State v. Jones, No. 30,766, slip op, (N.M., Feb. 16, 2010) 30, 33

State v. Lucero, 2007-NMSC-041, 163 P.3d 489 (N.M. 2007) 9

Other State Cases

Commonwealth v. Quincy Q., 753 N.E.2d 781 (Mass. 2001) 14

State v. Jones, 47 P.3d 783 (Kan. 2002) 14

State v. Rodriguez, 71 P.3d 919 (Ariz. App. 2 Div. 2003) 14

Federal Cases

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 20, 21

Apprendi v. New Jersey, 530 U.S. 466 (2000) .... passim

Blakely v. Washington, 542 U.S. 296 (2004) .... passim

Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) 10

Cunningham v. California, 549 U.S. 270 (2007) .... passim

Duncan v. Louisiana, 391 U.S. 145 (1968) 10, 11

Harris v. United States, 536 U.S. 545 (2002) 20

Jones v. United States, 526 U.S. 227 (1999) 8, 14, 21

Lewis v. United States, 518 U.S. 322 (1996) 11

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 12, 13

Oregon v. Ice, 129 S.Ct. 711 (2009) .... passim

Rangel-Reyes v. United States, 547 U.S. 1200 (2006) 21

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

Roper v. Simmons, 543 U.S. 551, 570 (2005) 33

United States v. Booker, 543 U.S. 220 (2005) .... passim

Walton v. Arizona, 597 U.S. 693 (1990) 28

New Mexico Statutes

NMSA 1978, §§ 32A-2-1 to -33 .... 7, 11

NMSA 1978 § 32A-2-16 .... 11, 13, 14

NMSA 1978 § 32A-2-19 8

NMSA 1978 § 32A-2-20 .... 8, 9, 33

Other State Statutes

Ark. Code Ann. § 9-27-325 11

Colo. Rev. Stat. Ann. § 19-2-107 11

Conn. Gen. Stat. § 46b-133 11

Idaho Code Ann. § 20-509 11

Kan. Stat. Ann. § 38-2347 11

Kan. Stat. Ann. § 38-2357 11

N.H. Rev. Stat. Ann. § 169-B:19 11

R.I. Gen. Laws § 14-1-7.3 11

Or. Rev. Stat. § 137.123 24

Journals and Periodicals

Jenny E. Carroll, Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process, 61 Hastings L.J. 175 (2009)...32

IDENTITY AND INTEREST OF AMICI CURIAE

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States. JLC advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services and create opportunities. Recognizing the critical developmental differences between youth and adults, JLC works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. JLC advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. *Amicus*, JLC, believes that juvenile justice policy and practice, including state laws on sentencing, should be aligned with modern understandings of adolescent development. JLC participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in continuing

legal education seminars and have filed *amicus curiae* briefs in juvenile justice and child welfare matters in the past. The CLCM mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth Further, the CLCM is committed to assuring children's age and developmental factors are considered by decision makers when imposing policies or penalties that impact children's lives. This case presents questions of significance both to the children who are involved in the court system and to the attorneys who represent them. The *amici* hope their views will add to the Court's consideration of the issues raised in this appeal.

The **Juvenile Justice Project of Louisiana (JJPL)** is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and indentify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between

youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The **National Juvenile Defender Center (NJDC)** was created in 1999 to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. Previously part of the American Bar Association Juvenile Justice Center, NJDC collaborates with nine Regional Juvenile Defender Centers, including the Southwest Juvenile Defender Center, which covers New Mexico, Arizona, Colorado, Oklahoma, Texas and Utah. Each Center coordinates regional activities, which include helping to compile and analyze juvenile indigent defense data, facilitating organizing and networking opportunities for juvenile defenders, offering targeted, state-based training and technical assistance, and providing case support specifically designed for complex or high profile cases. NJDC's mission is to ensure excellence in juvenile defense and promote justice for all children. In service to that mission, NJDC helps juvenile defense attorneys improve their capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over how our society should treat children accused of crime. NJDC provides support to public

defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **New Mexico Criminal Defense Lawyers Association (NMCDLA)** is one of 80 state and local organizations affiliated with the National Association of Criminal Defense Lawyers (NACDL). Like the national organization, NMCDLA endeavors to provide the courts with the perspective of its members on issues important to the criminal justice system.

The **Southern Juvenile Defender Center (SJDC)** works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC educates attorneys and court personnel about the role of counsel in delinquency cases and provides training and resources to juvenile defenders. SJDC is based at the **Southern Poverty Law Center** (SPLC) in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

Barbara Fedders is a clinical assistant professor at the University of North Carolina School of Law. Prior to joining the UNC faculty in January 2008,

Professor Fedders was a clinical instructor at the Harvard Law School Criminal Justice Institute for four years. Prior to that, she worked for the Massachusetts Committee for Public Counsel Services as a Soros Justice Fellow and staff attorney. She began her career in clinical work at the Juvenile Rights Advocacy Project at Boston College Law School. As a law student, Professor Fedders was a Root-Tilden-Snow scholar and co-founded the NYU Prisoners' Rights and Education Project. She is a member of the advisory boards of the Prison Policy Initiative and the Equity Project.

SUMMARY OF PROCEEDINGS

On May 29, 2005, Rudy B[redacted], a minor, was involved in an altercation in which he used a gun. In December 2005, he pled guilty to two counts of shooting from a motor vehicle causing great bodily harm, and two counts of aggravated battery with a deadly weapon with a firearm enhancement. (Plea Hearing Transcript at 2.)

In April 2006, Rudy appeared at a hearing before a juvenile court judge to determine whether he was amenable to treatment in the juvenile system. The court did not present Rudy with the option of having his amenability hearing before a jury. At the hearing, the trial judge considered contested evidence on a number of points. Witnesses were in agreement that Rudy was doing well in the detention center, (April 2006 Amenability Hearing Transcript Vol II at 16) (hereinafter

A.H.), but presented conflicting evidence on whether that compliance was a sign of rehabilitation or whether it indicated only that Rudy was conforming to the detention center's power structure. (A.H. at 16, 25-34, 38-40). Evidence was also presented about Rudy's mental state during the commission of the crime, (A.H. at 34-36), and about the availability of resources in the juvenile justice system for his rehabilitation. (A.H. at 15, 19, 20, 21). After two days of hearings, the trial judge concluded that Rudy was not amenable to treatment. (June 2006 Amenability Hearing Transcript at 28). At a subsequent hearing, the judge sentenced Rudy to twenty-five years in an adult facility. (August 2006 Sentencing Hearing Transcript at 13).

Rudy appealed, arguing, *inter alia*, that the Court of Appeals should overrule *State v. Gonzales*, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776 (N.M. 2000) and hold that the Sixth Amendment, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, gives youthful offenders the right to have a jury determine beyond a reasonable doubt whether they are amenable to treatment under NMSA section 32A-2-20(B). *New Mexico v. Rudy B.*, 2009-NMCA-104, ¶ 5, 216 P.3d 810, 813 (N.M. Ct. App. 2009). The Court of Appeals agreed and consequently overruled *Gonzales*, reversed the trial court's amenability finding, and remanded the case to the trial court for resentencing. *Id.* ¶¶ 53-54, 61. The State appealed.

SUMMARY OF ARGUMENT

This case involves an issue of extraordinary importance to the lives of vulnerable youth – whether New Mexico's amenability hearing structure unconstitutionally denies juveniles the right to have a jury decide whether they may receive an adult sentence.

New Mexico's sentencing structure provides that a child can face an adult criminal sentence after appearing and participating in only juvenile proceedings.[1] In order to impose an adult sentence, the judge must find that the child is "not amenable to treatment or rehabilitation as a child in available facilities" and that the child "is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." § 32A-2-20(B). The consequences to these children are profound. Rudy's maximum sentence as a juvenile would have been confinement until age twenty-one – approximately three-and-a-half years. *See* § 32A-2-19(B)(1). Instead, he was subject to, and received, a twenty-five-year sentence.

The U.S. Supreme Court has long held that the judiciary must vigilantly guard against trial practices that reduce the jury's significance, and that the jury right is of "surpassing importance." *Apprendi v. New Jersey,* 530 U.S. 466, 476

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[1] New Mexico's Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through the first Session of the 49th Legislature (2009)). The section pertaining to disposition is § 32A-2-20.

(2000). *See also Jones v. United States,* 526 U.S. 227 (1999). In *Apprendi v. New Jersey*, the United States Supreme Court determined that a bright-line rule that a defendant is entitled to trial by jury beyond a reasonable doubt for any fact, other than the existence of a prior conviction, that increases a defendant's sentence beyond the statutory maximum, would best protect this right. *See* 530 U.S. at 490.

In *New Mexico v. Gonzales*, 2001-NMCA-025, 130 N.M. 341, 24 P.3d 776, the New Mexico Court of Appeals held that section 32A-2-20 does not violate *Apprendi* because the amenability determination differs from findings related to elements of the crime. *Id.* ¶¶ 24, 26. *Gonzales* also set forth that *Apprendi* did not apply because all of the sentences were within the statutory range. *Id.* ¶ 31. As the Court of Appeals recognized in the proceedings below, subsequent United States Supreme Court cases rejected the reasoning supporting *Gonzales*. *Rudy B.*, 2009-NMCA-104, ¶¶ 34-54.

Specifically, after the Court of Appeals decided *Gonzales*, the Supreme Court clarified that *Apprendi* applies to fact-finding in a variety of contexts, including sentencing factors like those at issue here. *Ring v. Arizona,* 536 U.S. 584 (2002); *Blakely v. Washington,* 542 U.S. 296 (2004); *Cunningham v. California*, 549 U.S. 270 (2007). The Court also specified that a statutory maximum is the maximum sentence a judge could impose based on the facts considered by the jury. *Ring*, 536 U.S. at 602. Like the other sentencing schemes to which the Court applied

Apprendi, amenability hearings require judicial fact-finding as a prerequisite to increasing the defendant's sentence above the statutory maximum.

The Court of Appeals thus properly overruled *Gonzales* and held that section 32A-2-20(B) and (C) defied *Apprendi*'s bright-line rule, and, therefore unconstitutionally eroded the Sixth Amendment right to trial by jury. *Id. Amici* respectfully request this Court to affirm that judgment.

ARGUMENT

At issue here is the constitutionality under the Sixth Amendment of the New Mexico youthful offender sentencing statutes. This Court reviews the constitutionality of legislation *de novo*. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 163 P.3d 489, 491 (N.M. 2007). Details regarding this Court's jurisdiction to review Rudy's constitutional challenge to the trial court's amenability decision are presented in Rudy's case in chief.

I. The Sixth Amendment Protects the Right to a Jury Trial in Juvenile Court Sentencing Hearings that Result in Serious Adult Sentences

Although *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not directly address the juvenile justice system, its Sixth and Fourteenth Amendment protections apply to this case because Rudy's offense – and the ensuing punishment – was sufficiently "serious." Long before the Supreme Court decided *Apprendi*, it held that the Fourteenth Amendment extends the right to a trial by jury

to defendants facing prosecutions under state law when they face punishment for a "serious" criminal offense. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). The Court declared that fundamental fairness entitles the defendant to a jury trial to ensure a buffer against arbitrary government action, explaining:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . Fear of unchecked power . . . [finds] expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-56 (footnote omitted). The Court concluded that "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* at 157-58.

Supreme Court case law makes clear that Rudy's offense falls well within the category of "serious" offenses that trigger the jury trial right. Rudy received an adult sentence of twenty-five years imprisonment. According to the *Duncan* Court, "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not." *Id.* at 159. The Supreme Court has further held that an offense carrying a maximum prison term of more than six months is sufficiently serious that the right to a jury trial attaches. *Blanton v. City of North Las Vegas,* 489 U.S. 538 (1989). Crimes with such penalties are "deemed by the community's social and ethical judgments to be serious. . . . Opprobrium

attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." *Lewis v. United States*, 518 U.S. 322, 334 (1996) (Kennedy, J., concurring) (citation omitted). *See also Duncan*, 391 U.S. at 160 ("The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.") (internal quotations omitted). As a result, when juveniles face serious adult punishment, they, like adults, are entitled to jury trials. Indeed, New Mexico recognizes this right, and provides for a jury trial when a juvenile may be subjected to an adult sentence. § 32A-2-16 (A).[2]

[2] The New Mexico statutes concerning youthful offenders can be found in New Mexico's Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2009). Many other states also grant youth facing adult consequences a jury right. *See*, *e.g.*, Ark. Code Ann. § 9-27-325 (West, Westlaw through end of 2009 Reg. Sess.) (jury trials for EJJ offenders); Colo. Rev. Stat. Ann. § 19-2-107 (West, Westlaw through end of the First Regular Session of the 67th General Assembly (2009)) (aggravated juvenile offenders and juveniles who have committed a crime of violence have a right to a jury trial); Conn. Gen. Stat. Ann. §§ 46b-133c, 46b-133d (West, Westlaw through the 2010 Supplement to the Connecticut General Statutes) (serious juvenile repeat offenders or serious sexual offenders get a jury trial in adult court); Idaho Code Ann. § 20-509 (Westlaw through Chs. 1-9 that are effective on or before Jan. 1, 2010) (juveniles aged 14 years and older accused of certain serious crimes get jury trials); Kan. Stat. Ann. §§ 38-2347, 38-2357 (Westlaw through 2009 Reg. Sess.) (EJJ juveniles have right to a jury trial); N.H. Rev. Stat. Ann. § 169-B:19 (Westlaw through Ch. 1 of the 2010 Reg. Sess) (right to jury trial if juvenile may be sentenced to an adult criminal facility or sentenced past the age of majority); R.I. Gen. Laws § 14-1-7.3 (Westlaw through Ch. 365 of the Jan. 2009 Sess.) (certified juveniles have jury trial right).

The distinction between the adult and juvenile justice systems lies at the heart of Rudy's claim that he was entitled to a jury trial to determine his amenability. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), which carves out an exception to the jury trial requirement for juvenile adjudications, underscores this point. *McKeiver* applies only to delinquency adjudications because the goal of such proceedings is rehabilitation, which would be undermined by imposing a fully adversarial system. As the *McKeiver* Court explained,

> We are particularly reluctant to say. . . that the [juvenile justice] system cannot accomplish its rehabilitative goals. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

403 U.S. at 547. To equate the juvenile and adult systems, the Court continued "chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. Justice White further explicated the difference between the adult and juvenile systems:

> Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system. For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control.).

Id. at 551-52 (White, J., concurring). To preserve the differences between these systems, the Court concluded that juvenile proceedings would be exempt from the jury trial right.

New Mexico's sentencing scheme, however, converts the juvenile proceeding into the functional equivalent of an adult criminal trial with the associated focus on blame and punishment rather than treatment. In fact, in its Brief in Chief, the State does not even allege that *McKeiver* controls. *See generally* State's Brief (hereinafter S.B.). Although Rudy's hearings took place in a juvenile courtroom, he faced the same maximum penalty as an adult offender charged with like crimes, was sentenced to serve his term in the same adult facilities, and was "treated as an adult offender." *See* § 32A-2-20(E). The focus was no longer rehabilitation; the threat – and reality – of adult criminal sentencing "put an effective end to what ha[d] been the idealistic prospect of an intimate, informal protective proceeding," *McKeiver,* 403 U.S. at 545. As a result, *McKeiver's* exception to the jury right does not apply to Rudy's case.[3]

[3] As mentioned above, New Mexico also provides by statute that juveniles are entitled to a jury trial when the offense at issue would be triable by jury if committed by an adult. § 32A-2-16. Thus, to fail to grant the jury trial right in amenability hearings not only violates the U.S. Constitution, it also runs counter to state law.

II. The Court of Appeals Correctly Determined that the Juvenile Court Violated the Sixth Amendment When, Based on Judicial Fact-Finding Alone, it Sentenced Rudy as an Adult

As a preliminary matter, because the statute at issue here addresses a sentencing procedure, *Apprendi* applies to this case. The challenged disposition statute is concerned exclusively with what type of sentence a child will receive. § 32A-2-16. Indeed, the fact-finding takes place after the child's adjudicatory hearing, and although it transfers the child to an adult custodial agency, it does not transfer the case to a different court. § 32A-2-20(E). The statute thus falls squarely under the *Apprendi* rule. Case law on juvenile transfer and waiver schemes, in contrast, may raise jurisdictional matters not at issue here.[4]

The New Mexico youthful offender disposition statute requires the trial judge to consider a number of factors before imposing an adult sentence. Some factors more closely resemble elements of a crime, such as "whether a firearm was used" and "whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner." § 32A-2-20(C)(3)-(4). Others mirror traditional sentencing considerations, such as "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child…." § 32A-2-

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[4] Some judges have characterized those schemes as jurisdictional in nature, and thus not subject to the *Apprendi* rule. *See, e.g. State v. Rodriguez*, 71 P.3d 919 (Ariz. App. 2 Div. 2003), *State v. Jones*, 47 P.3d 783 (Kan. 2002). Even in the more controversial context of transfer or waiver laws, however, some courts agree that *Apprendi* should apply. *See Commonwealth v. Quincy Q.*, 753 N.E.2d 781 (Mass. 2001).

20(C)(7). *Apprendi* and its progeny establish a defendant's right to have a jury decide all of these factors beyond a reasonable doubt.

A. *Apprendi* and its Progeny Establish a Bright-Line Rule that Any Fact Increasing a Sentence Beyond the Statutory Maximum Triggers the Right to a Jury Trial

In *Apprendi,* the Supreme Court established a bright line rule underscoring that the type of fact at issue alone does not determine whether the jury right attaches. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" triggers the jury right. 530 U.S. at 490. In *New Mexico v. Gonzales,* 2001-NMCA-025, 130 N.M. 341 (2001), the Court of Appeals held that section 32A-2-20 did not violate the Constitution because of the differences between amenability sentencing factors and elements of the crime. *Id.* ¶ 26. In its decision below, the Court of Appeals analyzed the United State Supreme Court decisions that followed *Apprendi* and correctly determined that *Gonzales* could not stand. *See Rudy B.*, 2009-NMCA-104, ¶¶ 34-54.

Specifically, the Supreme Court has definitively held that *Apprendi*'s bright-line rule applies not just to findings of facts labeled sentencing factors or elements of a crime, but to all factors that support an increase in punishment beyond the statutory maximum. "[T]he characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question 'who decides,'

judge or jury." *Ring v. Arizona,* 536 U.S. 584 (2002). When faced with novel factual circumstances, the Court has staunchly applied *Apprendi*'s bright-line rule. Regardless of the type of fact-finding at issue, if the effect of that fact-finding is to increase the defendant's sentence for a particular offense beyond the statutory maximum, the defendant has the right to have a jury decide those facts.

In *Ring*, the Court applied *Apprendi* and held unconstitutional Arizona's capital sentencing scheme, under which a defendant convicted of first-degree murder could receive a death sentence only if a judge determined that certain statutory aggravating factors, and no sufficiently mitigating factors, were present. 536 U.S. at 592-93. The Court explained that

> [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Id. at 602 (quoting *Apprendi*, 530 U.S. at 483) (internal citations omitted). Thus, "[t]he dispositive question, [the Court] said, 'is one not of form, but of effect.'" *Id.* (quoting *Apprendi*, 530 U.S. at 494). The Court held that although a single statute might contemplate both a life sentence and a sentence of death, when the law also requires a finding of aggravating factors before the death penalty may be imposed, the jury right attaches. 536 U.S. at 609. Citing *Apprendi*, the Court stated that "in effect the required finding of an aggravated circumstance exposed Ring to a greater

punishment than that authorized by the jury's guilty verdict." *Id.* at 604 (internal quotations and edits omitted). So, too, did New Mexico's amenability hearing structure in effect expose Rudy to a higher sentence based solely on facts a judge found. [5]

Blakely v. Washington further reinforced that any fact increasing a maximum sentence triggers *Apprendi*. 542 U.S. 296 (2004). There, the defendant pled guilty to an offense that carried a maximum sentence of fifty-three months. *Id.* at 303-04. The statute in question authorized the judge to impose a higher sentence upon finding certain factors beyond those authorized by the jury verdict. *Id.* In finding the statute unconstitutional, the Court established that a jury, not a judge, must consider whether a crime had been committed with "deliberate cruelty." 542 U.S. at 313-314. Analogously, here the judge considered, among other factors, a similar culpability issue - whether the offense was committed in an "aggressive, violent, premeditated or willful manner." § 32A-2-20(C)(2). More important, however, is the Supreme Court's prohibition on litigants and judges engaging in an analysis

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[5] The State mistakenly argues that it would be "arbitrary" to apply *Apprendi* to amenability hearings because adult sentences do not always result in a longer period of confinement than the juvenile disposition for the same offense. *See* S.B. at 26. As discussed in Rudy's case in chief, the State's argument ignores the fundamental differences between adult and juvenile sanctions and the consequences that flow from them.

about the type of facts at issue, instead requiring adherence to a bright-line rule barring *any* judicial fact-finding. [6]

The *Blakely* Court also highlighted why this bright-line rule was necessary to protect the right to jury trial. According to the majority, there were only two alternatives to the *Apprendi* bright-line rule, and neither sufficiently protects the right to trial by jury. *Id.* at 306. The first alternative would be that the jury "need only find whatever facts the legislature chooses to label elements of the crime, and those that it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge." *Id.* The Court rejected this approach, explaining that it could result in the "absurd result" that "a judge could sentence a man for committing murder even if the jury convicted him only of illegally

[6] Additionally, the judge's capacity as an effective fact-finder may not outweigh Rudy's constitutional right to a jury determination of his amenability. As the Court explained in *Blakely,* the right to trial by jury does not necessarily exist to identify the best or most knowledgeable fact-finder. Instead, it exists to prevent unchecked power in the judiciary. The jury trial is the "circuitbreaker in the State's machinery of justice," *Blakely,* 542 U.S. at 306, and must be vigilantly protected. More specifically, that a judge may be better-positioned to understand the complexity of a factual finding at issue does not eliminate the right to a jury determination of that fact. In *Ring,* the Court explicitly rejected the State's argument that the elaborate sentencing procedures and detailed factual findings needed in death penalty cases mandated judicial fact-finding. 536 U.S. at 606. The *Ring* Court concluded that the jury right would apply even in cases where the jury might be less capable than the judge, noting that "[t]he Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Id.* at 607.

possessing the firearm used to commit it-or of making an illegal lane change while fleeing the death scene." *Id.*

The second alternative, according to the Court, and the one that most closely mirrors the logic set forth in *Gonzales,* would be that "legislatures may establish legally essential sentencing factors *within limits* – limits crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.'" *Id.* at 307. The Court rejected this option as well, explaining that to rely on a judge's subjective interpretation of what constituted a sentencing factor and what constitutes an element of the crime would too deeply erode the power of the jury, and thus that *only* a bright-line rule could suffice.

> Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is too far. We think that claim is "not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."

Id. at 308. Thus, in *Blakely* the Court held that a judge could not increase the defendant's carjacking sentence upon his or her own finding "that a defendant acted with deliberate cruelty." *Id.* at 313-14 Similarly, the jury right attaches to the factual findings required by section 32A-2-20, whether they go to the circumstances of the crime, the defendant's mental state, or even the availability of resources, if the result is to take the sentence beyond the statutory maximum.

Whether the findings constitute a "tail which wags the dog," or a more traditional sentencing factor, the defendant is entitled to trial by jury.

In *United States v. Booker,* 543 U.S. 220 (2005) and *Cunningham v. California,* 549 U.S. 270 (2007) the Court applied *Apprendi* yet again. In *Booker,* the Court applied *Appendi's* bright-line rule and found unconstitutional the federal sentencing guidelines, which mandated judges to find additional facts before issuing an enhanced sentence. 543 U.S. at 245. Similarly, the *Cunningham* Court invalidated California's determinate sentencing law because it authorized a trial judge to find facts that exposed the defendant to an elevated "upper term" sentence, in violation of *Apprendi*'s bright-line rule. 549 U.S. at 288.

The Court has only declined to apply *Apprendi* to cases in which the facts in question did not increase the maximum available sentence for a particular crime: *Harris v. United States*, 536 U.S. 545 (2002), examined fact finding that increased the statutory minimum only, while *Oregon v. Ice*, 129 S.Ct. 711 (2009) concerned judicial fact-finding that determined only how sentences for multiple crimes would run.

What is more, only one "narrow exception" exists to the *Apprendi* rule: the finding that a defendant has a prior conviction. In *Apprendi,* the Supreme Court carved out the exception concerning prior convictions because it had previously decided in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), that prior

convictions need not be listed in a criminal indictment. *Apprendi,* 530 U.S. at 487. The Supreme Court allows the prior convictions exception because "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). *See also Apprendi*, 530 U.S. at 496 (emphasizing that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact"). These protections are manifestly absent from the amenability determination.[7]

Together, the *Apprendi* line demonstrates the Court's unwavering adherence to *Apprendi*'s core holding that defendants are entitled to have a jury decide the existence of any fact that could increase their sentence beyond the statutory

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[7] Moreover, Supreme Court case law suggests that even a finding of prior convictions may now warrant jury protections. *Almendarez-Torres* itself was a bare 5-4 majority opinion, with Justice Thomas as one of justices who signed the majority opinion. Since then, however, Justice Thomas admitted that he was wrong in *Almendarez-Torres*, having made "an error to which I succumbed . . . ." *Apprendi,* 530 U.S. at 520, (Thomas, J., concurring) Still more recently, Justice Thomas dissented from the denial of certiorari in *Rangel-Reyes v. United States,* 547 U.S. 1200, 1202 (2006), observing that "it has long been clear that a majority of [the United States Supreme Court] now rejects [the *Almendarez-Torres*] exception." The constitutional doubt cast even on the exception regarding prior convictions – which as a practical matter are unlikely to be contested – emphasizes the importance of the jury right in more subtle cases such as the one at bar.

maximum. Because Rudy's sentence increased due only to a judge's factual determination that Rudy was not amenable to treatment, this Court should affirm the lower court's holding that the sentence violates the Sixth Amendment jury right.

B. *Apprendi* Applies to New Mexico Amenability Hearings Because the Judge is Mandated to Find Certain Factors Before Imposing an Adult Sentence

If a sentencing recommendation is merely advisory, it does not trigger the jury right. If, as is the case here, the judge's discretion is limited because he or she must find certain facts to be true before imposing a sentence, *Apprendi* applies and the defendant has a right to a jury trial.

In *Booker,* the Supreme Court considered the constitutionality under the Sixth Amendment of federal sentencing guidelines. At issue were sentencing provisions that elevated the defendant's sentence based on a judicial finding regarding the quantity of illegal drugs at issue. 543 U.S. at 228. The Court concluded that the sentencing provisions violated the Sixth Amendment because they were mandatory. The Court explained that its holding "rests on the premise" that "the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." The Court continued:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We

> have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.

Booker, 543 U.S. at 233. Although the sentencing scheme at issue here allows the judge the discretion to impose the adult sentence, and allows the judge a degree of leeway in determining which facts are relevant, it is still "mandatory" as that term has been defined by the *Apprendi* line of cases. As the Court explained in *Cunningham,* what makes a sentencing scheme mandatory is the requirement that a judge find certain facts before imposing the heightened sentence.

> We cautioned in *Blakely,* however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Cunningham, 549 U.S. at 290. Because the judge was *required* to find additional factors in order to impose an adult sentence, § 32A-2-20(B), the sentence was mandatory and triggered the Sixth Amendment jury right.

III. *Ice* Does Not Change the Application of *Apprendi* to the Judicial Fact-finding that Led to Rudy's Sentence

The State and the Court of Appeals incorrectly asserted that *Ice* created a new "threshold test" for the application of *Apprendi. See* S.B. at 13-37; *Rudy B.*, 2009-NMCA-104, ¶ 22. On the contrary, *Ice* reaffirmed that judicial fact-finding affecting sentencing for a particular crime or related crimes, like that at issue in

Apprendi and its progeny, categorically encroaches on the jury's traditional role. *See Ice*, 129 S.Ct. at 714, 716-17.

A. *Ice* Does Not Apply to "Offense-Specific" Sentencing Determinations

Although the Court conducted an in-depth historical inquiry in *Ice*, judges need not conduct an in-depth historical inquiry before applying *Apprendi* to "offense-specific" sentencing schemes like those at issue in other *Apprendi* cases.

In *Ice*, the defendant entered an apartment on two separate occasions, each time sexually assaulting a young girl. 129 S.Ct. at 715. For each of the two incidents, the jury found him guilty of three crimes (*i.e.* six crimes in total). *Id.* At sentencing the judge made a finding that the two burglaries constituted "separate incidents." *Id.* Those determinations triggered the statute allowing the judge to order consecutive sentences when "a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct." *Id.* at 715-16 (citing Or. Rev. Stat. § 137.123(2)). The judge acted on this authority and imposed the two burglary sentences consecutively instead of concurrently. *Id.* at 716. The judge also found that both incidents of touching the victim evidenced "a willingness to commit more than one offense during each criminal episode, and his conduct caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim." *Id.* This

determination permitted the judge to impose the sentences for each of the sexual assault offenses consecutively to the associated burglary sentenced. *Id.*

When discussing the applicability of *Apprendi* to the facts of *Ice*, the Court repeatedly characterized the inquiry as whether or not to "extend" *Apprendi* to a new context. *Id.* at 717 ("historical practice and respect for state sovereignty. . . counsel again extending *Apprendi*'s rule to the imposition of sentences for discrete crimes"), 718 ("[s]tate's interest in the development of their penal systems... also counsel[s] against the extension of *Apprendi* that Ice requests"), 719 ("[m]oreover the expansion that Ice seeks would be difficult for states to administer"). By describing application of *Apprendi* to the facts of *Ice* as an extension of the doctrine, the Court reinforced that *Apprendi* and its progeny remain good law.

The Court also explicitly distinguished the previous *Apprendi* cases as "offense-specific." *Id.* at 714. In arguing that amenability hearings are not "offense-specific" because non-amenability is not a fact specific to any single criminal offense, such as the degree of the defendant's culpability, *see* S.B. at 26, the State misinterpreted the phrase's meaning. "Offense-specific" does not mean that the inquiry must be about the nature of the offense; rather, the phrase serves merely to set apart the issue in *Ice* regarding the interaction of different sentences for different offenses that did not arise from the same course of conduct. The particular phrase "offense specific" appeared in the statement that "[t]hus far, the

Court has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historical ground for the decisions." 129 S.Ct. at 714. The Court then contrasted these "offense-specific" cases with the issue in *Ice*; that is, sentencing "when a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions." *Id.* Through this contrast, the Court demonstrated that "offense-specific" means affecting the sentence for an offense or offenses arising from one course of conduct – not a judicial inquiry about the offense itself. The *Ice* Court repeatedly reinforced this point. For example, after listing the many cases in which it applied *Apprendi*, the Court explained "[a]ll of these decisions involved sentencing for a discrete crime, not – as here – for multiple offenses different in character or committed at different times." *Id.* at 717. Similarly, later in the opinion, as the Court distinguished *Cunningham* from *Ice*, it again noted that the issue there was "the imposition of an elevated 'upper term' sentence for a particular crime," which implicated *Apprendi*'s core concern of judicial "determination of facts that warrant punishment for a specific statutory offense." *Id.* at 718. As the Court of Appeals explained the distinction between *Ice* and previous *Apprendi* cases:

> In *Ice*, the jury found the facts that supported the charged offenses and imposed sentence for each offense. 129 S.Ct. at 715-16. The only determination for the trial court was the manner in which those sentences would be served.

Rudy B., 2009-NMCA-104, ¶ 31. The previous *Apprendi* cases are thus "offense-

specific," and distinct from *Ice*, because they involve sentencing for a particular crime or offenses arising from the same course of conduct, as opposed to the interplay of sentencing for multiple, unrelated offenses.

The amenability determination that increased Rudy's sentence was "offense-specific." Rudy pled guilty to four offenses[8] that all arose from one fight that occurred on one occasion. *See* Plea Hearing Transcript at 2. The judge then made the factual determination that Rudy was not amenable to treatment as a juvenile. June 2006 Amenability Hearing Transcript at 28. The judicial fact-finding in question therefore directly affected the sentence for Rudy's related offenses. Unlike in *Ice*, Rudy did not commit particular offenses on one day and others on a different occasion. Nor was the judicial inquiry about how sentences for different offenses would interact, as it was in *Ice*. Quite simply, the amenability determination increased the maximum sentence Rudy could receive for the related offenses to which he pled guilty and is therefore offense-specific.

[8] Note that "offense-specific" does not mean that the state has charged the defendant with only one offense. Indeed, in *Apprendi* itself, the defendant pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonal bomb. 530 U.S. at 469-70. There, the Court found the New Jersey hate crime statute that allowed the judge to increase the defendant's overall sentence upon finding that he acted "with a purpose to intimidate" violated the Sixth Amendment. *See generally Apprendi*, 530 U.S. 466.

B. "Offense-specific" Sentencing Determinations Categorically Encroach on the Traditional Role of the Jury

In *Ice*, the Court takes as a given that statutes allowing judges to decide factual issues that affect sentencing for a specific crime or related crimes intrude on the jury's traditional role and therefore violate the Sixth Amendment. *See* 129 S.Ct. at 714. The Court stated definitively that the "offense-specific" context of *Apprendi* and *Blakely* "supplied the historic grounding for the decisions." *Id.* (citing *Apprendi*, 530 U.S. 466; *Blakely*, 542 U.S. 296). Additionally, in distinguishing *Cunningham* from *Ice*, the Court noted that *Cunningham* implicated *Apprendi*'s core concern of the legislature taking away the jury's traditional right to decide facts that merit punishment for a specific statutory offense. *Id.* at 718 (citing *Cunningham*, 549 U.S. at 274; *Apprendi*, 530 U.S. at 490). Because the amenability determination here is also "offense-specific" it falls into the category of cases the Court has already determined implicate *Apprendi*.

The fact that the cases in which the Court applies *Apprendi* barely discuss the historic role of the jury further illustrates that the Court considers all fact-finding that influences sentencing for a particular offense to encroach on the traditional jury sphere. The *Ring* majority only brought up the historical role of the jury as part of the Court's rationale for overruling *Walton v. Arizona*, 597 U.S. 693 (1990), quoting Justice Stephen's comment in his *Walton* dissent that at common law a jury decided the facts that would determine a homicide defendant's

eligibility for the death penalty. 536 U.S. at 599. The *Blakely* majority barely mentioned the historical role of the jury. *See* 542 U.S. at 309 ("[indeterminate sentencing] increases judicial discretion... but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.") *Blakely* otherwise discussed the common law only generally. *See generally* 542 U.S. 296. Likewise, the *Booker* majority referred to the common law only superficially, focusing mainly on the ideals the Framers of the Sixth Amendment sought to promote. 543 U.S. at 238-39. Finally, the *Cunningham* Court only discussed the traditional jury function in the context of overruling a California Supreme Court case which held that the state determinate sentencing law in question did not violate the Sixth Amendment because "[s]uch a system does not diminish the traditional power of the jury." 549 U.S. at 289. The *Cunningham* Court stressed that judicial fact-finding that increases a sentence beyond that authorized by that authorized by the jury's findings does indeed violate the Sixth Amendment. *Id.* Just as it was unnecessary for the Court to conduct a robust inquiry into the historical role of the jury in these cases, this Court need not delve into a historical inquiry before applying *Apprendi* to Rudy's case.

C. Even if this Court Finds *Ice* Established a New Historical Test, That Test Should Not Control Here Because Amenability Hearings Did Not Exist At Common Law

The only history relevant for *Ice* purposes is whether the Framers of the Bill of

Rights understood the finding of a particular fact to fall into the jury's province. *See Ice*, 129 S.Ct. at 717. New Mexico did not create the "unique" post-guilt amenability hearing system at issue in this case until 1993. *State v. Jones*, No. 30,766, slip op, ¶ 31 (N.M., Feb. 16, 2010). When attempting to apply the historical prong of *Ice* to Rudy's sentence, the Court of Appeals therefore correctly recognized that "because post-guilt phase amenability hearings are unusual and of relatively recent development, we have little historical information on which to rely." *Rudy B.*, 2009-NMCA-104, ¶ 27.

Even if were to expand the relevant inquiry to historical amenability determinations in general, this Court has stated that New Mexico courts did not consider amenability of juveniles until 1955 when the Legislature amended the Juvenile Code such that only children over fourteen who were not "proper subject[s] for reformation or rehabilitation" could be treated as adults. *Jones,* No. 30,766, ¶ 27. A "history" starting in 1955 of judges deciding whether juveniles are amenable to treatment is no history at all for *Ice* purposes.

It would be a profound oversimplification of *Apprendi* and its progeny, including *Ice*, to hold that the lack of juvenile amenability determinations during the time of the Framers means this Court should not apply *Apprendi* to Rudy's sentence. As one commentator has noted in explaining why the fact that judges

have traditionally made findings in juvenile transfer proceedings does not address the Court's inquiry in *Ice*, or *Apprendi*:

> The *Apprendi* line seeks to reclaim the jury's role as sole arbiter of culpability upon which any criminal sentence can be based. *Apprendi* and its progeny, including *Ice*, admonish courts to look beyond the State's self-serving classifications of findings to the effect of such findings on the defendant's sentence.

Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 Hastings L.J. 175, 205-06 (2009) (Italics on case names added). When faced with a factual determination that did not exist at common law, the Court of Appeals similarly reasoned that because *Ice* did not overrule any of the previous *Apprendi* cases, and that prior to *Ice* "courts applied *Apprendi* without stopping to evaluate the historical jury function," the lack of history could not be the end of the analysis. *Rudy B.*, 2009-NMCA-104, ¶ 27. Rather, the proper course was simply to compare amenability determinations to the types of proceedings at issue in previous cases. *Id.*

IV. Rudy's Twenty-five Year Adult Sentence Exceeded the Statutory Maximum

Rudy's sentence violated the Sixth Amendment because the judge could not have imposed it without the judge making the factual determinations section 32A-2-20 required. The *Apprendi* rule applies to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. In *Blakely*,

the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum a judge may impose based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303. The Court further underscored this point, noting that the statutory maximum is "the maximum [a judge] may impose *without* any additional findings." *Id.* at 303-04 (emphasis in the original).[9]

The judge in Rudy's case could not have imposed the adult sentence without making the additional factual findings required by the amenability hearing. The statute requires that to invoke an adult sentence, "the court shall make" the findings that the child is not eligible for treatment or rehabilitation or for commitment to an institution for children with developmental disabilities or mental disorders. § 32A-2-20(B). Because New Mexico's sentencing scheme required

[9] Note that the juvenile and the adult sentences here do not fall within one "statutory range." When a judge's sentencing consequences are segmented – and the judge is asked to either impose *either* "sentence A" *or* a very different "sentence B" upon a finding of additional facts – then the second sentence is outside of the statutory range. In *Cunningham,* for example, the United States Supreme Court addressed a sentencing scheme in which a person convicted of sexual abuse of a child would be punished by a term of 6, 12, or 16 years. The law required the judge to impose the middle sentence unless he or she found aggravating or mitigating factors. 549 U.S. at 275. The Court explained that under this system, "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.'" *Id.* at 859 (quoting *Booker*, 543 U.S. at 233). Moreover, the United States Supreme Court has explicitly rejected the argument that the statutory maximum encompasses all possible sentences contemplated in one statute, instead recognizing that the sentence in question exceeded the maximum because it could not be imposed without additional fact-finding. *Ring*, 536 U.S. 584.

the judge to find those facts before imposing the adult sentence, the scheme violates *Apprendi* and the Sixth Amendment.

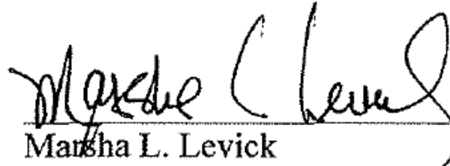
The State's argument that amenability determinations reduce rather than increase the maximum sentence available ignores the purpose and structure of New Mexico's Delinquency Act, as well as the language of the statute itself. *See* S.B. at 31. In *Jones,* this Court found that the Legislature intended "to insulate delinquent children from the potentially life-long consequences under the adult criminal justice system that may flow from a bad decision." No. 30,766, ¶ 37 (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). Due to this purpose of the Delinquency Act, this Court explained, amenability hearings are the only method through which a court may sentence a youthful offender as an adult. *Id.* ¶ 38. "Put another way, the finding of amenability gives the court the necessary leverage to dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act," this Court found. *Id.* Indeed, the Court of Appeals pointed out that the language of the statute itself defeats the State's argument. *Rudy B.*, 2009-NMCA-104, ¶ 43 (citing § 32A-2-20(B)). The juvenile sentence, not the adult sentence, is the baseline sentence for *Apprendi* purposes because the adult sentence is only available if a court makes the required factual findings, the Court of Appeals explained. *Id.* The statutory maximum in this case is thus the three-and-a-half year juvenile sentence, not the twenty-five year adult prison sentence.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court hold section 32A-2-20 unconstitutional.

Dated: April 15, 2010

Respectfully submitted,

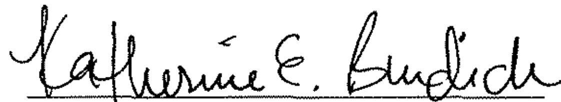


Marsha L. Levick
Deputy Director and Chief Counsel
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551

Theodosia Johnson
Assistant Public Defender
New Mexico Department of the Public Defender
301 North Guadalupe St., Suite 101
Santa Fe, New Mexico, 87501
Local Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, Katherine E. Burdick, do hereby certify this 15th day of April, 2010, that the attached Brief of *Amici Curiae* Juvenile Law Center et al. complies with New Mexico Rule of Appellate Procedure 12-213(F) because it is written in fourteen-point Times New Roman font, and contains 34 pages and 8,399 words in the body of the brief, as calculated by Microsoft Word 2003 software.



Katherine E. Burdick
Zubrow Fellow
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia, PA 19107
(215) 625-0551
Fax: (215) 628-2808
kburdick@jlc.org

CERTIFICATE OF SERVICE

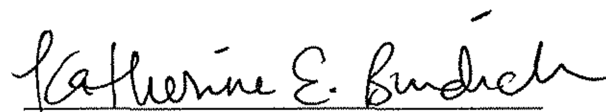
I, Katherine E. Burdick, do hereby certify, this 15th day of April, 2010, pursuant to New Mexico Rule of Appellate Procedure 12-307, that the original and six (6) true and correct copies of this Brief of *Amici Curiae* Juvenile Law Center et al. and attached Motion for Leave to File an *Amici Curiae* brief on Behalf of Defendant/Respondent Rudy B[redacted] have been served, via overnight mail, to:

New Mexico Supreme Court Clerk's Office
PO Box 848
Santa Fe, NM 87504-0848

Additionally, I hereby certify that one (1) copy of this Brief and attached Motion have been served, via first class mail, postage prepaid, to all counsel of record as follows:

Theodosia Johnson
Assistant Appellate Defender
New Mexico Department of the Public Defender
301 North Guadalupe Street, Suite 101
Santa Fe, New Mexico 87501
(505) 476-0734
(505) 476-0273 (fax)

Victoria Wilson
Assistant Attorney General
111 Lomas Blvd. N.W., Suite 300
Albuquerque, New Mexico 87102
(505) 222-9000



Katherine E. Burdick
Zubrow Fellow
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia, PA 19107
(215) 625-0551
Fax: (215) 628-2808
kburdick@jlc.org