


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**STATE OF NEW MEXICO,
PLAINTIFF-RESPONDENT**

V. S-1-SC-38130

**CHRISTOPHER RODRIGUEZ,
DEFENDANT-PETITIONER**

MOTION FOR REHEARING

COMES NOW Christopher Rodriguez, by and through undersigned counsel, moving this Honorable Court to rehear its decision in the above styled and numbered cause. As grounds therefore, Christopher shows as follows:

1. The Court of Appeals' holding in *State v. Christopher Rodriguez*, A-1-CA-37324, fundamentally altered juvenile procedure in New Mexico. Until the decision in Christopher's case, juveniles were able to appeal trial court decisions in amenability hearings following a plea to the underlying charges. However, the Court of Appeals dismissed Christopher's appeal finding that he waived defects in the amenability hearing due to his plea, which occurred

prior to the amenability hearing and left open the question of whether Chris was amenable to treatment.

2. That decision conflicted with the decision in *State v. Nehemiah G.* In *Nehemiah G.*, the parties were identically situated, procedurally, but the government was allowed to appeal the trial court's decision in the amenability hearing as an "aggrieved party" under NMSA 1978 § 39-3-7. Christopher, however, was denied the right provided to the State.
3. This Court denied certiorari without an opinion.
4. Several juvenile rights organizations have raised their concerns along with Christopher that this change in procedure not only violates Christopher's due process rights but also impacts the rights of juveniles who will follow him into the juvenile system. Two such letters from those organizations are attached.
5. Christopher seeks rehearing because, if juvenile procedure is to be fundamentally altered in the State of New Mexico, the Supreme Court should weigh in on the issue.
6. Christopher understands that the Court of Appeals' memorandum opinion is non-precedential. However, courts and practitioners are nevertheless relying on unpublished opinions as authority. There is the danger that this opinion will be relied upon as precedential despite Rule 12-405 NMRA. *See e.g. State v. Sosa*,

No. A-1-CA-39636, mem. op. ¶ 24 (Jan. 30, 2020)(citing to non-precedential opinion for a point of law).

7. Undersigned counsel contacted counsel for the State, Assistant Attorney General John Woykovsky, who opposed a Motion for Rehearing in the Court of Appeals. There exists no reason for him to have changed his mind.

Discussion:

In its Memorandum Opinion issued in this case, the Court of Appeals dismissed Mr. Rodriguez's appeal, finding that his plea agreement waived any right to an appellate challenge the trial court's finding in the *subsequent* amenability hearing. This Court specifically relied upon the language stated in the plea agreement that "Defendant specifically waives his right to appeal as long as the court's sentence is imposed according to the terms of this agreement." Those terms were that "all counts shall be served consecutively to each other for a total sentence of thirty-one and one-half years. Some of the charges make defendant a youthful offender, therefore an amenability hearing will need to be held to determine whether defendant will receive a juvenile or adult sentence ... If the court accepts this agreement, defendant will be ordered to serve a period of incarceration up to thirty-one and one-half years. Defendant may also be ordered to

to serve a period of probation. If defendant later violates that probation, he may be incarcerated for the balance of the sentence.”

Christopher is aware that he could have received an adult sentence as a result of his plea; however, at no point did he waive his right to a hearing that comports with due process. In fact, the above language clearly contemplated an amenability hearing without limit to the rights associated with that hearing. Christopher could not bargain away his right to challenge the process of his amenability hearing held after a plea agreement, just as the New Mexico Supreme Court found in *State v. Jones*, 2010-NMSC-012,, 48, 148 N.M. 1, that a juvenile could not bargain away his right to have an amenability hearing via plea bargain.

While some constitutional rights can be waived, *State v. Singleton*, 2001-NMCA-054, 130 N.M. 583, *cert. denied*, 130 N.M. 558, 28 P.3d 1099, one cannot waive the right to appeal the outcome of an event that has not yet occurred.

"Waiver is the intentional relinquishment or abandonment of a known right."

United States v. Olano, 507 U.S. 725 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464) Here, because Christopher did not know that the trial court would ignore every witness' testimony in violation of his due process rights, *Medler v. Henry*, 1940- NMSC-028,, 20, 44 N.M. 275, he could not waive that right.

Further, the Court of Appeals' rationale offends common sense. For example, if the trial court were to, during the course of the amenability hearing, use racial slurs or announced that it would not find a child amenable, no matter what evidence was presented, the Court of Appeals' reasoning would prevent review. *See State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22.

Ordinarily in plea bargain scenarios, a criminal defendant enters into the bargain knowing what the outcome will be. *See State v. Gutierrez*, 2016- NMCA-077, ¶ 21, 380 P.3d 872 (discussion of the doctrine of finality) Here, Christopher could not and did not contemplate subsequent legal errors by the trial court in the amenability hearing. As an analogy, in adult proceedings, defendants often enter guilty pleas and sentencing is set for a later date. If legal errors occur in the sentencing proceeding, adult defendants do not waive those errors by virtue of the entry of a guilty plea. *State v. Torres*, 2012-NMCA-026, ¶ 14, 272 P.3d 689, Rule 5-802 NMRA (illegal sentence can be challenged at any time) Similarly, Christopher did not waive any legal errors in the amenability hearing by virtue of his guilty plea that occurred prior to the amenability hearing.

Legal errors did occur in the amenability hearing that Christopher contends will warrant reversal upon a review of the merits. The trial court abused its discretion in ignoring the unanimous testimony that Christopher was amenable to treatment in the juvenile system. In many ways, the case at bar is similar to

Nehemiah G., but factually opposite. In *Nehemiah G.*, this Court found abuse of discretion in the trial Court's ignoring the testimony that Nehemiah was not amenable. *State v. Nehemiah G.* 2108-NMCA-034, 417 P.3d 1175. Similarly, but conversely, the trial Court in the case at bar was presented with uncontroverted testimony that Christopher was amenable. But the trial Court ignored the experts' conclusions and cherry-picked negative features from the reports to support its contrary conclusion.

If the Court of Appeals' opinion is allowed to stand, the fundamental structure of juvenile procedure would be altered. If the Court of Appeals' opinion is allowed to stand, trial courts' decisions in amenability hearings would go unchecked. Every child who enters into a plea to the underlying charges and puts his future into the hands of the trial court at an amenability hearing, does so at his peril. If the Court of Appeals' opinion is allowed to stand, the entire reason why juvenile offenders take pleas would be undermined. The knowing and voluntary nature of the plea would be rendered void. The notion of "taking responsibility for ones' actions" would no longer matter.

WHEREFORE, for these reasons and for the reasons more fully outlined in his Petition for Certiorari, Christopher Rodriguez respectfully prays that the Court rehear this cause and issue an Opinion, as outlined above.

RESPECTFULLY SUBMITTED,
Bennett J. Baur,
CHIEF PUBLIC DEFENDER,

Gregory B. Dawkins,
ASSISTANT APPELLATE DEFENDER
s/Gregory B. Dawkins

Law Offices of the New Mexico Public Defender,
1422 Paseo de Peralta, Bldg. 1
Santa Fe, New Mexico, 87501
(505) 395-2890
Attorneys for Appellant

Certificate of Service

I certify that on March 27, 2020, I caused a true and correct copy of this pleading to be served, via e filing, to Mr. John Woykovsky, Attorney General's Office, Post Office Box 1508, Santa Fe, New Mexico 87504-1508.

s/Gregory B. Dawkins

NEW MEXICO COALITION FOR THE FAIR SENTENCING OF YOUTH

Investing in community in order to create fair and age-appropriate sentencing for children who commit serious crimes in New Mexico.

As an organization concerned with the development of New Mexico law governing children sentenced as adults, The New Mexico Coalition for the Fair Sentencing of Youth writes this letter for consideration by the New Mexico Supreme Court in the case of State v. Christopher Rodriguez, case no. S-1-SC-38130.

The New Mexico Coalition for the Fair Sentencing of Youth formed in the fall of 2018 to serve youth in New Mexico facing adult sentences by advocating for fair and age-appropriate sentencing reform. The organization has close relationships with those serving long adult sentences for crimes committed as children. Two young men that belong to the coalition have been treated quite distinctly by the New Mexico courts; yet only through treating them differently has the outcome for them both been the same. Both now face long adult sentences for crimes committed when they were fifteen and sixteen years old respectively, despite the progress and promise they have shown while in custody.

Christopher Rodriguez and Nehemiah Griego were both originally charged as Serious Youthful Offenders (SYOs). An SYO is, by definition, a child fifteen years or older who is charged with first degree murder. An SYO is automatically tried and sentenced as an adult. Both Christopher and Nehemiah pled down to lesser charges that would entitle them to an amenability hearing and the possibility of a juvenile sentence. Both plea agreements included clauses recognizing the children's entitlement to amenability hearings.

In 2016, Nehemiah Griego was found amenable to treatment. He was adjudicated as a juvenile and was committed to CYFD custody until age twenty-one.

In 2017, Christopher Rodriguez was found *not* amenable to treatment. He was sentenced as an adult to thirty-one and a half years, partially suspended, for a total incarceration term of fourteen years.

In 2018, the Court of Appeals concluded that the state had the right to appeal Nehemiah's amenability determination.

In 2019, the Court of Appeals decided that Christopher did not have this same right.

Christopher's amenability hearing had serious defects outlined by his appellate counsel. The state never referenced Christopher's waiver of his right to appeal and defended the challenge on its substance. Waiver of this right was never discussed in the parties' supplemental briefing.

By all accounts, even the state seemingly assumed that the Court's 2018 opinion in *Nehemiah's* case decided the unique reviewability of an amenability decision.

In *State v. Nehemiah G.*, the Court of Appeals found the state to be an "aggrieved party" with a right to appeal the amenability determination under NMSA 39-3-7 (1966). The court arrived at this finding despite the fact that *Nehemiah's* juvenile sentence complied with the state's plea agreement. In the factually opposite scenario with Christopher, the court found that the plea agreement barred review. In *State v. Nehemiah G.*, where the state was the "aggrieved party" asserting the rights to appellate review notwithstanding a disposition consistent with the plea agreement, the court found jurisdiction to review and overturn the amenability determination. Now, in *State v. Christopher Rodriguez*, where a child is the "aggrieved party," the Court is unwilling to hear the challenge. The only way to reconcile these two cases is to conclude the state has substantially greater due process rights than an aggrieved child.

This is a dangerous conclusion. Both *Nehemiah* and Christopher's plea agreements included provisions acknowledging their entitlement to an amenability hearing. Whether or not it is the result of a plea agreement, that hearing must be a legal one. A plea agreement does not shield an illegal sentence from review, and any sentence resulting from an amenability determination that violated the Children's Code is fruit of the poisonous tree. Where a child alleges an amenability determination has been made in violation of the child's rights, the existence of a plea agreement is immaterial on the child's right to review.

In 2018, the New Mexico Supreme Court denied cert in *State v. Nehemiah G.*, allowing the state to assert the right to review of the amenability determination despite the existence of a plea agreement. Now the New Mexico Supreme Court has denied cert in *State v. Christopher Rodriguez*, a decision that suggests that the state holds those rights exclusively against the child. The double standard these cases held side-by-side creates is unconscionable and deeply inconsistent with New Mexico's tradition of protecting children from the most severe of punishments.

We urge that the New Mexico Supreme Court grant the petition for cert in this case upon this motion to reconsider.

Respectfully Submitted,

Members of the Coalition for the Fair Sentencing of Youth
PO Box 4873
Santa Fe, NM 87502
NMCFSY@gmail.com

March 27, 2020

New Mexico Supreme Court
237 Don Gaspar Avenue, Room 104
Santa Fe, New Mexico 87501

**RE: In Support of Christopher T. Rodriguez's Motion for Reconsideration on
Denial of Certiorari**

To the Honorable Justices of the New Mexico Supreme Court:

Juvenile Law Center submits this letter for consideration by the New Mexico Supreme Court in the case of *State v. Christopher Rodriguez*, case no. S-1-SC-38130. Juvenile Law Center advocates for rights, dignity, equity, and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy, and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Juvenile Law Center has appeared as *amicus* in hundreds of important juvenile law cases in state and federal courts across the country. As the co-author of the advocates' *amicus* briefs in the seminal United States Supreme Court cases, *Roper v. Simmons*, *Graham v. Florida*, *J.D.B. v. North Carolina*, and *Miller v. Alabama*, and as co-counsel in *Montgomery v. Louisiana*, Juvenile Law Center has played a key role in developing our current jurisprudence concerning youth in the justice system. Juvenile Law Center participated as amici before the New Mexico Supreme Court in three watershed cases involving youth rights: *State v. Rudy B*, 2010-NMSC-045, *State v. Jones*, 2010-NMSC-012, and *Ira v. Janecka*, 2018-NMSC-027. We submit this letter because the New Mexico Supreme Court's denial of certiorari in *State v. Christopher Rodriguez* jeopardizes the one of the key principles of these three cases—that children are different from adults.

BOARD OF DIRECTORS

Stephen Labaton, Esq.

Chair

Kathleen Chemicles, ASA

Vice Chair

Tom McCoy, Esq.

Secretary

Suzanne Meiners-Levy, Esq.

Treasurer

Scott Barsky

James R. Bell, Esq.

Dr. Tami D. Benton

Emily Buss, Esq.

Gail Chavis

Sarah Chubb Sauvayre

Susan Jin Davis

Judge Nancy Gertner (Retired)

Sekou Lewis, Esq.

Rebecca Santoro Melley

Johnny Perez

Julia H. Pudlin, Esq.

Ann Rosewater

Elizabeth Scott, Esq.

Barry L. Zubrow

EXECUTIVE LEADERSHIP

Susan Vivian Mangold, Esq.

Chief Executive Officer

Marsha L. Levick, Esq.

Chief Legal Officer

Kauthar Rahman, MBA

Chief Operating Officer

Robert G. Schwartz, Esq.

Co-Founder and Executive
Director Emeritus

Christopher Rodriguez was charged as a Serious Youthful Offender. He entered a plea of not guilty to lesser charges, which entitled him to an amenability hearing under the New Mexico Children's Code. The trial judge found Christopher not amenable to treatment and he was sentenced as an adult. Although the amenability hearing was inconsistent with the statute and implicated Christopher's rights under the Children's Code, the Court of Appeals found his guilty plea barred review of the amenability determination.

On March 13, 2020, the New Mexico Supreme Court denied *certiorari* to the Court of Appeals decision barring Christopher's appeal. This decision offends the principles announced in *State v. Rudy B*, *State v. Jones*, and *Ira v. Janecka*. *Certiorari* should be granted on appellate counsel's motion to reconsider because, despite a plea of guilty, children retain the right to appeal amenability proceedings for three reasons: (1) a child is not an adult criminal defendant, (2) an amenability proceeding is uniquely important and cannot be "bargained away," and (3) a sentencing judge lacks jurisdiction to sentence a child as an adult barring a legal amenability hearing.

Christopher was sixteen years old at the time of the incidents giving rise to this case. Although the law required his prosecution under the Serious Youthful Offender statute, he was a child, not an adult criminal defendant. This difference carries substantial weight in determining his rights and protections in his plea bargain and disposition proceedings, and appeal. The Court of Appeals ignored key differences between children and adults that are now part of the fabric of our state and federal jurisprudence.

Regarding amenability, this Court has recognized that the decision to sentence a child as an adult is "an extreme sanction that cannot be undertaken lightly." *Ira v. Janecka*, 2018-NMSC-027, ¶ 7, 419 P.3d 161. Similarly, in *State v. Jones*, this Court held that the amenability determination is of such importance that it cannot be "bargained away." 2010-NMSC-012, ¶ 46, 148 N.M. 1. Because the decision to send a child to prison implicates not only the child's interests but those of society at large, amenability proceedings are beyond the reach of the plea-bargaining process. *Id.* The *Jones* Court said, "we are hard-pressed to conceive of a decision that cuts closer to the core of society's interest than an election to give up on one of its children. This responsibility ought not be used as currency in the plea-bargaining process." *Id.*

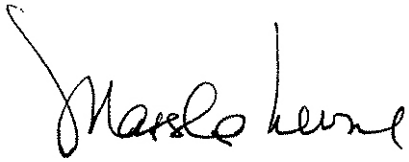
Concluding a child is beyond reform is a decision that must not be taken lightly. Indeed, the United States Supreme Court similarly has held that a child cannot be sentenced to life without the possibility of parole unless deemed to be irreparably corrupt and beyond rehabilitation. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). In her concurrence in *Tatum v. Arizona*, Justice Sotomayor emphasized that the decision to sentence an individual to life without the possibility of parole is such a grave decision that it requires thorough consideration of youth and all its attendant characteristics. *Tatum v. Arizona*, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring).

In the context of transferring a child's case to the adult criminal justice system, absent a legal amenability hearing, the trial court lacks jurisdiction under the Children's Code to impose an adult sentence. *Id.*, ¶ 34. Therefore, this Court should grant review to determine whether the children's court had jurisdiction to impose an adult sentence. In *State v. Rudy B*, this Court rejected the state's argument that the child's waiver of his right to appeal divested the Court of Appeals of jurisdiction to consider the challenge. 2010-NMSC-045 ¶ 11, 149 N.M. 22. Despite the waiver of appeal in a guilty plea, the Court properly retained and exercised jurisdiction to rule on Rudy B.'s challenge to his amenability proceeding.

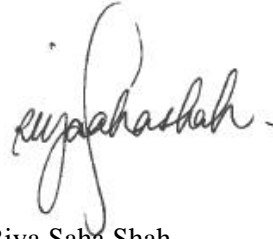
Juvenile Law Center acknowledges New Mexico's leadership in protecting the rights of children and ensuring the justice system is calibrated to account for their status as youth. The Court of Appeals decision threatens this foundation and is contrary to well-established United States Supreme Court precedent.

For these reasons, we urge the Supreme Court to grant certiorari to the Court of Appeals decision in *State v. Christopher Rodriguez*.

Sincerely,



Marsha L. Levick
Chief Legal Officer



Riya Saha Shah
Managing Director