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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO

Plaintiff-Respondent,

vs.

CHRISTOPHER RODRIGUEZ, **S-1-SC-38130**

Defendant-Petitioner.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
BERNALILLO COUNTY, NEW MEXICO
ON CERTIORARI TO THE
NEW MEXICO COURT OF CRIMINAL APPEALS

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

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STATEMENT REGARDING RECORD CITATIONS

This brief follows the citation conventions of Rule 23-112 NMRA. Citations to the record proper are in the format **[RP (page number)]** or to the supplemental record proper are in the format. Citations to the transcript are cited by volume and page **[Vol. x, Tr. #]**. Citations to the State's exhibits are cited by exhibit designation as **[State's Ex. (number)]**. Citations to Defendant's exhibits are cited by exhibit designation as **[Def't Ex. (number)]**.

District court proceedings were transcribed.

CERTIFICATION OF COMPLIANCE

The body of this brief does not exceed the page limits set forth in Rule 12-213(F)(2) NMRA. Counsel used Times New Roman, a proportionally-spaced type style / type face.

As required by Rule 12-213(F)(3), I certify that this brief in chief is proportionally spaced and the body of the brief contains **6176** words. This brief was prepared using Microsoft Word, version 2016.

NATURE OF THE CASE

Christopher Rodriguez entered a guilty plea to juvenile criminal charges believing he would receive a fair amenability hearing, at which the district court would properly consider evidence and factors to determine whether he would be sentenced as a juvenile or as an adult. At the hearing, every witness who testified before the district court found Christopher Rodriguez to be amenable to treatment in the juvenile system. Nevertheless, the district court found him not to be amenable and sentenced 16 year-old Christopher to 31.5 years in prison, split to serve 14, suspending 17.5, followed by five years of probation. Christopher appealed the district court's decision finding him not amenable. The Court of Appeals found that Christopher waived his right to appeal the result of the amenability hearing by entering a plea in the district court. This Court denied certiorari on that issue but then granted Christopher's motion for rehearing. On rehearing, this Court granted certiorari.

SUMMARY OF FACTS AND PROCEEDINGS

Christopher Rodriguez was part of a group of children that went "mobbing" in northeast Albuquerque on the evening of June 26, 2015. The group broke into several cars and residences. At one of the residences, one member of the group, Jeremiah King, shot and killed a man. It was later discovered that King also shot at

another homeowner, but he was not injured. At no time did Christopher possess or use the gun. **[RP 116]**

Christopher's Background:

Christopher's was born to a heroin addicted father and a methamphetamine addicted mother, both of whom were in and out of prison. Christopher discovered his father dead of a heroin overdose when he was 12. Due to his parents' unsuitability, his maternal grandmother and great grandmother were his primary caretakers until his grandmother died of cancer in 2007. His 80-year-old great grandmother then became his and his autistic sister's primary caretaker. **[Deft's Ex. 3-4]**

In 2001, Christopher's father went to prison for an incident where his father severely beat his mother, then fled with Christopher in the car, ultimately crashing. When his father was released on parole, he returned to the family home where he continued to beat Christopher's mother. *Id*.

Later, due to his mother's methamphetamine addiction, Christopher was sent to live with friends of his mother, whom he did not know, while she was in jail. It was at this point (age 14 or so) that Christopher began acting out. He incurred juvenile referrals for minor offenses: throwing rocks at lights, knocking on apartment windows, possession of marijuana. **[Def't Ex. 5]**

Christopher returned to Albuquerque to live with his mother and her boyfriend in a motel room after her release from jail on a trafficking charge. There, Christopher, his mother and the boyfriend were apprehended in a stolen vehicle. The boyfriend was in the driver's seat; Christopher was in the back. The boyfriend blamed the mother for stealing the vehicle, and Christopher took responsibility for the theft to spare his mother (confirmed by his mother). *Id.*

His mother then placed Christopher with more friends whom he did not know. Christopher ran away and began staying with his own friends. *Id.* It was at this point when the incident occurred that gave rise to the case at bar.

<u>Procedural History</u>

The District Attorney lodged a 40 count indictment against Christopher, based upon the offenses of that night, as well as one count of battery with a co-defendant that arose out of incident while he was in custody at the Juvenile Detention Center. **[RP 3-10]**

Christopher entered into a plea agreement with the State wherein he pled guilty to Aggravated Burglary (deadly weapon), two counts of Conspiracy to Commit Aggravated Burglary (deadly weapon), three counts of Unauthorized Use of a Credit Card, three counts of Residential Burglary, and two counts of Auto Burglary. As a condition of that plea agreement, and in accordance with the

requirements set forth in NMSA 1978, Section 32A-2-20(c) (2009), the district court would conduct an amenability hearing to determine whether Christopher was amenable to juvenile treatment or if he would be subject to adult sanctions. **[Vol. 9, Tr. 3-14]**

<u>The Witnesses' Conclusions</u>:

At the amenability hearing, the State called Joan Castillo, Christopher's probation officer, and it entered her baseline assessment into the record finding that Christopher was amenable to treatment in the juvenile system. **[State's Ex. 1]** That report and the conclusions reached therein were not just her opinions, but were a consensus and unanimous opinion reached by Ms. Castillo, along with Jeanne Masterson, Associate Deputy Director for Field Services; Kelly Jo Parker, Juvenile Probation Chief; Stephanie Kauffman, Juvenile Probation Supervisor; and Elizabeth Hamilton, Behavioral Health Clinician Supervisor. **[State's Ex. 1, p. 12]** To be clear, five different professionals in the probation field agreed that Christopher was amenable to juvenile services. *Id.*

In reaching their conclusion, Ms. Castillo and her team analyzed each statutory factor under Section 32A-2-20(c). **[State's Ex. 1, p. 9]** In addition, Ms. Castillo's report indicates that "Christopher has had highs and lows in detention since he was arrested in July 2015. For the most part, Christopher has been on

super honors level." However, the report does not paint an entirely rosy picture of Christopher, noting that he has been in four fights since his detention as well as the resulting four referrals. But throughout all of that, Ms. Castillo noted that Christopher has maintained positive attitude "even when his mother was still in jail and unable to visit him." Ms. Castillo's report further notes that Christopher is aware of his anger issues and lack of impulse control, and he would like help with getting those under control. He also expressed remorse and empathy with the victims. **[State's Ex. 1, p 8]**

At the amenability hearing, Christopher introduced into evidence the report of Christine Johnson, Ph.D., a Board Certified Forensic Psychologist. Dr. Johnson met with Christopher on five occasions for a total of 12 hours. According to her report, Dr. Johnson reviewed the relevant records, administered the appropriate tests, and interviewed the appropriate people. Dr. Johnson found Christopher amenable to treatment in the juvenile system. **[Def't Ex. A, p. 2]**

Dr. Johnson's findings largely mirror those of the probation officers' report, finding "chronic family and environmental instability, and repeated parental violence and neglect, loss of loved ones, and other emotionally traumatic events." *Id.* p. 15. More instructive was her finding that "Christopher's conduct problems did not start until after his father's parole from prison and overdose when Christopher was 12 years old, an event that also coincided with his mother's

escalating methamphetamine addiction and repeated incarcerations." *Id.* p. 16. Despite all of that, Dr. Johnson found that Christopher "does not appear lacking in the capacity for attachment to, and empathy for others…and has shown the ability to form therapeutic relationships and to accept and even elicit support from positive adults." *Id.*

Dr. Johnson further found that Christopher "should receive therapy, skill-building, and mentoring…as well as appropriate educational opportunities and support." This is not to suggest that Christopher faces an easy road ahead. Dr. Johnson noted that he remains "at high risk for further violence at present, particularly in the short term…in the form of fighting with peers and is more likely to occur in an institutional setting, given the nature and relevance of provocation (perceived and actual)…combined with Christopher's ongoing anger management problems." *Id.* p. 19

Ultimately, though, Dr. Johnson found that "the nature and severity of his likely violent behavior appears to **be manageable within the scope of available intervention in juvenile correctional settings** (such as YDDC), particularly given his involvement in the increased intervention available in such a rehabilitative setting." *Id.* (emphasis added) Further, **"his risk to the public in general would be expected to diminish,** given his ongoing participation in appropriate intervention efforts in a setting such as YDDC," and "the **community's safety**

needs with regard to Christopher can be adequately addressed with programs and services available through the juvenile justice system in New Mexico, both in juvenile correctional facilities, and eventually in the community, given intensive community-based supervision." *Id.* p. 20. (emphasis added)

Aside from Christopher's Juvenile Probation Officer and the offense history, the State offered no evidence.

<u>The District Court's Findings:</u>

The district court addressed the factors set forth in NMSA §32A-2-20(c)(1978) and found Mr. Rodriguez not to be amenable to treatment in the juvenile system, contrary to the testimony, exhibits, and argument presented at the hearing. Thereafter, the district court sentenced Christopher to 31 years and six months in the Department of Corrections (more than co-defendant Jeremiah King, who actually murdered a man and shot at another), and he was ordered to serve 14 years, with the balance suspended followed by five years of probation following his release. **[Vol. 9, Tr. 14]**

<u>Post-conviction Matters</u>

Christopher filed a Motion to Reconsider Sentence, which was denied. **[Vol. 13, Tr. 22]** He appealed to the Court of Appeals arguing that the district court had abused its discretion. Without reaching the merits of claim, the Court of Appeals

determined that because Christopher had entered into a plea, he waived his right to contest the outcome of his amenability hearing that occurred subsequent to the entry of the plea. *State v. Christopher Rodriguez*, A-1-CA- 37324, mem. op., November 27, 2109 (non-precedential). Christopher then sought certiorari in this Court. He was denied that relief on March 13, 2020, so he asked this Court to rehear his case. This Court granted that motion for rehearing and ultimately granted certiorari on July 6 of this year.

ARGUMENT

I. Christopher did not and could not waive his right to challenge an erroneous amenability determination.

Christopher entered into his plea agreement believing that he was guaranteed a subsequent amenability hearing as provided for in Section 32A-2-20. When that did not occur because the court did not follow the dictates of the statute, Christopher appealed. An overwhelmed Court of Appeals raised the issue of waiver and determined that Christopher had waived his right to appeal the fairness of a procedure specifically contemplated by his plea and guaranteed by statute, due process, and case law.

The Court of Appeals ruling in this case needs to be reversed. Not only is it an incorrect interpretation of the terms of Christopher's plea and his understanding

in entering the plea, but the ruling is also inconsistent with this Court's ruling in *State v. Jones*, 2010-NMSC-012, ¶ 38, 148 N.M. 1, holding that a juvenile defendant cannot bargain away the amenability determination, and unfair and unworkable for juveniles generally.

A. The language of the plea and Christopher's understanding of it do not substantiate that he waived his right to appeal an erroneous amenability determination.

There was no explicit discussion or waiver of the right to appeal the amenability determination at the plea hearing itself, so the only evidence of waiver cited by the Court of Appeals was language in the plea agreement.

A plea agreement is a unique form of contract, the terms of which must be interpreted, understood, and approved by the district court. *State v. Orquiz*, 2003-NMCA-089, ¶ 7, 134 N.M. 157, 74 P.3d 91. "Upon review, [appellate courts] construe the terms of the plea agreement according to what Defendant reasonably understood when he entered the plea." *State v. Miller*, 2013-NMSC-048, ¶ 9, 314 P.3d 655 (internal citation omitted). Any ambiguity in the terms of the plea agreement should be construed against the State. *Cf. Western Farm Bureau Insurance v. Carter*, 1999-NMSC-012, ¶ 4, 127 N.M. 186 ("We construe ambiguous provisions against the party that drafted").

In finding that Christopher's plea agreement waived any right to an appellate challenge to the trial court's amenability determination, the Court of Appeals relied upon the language 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 serve a period of probation. If defendant later violates that probation, he may be incarcerated for the balance of the sentence."

However, the language quoted by the Court of Appeals does not demonstrate that Christopher waived his right to appeal an amenability determination in contravention of the requirements of Section 32A-2-20 and due process. First, as the language emphasized above illustrates, Christopher's plea agreement contemplated an amenability hearing to determine whether he would be sentenced as a juvenile or as an adult. Nothing about the terms of the agreement suggest it contemplated anything less than a full and fair amenability hearing provided for by Section 32A-2-20 and due process.

Section 32A-2-20 requires a trial court to hold an evidentiary hearing and exercise its discretion to determine whether a juvenile adjudicated as a youthful offender should be sentenced as a juvenile or as an adult. Section 32A-2-20(A). To sentence a youthful offender as an adult, the court must make two findings (collectively "the amenability determination"): "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." Section 32A-2-20(B). The statute provides a list of factors the trial judge must consider in light of the evidence presented at the amenability proceeding. Section 32A-2-20(C). Implicit in these requirements is the guarantee that the district court will properly exercise its discretion and properly take into account the evidence presented to it.

Thus, in signing the plea, Christopher was agreeing to plead guilty believing he would receive a full and fair amenability determination, and at no point did he agree to waive the right to challenge an improper one.

"Waiver is the intentional relinquishment or abandonment of a known right." *State v. Zamarripa*, 2009-NMSC-001, ¶ 38, 145 N.M. 402 (internal citation and quotation marks omitted). "A waiver must be knowing and voluntary." *Id.* While some constitutional rights can be waived, *State v. Singleton*, 2001- NMCA-054, ¶ 11, 130 N.M. 583, there is a presumption against the waiver of constitutional

rights, such as the right to appeal or to due process of law. *Id.;* N.M. Const. art. VI, § 2 ("an aggrieved party shall have an absolute right to one appeal").

The language cited by the Court of Appeals—that "Defendant specifically waives his right to appeal as long as the court's sentence is imposed according to the terms of this agreement"—does not support a conclusion that Christopher waived his right to challenge an erroneous amenability determination. First, the language does not specifically mention waiver of any challenge to the amenability determination, nor would it have been understood to do so given that it was common practice to appeal such matters when Christopher pled. *See e.g. State v. Gilbert Tafoya,* A-1-CA-37325, mem. op., July 28, 2020 (non-precedential). And, given the critical importance of the amenability determination—particularly its potential to subject a juvenile to adult sanctions—waiver of the right to contest an erroneous amenability determination should be explicit and not by implication. *See e.g., Jones*, 2010-NMSC-012, ¶ 38 ("The amenability hearing is the sole device provided by the Legislature to determine whether, for a specific youthful offender, the [sentencing] consequences can be effective. The finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult.").

In addition, under the language of the plea, Christopher only agreed to waive his right to appeal as long as the sentence imposed was arrived at in accordance with the terms of the plea agreement. As explained, the agreement contemplated

that Christopher would receive a proper amenability determination; that did not occur. Christopher's sentence was, therefore, founded on a determination that was not "according to the terms" of his plea agreement, entitling Christopher to an appeal.

At the very least, the language of the plea was ambiguous. In light of the lack of an explicit discussion of the matter at the plea hearing and in accordance with precedent governing plea agreements, that ambiguity accrues to Christopher's benefit and requires that the terms of his agreement be interpreted in his favor. *See e.g., Miller*, 2013-NMSC-048, ¶ 31 (remedy for ambiguous plea agreement is "specific performance" of defendant's reasonable understanding).

B. Christopher could not have validly waived his right to appeal an erroneous amenability determination.

Even assuming the language in plea agreement alone (without any explicit discussion at the hearing) could be interpreted as a waiver of the right to challenge an amenability determination, however, such a term would be unenforceable and unworkable. Restatement (Second) of Contracts §§ 178-79 (1981) (discussing when a contractually stated term is unenforceable).

In *Jones*, this Court conducted a thorough overview of the Children's Code and determined that in light of the critical importance of the amenability

determination, a juvenile could not waive his right to an amenability hearing. 2010-NMSC-012, ¶¶ 23-38, 45-46. In reaching this conclusion, this Court recognized not only the weight of the determination facing the trial court, but the critical importance of the determination to the juvenile and society at large:

> [T]o sentence a child as an adult, the trial court must make a conscious determination that, in spite of the foregoing, the child is beyond reform—that instead of a chance at rehabilitation, the child must be separated from society and placed in the confines of an adult correctional facility. This is not a responsibility to be taken lightly.
>
> We are convinced that the Legislature did not intend this responsibility to be bargained away. The amenability determination is not like certain rights which can be waived. … The amenability determination implicates more than just the personal rights of a child. The Delinquency Act requires that this determination be made "consistent with the protection of the public interest." Section 32A-2-2(A). Thus, the trial court must weigh not only the interests of the child, but also the interests of the child's family and of society as a whole. See § 32A-2-2. 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. Simply put, the amenability determination is not the child's choice to be traded away.

Jones, 2010-NMSC-012, ¶¶ 45-46.

Just as a juvenile cannot waive such a critically important determination, a juvenile should not be permitted to waive the ability to challenge an unjust one. Permitting the waiver of challenges to defects in the amenability determination would effectively remove necessary oversight of a process this Court has already acknowledged as having significant societal ramifications. For example, if the trial

court were to, during the course of the amenability hearing, use racial slurs or announce that it would not find a particular child amenable no matter what evidence was presented, the Court of Appeals' reasoning would prevent review though no one observing the situation would deem the process fair. *See State v. Rudy B.*, 2010-NMSC-045, ¶ 35, 149 N.M. 22 (factors and evidence a district court must consider regarding amenability).

Beyond endangering the fairness and credibility of such proceedings, permitting waivers of appeals related to defects in the amenability determination would also be unworkable. As mentioned previously, a waiver is the intentional relinquishment or abandonment of a known right. It does not make sense to find a waiver is knowingly and voluntarily made when it relates to the correctness of an event that has not yet occurred. 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. No one could be said to have knowingly and voluntarily bargained for an unknown and potentially illegal outcome. *Cf. State v. Paredez*, 2004-NMSC-036, ¶ 7, 136 N.M. 533 (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)) (explaining a plea should be an "intelligent act done with sufficient awareness of the relevant circumstances and likely consequences").

This Court should be especially concerned about the knowingness and voluntariness of prospective waivers (that fail to even mention the amenability determination) for juveniles. Indeed, both the Legislature and this Court have indicated that they do not take waivers by juveniles lightly; this Court should not start doing so now. *See e.g.,* NMSA 1978, Section 32A-2-14(E); *see also State v. Rivas*, 2017-NMSC-022, ¶ 43, 398 P.3d 299 (recognizing that "Children, then, have a unique need for the guidance of counsel every step of the way and a unique need for 'special consideration' of whether they might appropriately waive that guidance"). After all, "[l]ack of experience, perspective, and judgment … often leave children without the ability to 'recognize and avoid' various choices detrimental to them, and those choices may frequently arise in interrogation, just as they may at any stage of a criminal proceeding." *Id.* (internal citation omitted).

Finally, permitting the kind of indirect waiver language at issue in this case to act as a valid waiver would require juveniles who do not wish to waive such errors to specifically reserve a future challenge to the amenability determination in the plea. Rule 5-304(A)(2) NMRA. That is, the juvenile would have to reserve the right before the trial court has even made the determination. Moreover, in order to preserve the issue for appeal, a juvenile would have to obtain the approval of the sentencing court and the consent of the State. This dynamic of preemptively assuming error in the trial court's determination potentially creates an adversarial

dynamic between the trial court and the juvenile going into a hearing that, in many ways, underrmines the juvenile's fate. *Cf. State v. Bonilla*, 2000-NMSC-037, ¶ 7, 130 N.M. 1.

In sum, the Court of Appeals improperly dismissed Christopher's appeal based upon a waiver that did not and could not occur. As a result, Christopher was never able to challenge the district court's erroneous decision to give up on a child even though five probation officers and a psychotherapist found Christopher amenable, and there was no contrary evidence presented.

II. The district court abused its discretion in ignoring unanimous testimony that Christopher was amenable to treatment as a juvenile.

The injustice of deeming any challenge to this critical determination waived by implication is especially evident in consideration of the district court's clearly erroneous findings in this case. The district 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*., the Court of Appeals found abuse of discretion in the trial Court's ignoring the testimony that Nehemiah was not amenable. *State v. Nehemiah G*. 2108-NMCA-034, ¶ 44-47, 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 district court ignored the experts' conclusions and cherry-picked negative features from the reports to support its contrary conclusion.

As this Court is aware, and as noted *supra*, there are seven factors that a Court must consider in determining whether a child offender is amenable to treatment in the juvenile system. The district court must find clear and convincing evidence that **"instantly tips the scales"** in favor of its ruling that a child is not amenable to juvenile sanctions. *In re: State ex rel. CYFD*, 2001-NMCA-071, ¶ 12, 130 N.M. 781. (emphasis added) The district court made specific findings in the case at bar. **[RP 115-122].** Upon a review of those findings, this Court will certainly agree that the scales were not instantly tipped in the State's favor on the ultimate issue of amenability. As noted above, five probation officers and a psychotherapist found Christopher amenable, and there was no contrary evidence. Therein lies the injustice: in light of the district court's clearly erroneous findings, the Court of Appeals denied Christopher the right to be heard on those issues.

As to the first factor, seriousness of the offense, the district court found that the most serious offense to which Mr. Rodriguez admitted was aggravated burglary with a deadly weapon, though he had originally been charged with first degree murder (dismissed by the State). The district court went on to find that "the Court takes into consideration the State's decision not to pursue the more serious crimes

which were originally charged." **[RP 116]** The finding is so vague that Mr. Rodriguez is unsure how to approach it. On the one hand, the district court could have been finding that the State's dismissal weighed in Christopher's favor as the most serious offenses were no longer on the table; on the other hand, the district court could have been taking into consideration the fact that Christopher was originally charged with first degree murder. Thus, assuming the former, the first factor either bends slightly in Mr. Rodriguez's favor or is neutral because Christopher did enter a guilty plea to a property crime.

Assuming the latter, it would be unfair and improper to inflict punishment based on crimes of which Christopher was never convicted. *Cf. Apprendi v. New Jersey,* 530 U.S. 466, 476-77 (2000) (recognizing that any fact, other than a prior conviction, which is used to increase a defendant's punishment must be admitted by a defendant or based upon "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

<u>Second;</u> whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; the district court found that the actions of the group did meet the standard and Mr. Rodriguez concedes this factor.

<u>Third,</u> whether a firearm was used to commit the offense, the district court found that a firearm was used by one member of the group, but Christopher did not

use the gun. **[RP 116]** The district court went on to opine that Christopher knew Mr. King had a gun and that, in some hypothetical situation involving Mr. King's absence, Christopher would have had the gun. *Id.* These considerations fall outside the narrow issue presented to the district court--whether Mr. Rodriguez used a gun to commit the offense charged--and it was an abuse of discretion to use these considerations in the district court's determinations. The facts of this case are that Mr. Rodriguez did not use a gun to commit the offenses charged. This factor weighs in his favor.

Fourth; whether the offense was against persons or property, greater weight being given to offenses against persons, especially if personal injury resulted; the district court found that Christopher "did not, himself, physically harm any person," and that the charges to which Christopher pled were property crimes. **[RP 116, 117]** Christopher concurs that this was the correct finding, and that it weighs in favor of amenability.

Fifth; the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability. It is undisputed that Christopher's upbringing was nothing short of a nightmare. Both of his parents were in and out of prison during his childhood, and he was witness to his father beating his mother at an early age. Christopher found his father dead from a heroin overdose when he

was 12 years old, **[Def't Ex. A, p. 4],** and his mother was addicted to methamphetamines. He attended nine schools in nine years, and spent his childhood living with his grandmother, great-grandmother, friends of his mother, and his own friends. Unsurprisingly, Christopher shows signs of Post-Traumatic Stress Disorder. *Id*.

Christopher had used alcohol and drugs since the 6th grade and by the time of the offense, he was using alcohol and marijuana daily. Further, his IQ falls in the low average range, attributed to his "inconsistent academic experience." **[RP 118]**

Undoubtedly, the horrific nature of Christopher's upbringing contributed to his current situation and even the State conceded in the district court that this factor weighs heavily in favor of amenability, calling his childhood "a nightmare." **[Vol. 11, Tr. 6]**

<u>Sixth</u>, the record and previous history of the child, the district court notes Christopher's eleven referrals to CYFD, but correctly notes that only one of those referrals, prior to the incident giving rise to the case at bar, amounted in charges: receiving/transferring of a motor vehicle, discussed *supra,* where Christopher took responsibility for stealing a car to avoid his mother being charged. The others were handled informally. Despite that, the district court found that "Christopher has a

lengthy criminal history which demonstrates an escalation in the serious (sic) of his crimes and the increased likelihood of harm to others," **[RP 121]** The facts simply do not support that finding nor the district court's peculiar prediction of Christopher's future behavior. There are a multitude of reasons why charges may not have been brought in the other referrals, including that they were not serious enough to pursue or a discovery that Christopher did nothing wrong. Considering them is error and in violation of the presumption of innocence. U.S. Const. Amend. VI. In fact, Christopher only has one prior "conviction" in juvenile court, which does not give rise to such a serious criminal history that a child should be left to spend his next 14 years in an adult penitentiary. One prior instance of juvenile delinquency either weighs in Christopher's favor or is a neutral factor. Surely, many children have been found amenable to treatment with far more extensive contact with the system.

Seventh, and finally, as to the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available, the district court made six separate findings regarding this factor, some of which were irrelevant, while others were cherry-picked facts to support its ruling. As an example of cherry-picked facts, the district court noted that "although Christopher has the opportunity to meet with a BCYSC psychiatrist and although he has occasionally participated in

counseling, his participation has been inconsistent." **[RP 119]** The district court ignored that Christopher has voluntarily completed the following:

1. Substance Abuse Counseling
2. Dog therapy
3. Equine therapy
4. Art therapy
5. Ropes course
6. Bible studies
7. Meets with psychiatrist regularly
8. Meets with case manager regularly

[Vol. 11, Tr 82] If the district court had noted everything that Christopher had done, but still found his inconsistent meetings with his counselor compelling, that would be a different argument. But by refusing to even note the positive things that he has done, the district court tipped its hand that the deck was stacked against Christopher from the beginning. Further, the district court apparently found that because the programs and counseling at YDDC or other juvenile detention centers are "wholly voluntary" **[RP 120],** Christopher is less amenable. Again, the district

court ignored the things that Christopher had done while being held in detention, which were equally as voluntary. *Id.* The district court further relied on Dr. Johnson's report that indicated "Christopher is at a high risk of recidivism and future violence." Again, the district court conveniently ignored the ultimate conclusion of that report: that Christopher Rodriguez is amenable to treatment within the juvenile system. **[Deft's Ex. A, p. 19-20]** This factor, based solely upon the findings of the district court, weighs in favor of the State. But, when this Court makes itself of aware of all of the facts, not just the ones that the district court chose to make a part of its findings, it actually weighs in Christopher's favor as both experts found him amenable to treatment within the juvenile system.

CONCLUSION

In a high-profile case with disturbing facts, the district court ignored the opinions of the uncontroverted and qualified experts, all of whom found Christopher Rodriguez to be amenable to treatment, making this case like *Nehemiah G.*, but with the State and defendant's positions switched.

However, unlike *Nehemiah G.*, Christopher was never able to contest the court's erroneous ruling because the Court of Appeals asserted he had "waived" his right to appeal the most critical issue in his case. In cases such as Christopher's where the charges are horrific, but where the child's background is tragic, it is

sound legal strategy to enter a guilty plea but to rely on evidence presented at an amenability hearing to mitigate the sentence, especially when the evidence uniformly points toward amenability. Christopher's probation officer, her co-workers, and Christopher's treating psychologist amply showed that there is hope for him. But the Court of Appeals' opinion effectively eliminated that option for juvenile offenders notwithstanding the soundness of such a strategy, the fact it eliminates potentially lengthy trials, and the fact it permits the parties to focus on the critical determination in most juvenile cases: whether to write the child off as a lost cause or try to salvage him for his own and society's sake.

When a district court makes findings in an amenability hearing that are contrary to both the law and common sense, a juvenile should be able to seek review, lest a trial court judge's ruling will go unchecked. Because that is what occurred here when the Court of Appeals found that Christopher could not challenge the district court's decision to subject him to adult punishment, he asks this Court to reverse the Court of Appeals ruling and remand with instructions to entertain Christopher's appeal. Alternatively, Christopher asks this Court to vacate the judgment of the district court and direct it to find Christopher amenable to treatment in the juvenile system.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that a copy of this pleading was served by the Court of Appeals electronic File and Serve system to John Woykovsky of the Attorney General's Criminal Appeals Division on this the 10th day of August, 2020.

s/ Gregory B. Dawkins
Assistant Appellate Defender