



Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

No. S-1-SC-38130

v.

CHRISTOPHER RODRIGUEZ

Defendant-Petitioner.

BRIEF OF JUVENILE LAW CENTER, CAMPAIGN FOR YOUTH JUSTICE,
AND THE SENTENCING PROJECT AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-PETITIONER CHRISTOPHER RODRIGUEZ

Appeal from The Second Judicial District Court, Bernalillo County, New Mexico
The Honorable Brett Loveless, Presiding

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IDENTITY AND INTEREST OF *AMICI*¹

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.

The Campaign for Youth Justice (CFYJ) is a national initiative working to end the practice of prosecuting, sentencing, and incarcerating youth under the age of 18 in the adult criminal justice system through federal advocacy, media, research and policy initiatives, as well as providing technical assistance in states. Our advocacy is based on research, jurisprudence, and evidenced-based practice that shows that youth, even those engaging in violence, are best served in the juvenile

¹ Pursuant to Rule 12-320(D)(1) NMRA, counsel of record received timely notice of the intent to file this brief. Pursuant to Rule 12-320(C) NMRA, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

justice system, where they have access to developmentally appropriate services and supports, leading to better public safety and life outcomes.

The Sentencing Project, founded in 1986, is a national nonprofit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

SUMMARY OF PROCEEDINGS

Amici adopt the Summary of Proceedings as laid out in the brief of the Defendant-Petitioner.

SUMMARY OF ARGUMENT

In *State v. Jones*, 2010-NMSC-012, ¶ 46, 148 N.M. 1, this Court established that the amenability hearing was so integral to safeguarding the rights of youth that it was unwaivable:

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.

Jones, 2010-NMSC-012, ¶ 46. Prosecuting youth in the adult criminal justice system by waiver of juvenile court jurisdiction is a “‘critically important’ action” that can mean the difference between treatment and rehabilitation and severe punishment. *Kent v. United States*, 383 U.S. 541, 556 (1966). This Court and the United States Supreme Court have accordingly affirmed that when youth come into contact with the legal system, “non-criminal treatment is to be the rule—and the adult criminal treatment, the exception.” *Jones*, 2010-NMSC-012, ¶ 43 (citing *Kent*, 383 U.S. at 560-61). The amenability hearing is New Mexico’s “sole device” for fulfilling the promise of *Kent*. *Id.*, ¶ 38. Consequently, amenability hearings must comply with due process and the statutory requirements. *Id.*, ¶ 44.

The Court of Appeals has taken the untenable position that while youth who take a plea bargain may not waive the right to an amenability hearing, they have no ability to appeal deficiencies in the amenability proceeding itself. This result contradicts *Jones* and defies logic. It is also out of step with recent Supreme Court jurisprudence underscoring youth’s diminished culpability and enhanced capacity for change. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005). Youth’s unique developmental characteristics, including particular vulnerabilities during the plea bargaining process, warrant robust appellate protections. When evaluating plea

agreements that waive appellate rights, courts should not allow waiver of the appealability of the outcome of the amenability hearing.

Meaningful appellate review is particularly critical in this context, where the consequences of adult court involvement are not only severe but are also not equally applied. *See* Sarah Hockenberry & Charles Puzzanchera, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court*, Off. Juv. Just. & Delinq. Prevention (July 2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf. Rather, the amenability system disproportionately punishes Hispanic, Black and Native American children. Study of Data Collected from New Mexico Department of Health and Corrections (current through Sept. 2019) (on file with the ACLU-NM). The decision to treat a child as an adult can be catastrophic and robust appellate rights are essential to curb bias and other defects in the process. *Amici* urge this Court to reverse the Court of Appeals decision precluding Christopher Rodriguez from appealing defects in his amenability hearing.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REFUSING TO HEAR CHRISTOPHER’S APPEAL BECAUSE HIS PLEA PRESUMED A LEGALLY COMPLIANT AMENABILITY HEARING AND HE IS PERMITTED TO CHALLENGE DEFECTS IN THE PROCESS

A. This Court Has Emphasized the Importance of Amenability Hearings That Comply With Due Process

The Court of Appeals’ determination that Christopher waived his right to appeal the defects in his amenability hearing contravenes both the letter and spirit of this Court’s decision in *State v. Jones*, 2010-NMSC-012, 148 N.M. 1. At the heart of the *Jones* decision is this Court’s recognition of “the Legislature's consistent intent to protect children, if at all possible, from the adult consequences of criminal behavior.” *Jones*, 2010-NMSC-012, ¶ 36. With this goal in mind, this Court underscored the “critical importance” of the amenability determination, deeming it so important that an amenability hearing must occur each and every time a youth may be subject to adult penalties. *Id.*, ¶ 46. (finding that the amenability hearing is “not the child’s choice to be traded away”). This Court noted that the amenability determination is the “sole device provided by the Legislature” for carrying out the Legislature’s intent that “children be treated as children so long as they can benefit from the treatment and rehabilitation provided for in the Delinquency Act. *Id.*, ¶¶ 32, 38, and held that youth cannot waive their right to an amenability hearing. *See id.*, ¶ 46.

Jones relied heavily on the United States Supreme Court’s decision in *Kent v. United States*, 383 U.S. 541 (1966). *Kent* seminally established the importance of due process protections in transfer hearings, noting, “[t]here is no place in our system of law for reaching a result of such tremendous consequence” as transferring a child to the adult criminal system, “without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Kent*, 383 at 554. It specifically rejected the idea that a court could make the determination in isolation, reasoning that “society’s special concern for children” could not tolerate such a procedure. *Id.* The Supreme Court explained that while the transfer statute in question did allow for some judicial discretion, “[i]t does not confer upon the Juvenile Court a license for arbitrary procedure.” 383 U.S. at 553. Rather, “the hearing must measure up to the essentials of due process and fair treatment.” *Id.* at 562.

Jones echoes *Kent*’s conclusions regarding the importance of amenability hearings and the need to follow statutory requirements:

Like the legislative scheme in *Kent*, the Delinquency Act makes clear that “non-criminal treatment is the rule,” unless the child is charged with first-degree murder. As a result, because the amenability hearing is the exclusive tool for invoking the exception of adult criminal punishment, we agree with *Kent* that it is a “critically important proceeding” and **“that it is incumbent on the Juvenile Court” to follow the requirements spelled out in Section 32A–2–20 before sentencing a child as an adult.**

Jones, 2010-NMSC-012, ¶ 44 (emphasis added).

Accordingly, it defies logic to conclude that a court must hold an amenability hearing and must follow the requirements of Section 32A–2–20 and due process, but yet a youth who takes a plea that includes the required future amenability hearing has no way to challenge defects in that process. Such lack of redress would render the amenability scheme “meaningless—an illusion, a mockery.” *Cf. Kent*, 383 U.S. at 561. By way of analogy, in examining the role of counsel in *Kent*, the Court explained, it is not the act of appointing counsel that satisfies the requirements of due process, but rather the opportunities and protections that counsel provides. *See Kent* at 561. As *Kent* explained:

[T]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice.

Id. Likewise here, a court’s carrying out a “critically important” amenability hearing is not a formality. Conducting an amenability hearing without proper due process or statutory safeguards does not satisfy one’s right to an amenability hearing any more than the act of appointing counsel satisfies one’s right to counsel. Indeed, as *Kent* states, “[a]ppointment of counsel without affording an opportunity for hearing on a ‘critically important’ decision is tantamount to a denial of counsel.” *Kent*, 383 at 561. An amenability hearing without proper consideration of the evidence, or other due process deficiencies, is tantamount to a denial of an amenability hearing. Barring youth from appealing such defects, as the Court of Appeals did here, risks

perfunctory proceedings that effectively nullify the *Jones*'s holding that such hearings are so important they cannot be waived.

B. This Court Has Held That Courts May Review Appeals of Amenability Hearings Even When A Youth Has Waived Appellate Rights.

This Court has previously held that children's waivers of their appellate rights do not preclude appellate review. *In re Rudy B.*, 2010-NMSC-045, ¶ 15, 149 N.M. 22. In *Rudy B.*, Rudy B. was charged with various youthful offender offenses and subject to a possible adult sentence. *Id.*, ¶ 4. In exchange for the State dropping two charges against him, Rudy B. entered into a plea agreement pending an amenability hearing and waived his right to appeal his sentence. *Id.*, ¶¶ 4-6. In his amenability hearing, the district court found him not amenable to treatment. *Id.*, ¶ 8. Rudy B. appealed the district court's determination. *Id.*, ¶ 9. Reasoning that an appellate court's subject matter jurisdiction to hear an appeal is unaffected by a party's waiver of their right to appeal, this Court held that the New Mexico Court of Appeals had jurisdiction to hear Rudy B.'s appeal. *Id.*, ¶ 15.

Christopher's case is procedurally and factually analogous to that in *Rudy B.* Christopher was charged with various youthful offender offenses and subject to a possible adult sentence. [RP 3-10]. In exchange for the State dropping charges against him, Christopher entered into a plea agreement pending an amenability hearing and waived his right to appeal his sentence. [Vol. Tr. 3-14]. In his

amenability hearing, the district court found him not amenable to treatment. [Vol. 9, Tr. 14]. Christopher appealed the district court’s determination. This case is now before this Court because the Court of Appeals held that Christopher’s waiver of his appeal precludes appellate review, in direct conflict with this Court’s holding in *Rudy B.*

II. COURTS SHOULD ALLOW APPELLATE REVIEW OF CHILDREN’S AMENABILITY HEARINGS DUE TO THE UNIQUE DEVELOPMENTAL CHARACTERISTICS AND VULNERABILITIES OF YOUTH

A. The Decision Below Contravenes U.S. Supreme Court Case Law Requiring Special Criminal Procedural Protections for Youth

Permitting youth to challenge defects in their amenability hearings is consistent with the principles underlying recent U.S. Supreme Court jurisprudence on adolescent development. The bedrock principles undergirding *Jones* and *Kent* have only grown stronger in the last fifteen years as United States Supreme Court case law has repeatedly recognized, based on scientific research, that children “cannot be viewed simply as miniature adults.” *See J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)). *See Miller v. Alabama*, 567 U.S. 460, 473-74, 481 (2012) (sentencing); *Graham v. Florida*, 560 U.S. 48, 76 (2010) (sentencing); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (sentencing). The Supreme Court has made clear that “youth matters” for criminal procedure purposes. *See Miller v. Alabama*, 567 U.S. 460, 473 (2012)

(citing *Graham*, 560 U.S. at 71-74). Indeed, in *Graham v. Florida*, the Supreme Court wrote that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” 560 U.S. at 76. In *Miller*, the Court reiterated its prior rulings that “children are constitutionally different from adults.” 567 U.S. at 471-72; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (holding *Miller* retroactive on collateral review). The Court stressed that the State cannot simply treat youth accused of committing crimes “as though they were not children.” *Miller*, 567 U.S. at 4774. Grounding its decision in commonsense and scientific research, the Court explained that children differ from adults in their developmental maturity, susceptibility to outside influences, and capacity for change. *Id.* at 471-73; *see also Roper*, 543 U.S. at 569 (explaining that adolescence is a period when youth are “most susceptible . . . to psychological damage”) (quoting *Eddings*, 455 U.S. at 115). This Court has echoed these findings: referring to the signature qualities of “impetuosity” and “recklessness” in youth, as outlined in *Roper*, this Court in *Jones* noted that the treatment available in the juvenile system “reflect[s] the Legislature’s intent to insulate delinquent children from the potentially life-long consequences under the adult criminal justice system that may flow from a bad decision.” *Jones*, 2010-NMSC-012, ¶ 37.

As noted above, the Supreme Court’s extensive jurisprudence is strongly rooted in research. As a group, adolescents typically make decisions differently than

adults, in part because of developmental differences in a variety of brain regions. See Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Developmental Rev.* 78, 83-92 (2008). The prefrontal cortex, which controls executive functioning, matures late in adolescence. Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 *J. Child Psych. & Psychiatry* 296, 301 (2006). Developmental changes within this region are essential to developing higher-order cognitive functions, such as foresight, weighing risks and rewards, and making decisions that require the simultaneous consideration of multiple sources of information. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Ann. Rev. Clinical Psych.* 459, 466 (2009). As a result, adolescents tend to have greater difficulty assessing potential long-term consequences and tend to assign less weight to consequences that they have identified. See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *Future Child.* 15, 20 (2008). At the same time, the parts of the brain responsible for social-emotional regulation are highly active during adolescence, which can lead to reward-seeking impulses and heightened emotional responses. Steinberg, *Adolescent Development and Juvenile Justice*, *supra*, at 466; see also Lindsay C. Malloy et al., *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 *L. & Hum. Behav.* 181, 182 (2014). Thus, adolescents are likely to experience an

imbalance in developing brain systems: one highly active system involved in social-emotional processes leads to emotional volatility, while immature executive functioning hinders behavior control and decision making. Steinberg, *Adolescent Development and Juvenile Justice*, *supra*, at 466; *see also* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8174, 8177 (2004). Because of the way the brain develops, many adolescents have difficulty tempering strong feelings, lack impulse control, have difficulty planning for the future, and lack the ability to compare costs and benefits of alternative courses of action. Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implication for Adolescent Rights and Responsibilities*, in Human Rights and Adolescence 59, 64-65 (Jacqueline Bhabha ed., 2014); *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgement in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 Behav. Sci. & L. 741, 744-45 (2000) (concluding that immature judgment that engenders impulsiveness, pursuit of immediate gratification, and difficulty perceiving long-term consequences also hampers the decision-making of minors). These factors are all relevant in considering Christopher 's ability to assess the plea options before him.

B. Adolescents are Uniquely Vulnerable During Plea Negotiations

An established and growing body of scientific literature applies the principles of adolescent brain development in the plea context and confirms that teenagers' differing thought processes render them uniquely vulnerable during plea negotiations. In particular, teenagers are less likely than adults to consider the consequences of the plea and can be "overly influenced by short-term outcomes." Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & Hum. Behav. 611, 620 (2016) (quoting Tarika Daftary-Kapur & Tina M. Zottoli, *A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court*, 13 Int'l J. Forensic Mental Health 323, 333 (2014)). Leading researcher Thomas Grisso studied this effect in 2003, finding that when deciding whether or not to take a plea, youth "focused on the length of time associated with the plea (two vs. six years), whereas adults' reasoning reflected attempts to weigh the odds (two years vs. six years vs. the possibility of zero years)." Redlich & Shteynberg, *supra*, at 612 (describing findings of Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003), and Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 New Eng. J. Crim. & Civ. Confinement 3 (2006)).

The distinctions between adolescent and adult decision-making may be even more profound because of the high-stress nature of plea deals. Emotional and social factors have particular influence on adolescent decision-making. Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 *Nature Neurosci.* 1184, 1184-88 (2012). Even adolescents in their late teens are less capable of using “their cognitive capacities as effectively as adults” in emotionally and socially charged environments. Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 *Victims & Offenders* 428, 434 (2012). As such, “[l]imited one-time plea offers, the authority of prosecutors, and other . . . tactics” in plea negotiations may increase the likelihood that a teenager will plead guilty even if innocent. Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 *Rutgers L. Rev.* 943, 953 (2010). Youth are more likely than adults to react emotionally and impulsively in such circumstances without engaging in a measured decision-making process, Cauffman & Steinberg, *Emerging Findings from Research of Adolescent Development and Juvenile Justice*, *supra*, at 438, and to succumb to perceived pressure from adults. Malloy et al., *supra*, at 181-82. Thomas Grisso specifically concluded that “[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as . . . accepting a prosecutor’s offer of a plea agreement.” Grisso et al., *supra*, at 357; *see*

also Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 163 (2008) (concluding that adolescents have “a much stronger tendency . . . to make choices in compliance with the perceived desires of authority figures” than do adults).

Developmental differences may also affect adolescents’ capacity to understand their rights, appreciate the benefits and consequences of exercising or waiving those rights, and to make reasoned and independent decisions about the best course of action. Malloy et al., *supra*, at 182. Research likewise demonstrates that minors may be less likely to comprehend abstract rights, such as those they must relinquish when pleading guilty. Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 *J. Crim. L. & Criminology* 219, 228-33 (2006).

In addition to the increased risk that youth may not understand on an abstract level what it means to exercise or waive their constitutional rights, teenagers may also lack the context and basic vocabulary to understand the terms of plea deals. One study of court-involved youth revealed that they understood very few of the words commonly used on tender-of-plea forms and in guilty-plea colloquies. In this study, half the group had been instructed in the meaning of thirty-six such words; the other half had not. “The results were striking,” in that both groups understood almost none of the vocabulary used. Redlich, *supra*, at 948. “On average, members of the uninstructed group defined only two of thirty-six words correctly, and members of

the instructed group, only five words correctly.” *Id.* The study gave “examples of incorrect answers, such as ‘presumption of innocence’ being defined as ‘[i]f your attorney feels you didn’t do it’ (age fifteen) and ‘disposition’ repeatedly defined as ‘bad position’ (age sixteen).” *Id.* (alteration in original).

III. APPEALS OF AMENABILITY HEARINGS ARE ESPECIALLY IMPORTANT GIVEN THE GRAVE CONSEQUENCES OF ADULT COURT INVOLVEMENT AND THE POTENTIAL FOR RACIAL BIAS

A. The Grave Ramifications of Sentencing a Child as an Adult Warrant Broad Construction of Appellate Protections

As this Court declared in *Jones*, “[w]e 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.” *Jones*, 2010-NMSC-012, ¶ 46. There are indeed drastic differences in outcomes for youth who are sentenced as juveniles and youth who are sentenced as adults. As of September 2019, there were eighty-seven individuals in New Mexico serving adult sentences of longer than ten years for crimes committed when they were children. Ike Swetlitz, *Life Behind Bars*, Searchlight N.M. (Sept. 24, 2019), <https://searchlightnm.org/life-behind-bars/>. Youth prosecuted as adults bear the heavy burden of adult criminal records; they suffer consequences to employment, higher education, housing options, military involvement and voting rights. *Children in Adult Courts, Jails, and Prisons: Basic Facts*, Campaign for Youth Just. 1 (Mar. 23, 2020),

http://www.campaignforyouthjustice.org/images/factsheets/BASIC_FACTS_032320.pdf. Youth prosecuted as adults are a third more likely to commit another, more violent crime than youth treated in the juvenile system. *Id.* (citing Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services*, Ctr. for Disease Control & Prevention (2007), <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>).).

Many youth tried as adults are still incarcerated in adult facilities. Bernalillo and Dona Ana counties account for some of the largest number of youth held as adults in the country. Neelum Arya, *Getting to Zero: A 50-State Study of Strategies to Remove Youth from Adult Jails*, ULCA Sch. of L.9 (2018), https://drive.google.com/file/d/1LLSF8uBlrcqDaFW3ZKo_k3xpk_DTmItV/view.

Youth incarcerated with adults are significantly more likely to experience feelings of depression than youth in juvenile placement. Irene Y.H. Ng et al., *Incarcerating Juveniles in Adult Prisons as a Factor in Depression*, 21 *Crim. Behav. & Mental Health* 21, 27 (2011). Youth in adult facilities are often held in solitary confinement and are five times more likely to die from suicide than are youth in juvenile facilities.

Children in Adult Courts, Jails, and Prisons: Basic Facts, Campaign for Youth Just.

1 (Mar. 23, 2020),

http://www.campaignforyouthjustice.org/images/factsheets/BASIC_FACTS_0323

20.pdf. And the generally poor educational services in adult facilities set youth further behind in reaching their school and employment goals. *See, e.g.,* Mahari Simmonds, *Education behind Bars: Can Young People Be Taught in Adult Justice System?* (Jan. 2, 2019), <https://jjie.org/2019/01/02/education-behind-bars-can-young-people-be-taught-in-adult-justice-system/>.

These severe consequences are particularly troubling given the wide discretion and substantial risk of error inherent in amenability hearings. The statutory requirement that the court make a finding 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,” N.M. Stat. Ann. § 32A-2-20(C)(7) (2019), is especially prone to error. Courts are not well equipped to make predictions as to future dangerousness of youth. Leading researcher Thomas Grisso has explained that “[n]one of [the risk factors associated with future violence in adolescents], alone or in combination, is powerful enough to produce actuarial or clinical predictions with great accuracy.” Vanessa Kolbe, *A Cloudy Crystal Ball: Concerns Regarding the Use of Juvenile Psychopathy Scores in Judicial Waiver Hearings*, 26 *Devs. Mental Health L.* 1, 9 (2007) (citing Thomas Grisso, Forensic Evaluation of Juveniles 231 (1998)). Preserving the right to appeal amenability hearings is critical given the life-altering costs of adult court involvement and the challenges in the underlying judicial inquiry.

B. Robust Appellate Rights are Necessary Checks on Racial Bias in Amenity Hearings

Less than three weeks ago, this Court penned an open letter to the public establishing the Commission on Equity and Justice and vowing to “eliminate the deleterious effects of the poisons of prejudice, bias and racism.” Letter from New Mexico Supreme Court to Public (July 30, 2020) (embedded in *NM Supreme Court Announces Commission to Study Issues of Racial Bias in Courtroom*, KRQE (July 30, 2020, 2:32 PM), <https://www.krqe.com/news/new-mexico/nm-supreme-court-announces-commission-to-study-issues-of-racial-bias-in-court-system/>) [hereinafter “Open Letter”]. These biases pervade the justice system. Black, Latino², and Native American people are more likely to become involved in the justice system due to heightened community surveillance, police scrutiny, and racial bias at every stage of criminal process. *Blueprint for Smart Justice New Mexico*,

² The variation in terminology around ethnic identity in this brief reflects the variation in terminology used in the applicable data or sources. We recognize that the terms “Latino” and “Hispanic” may have different meanings, and that language around ethnic identity varies widely. See Mark Hugo Lopez, Jens Manuel Krogstad, and Jeffrey S. Passel, *Who is Hispanic*, Pew Research Ctr. (Nov. 11, 2019), <https://www.pewresearch.org/fact-tank/2019/11/11/who-is-hispanic/>; see also Daniel Hernandez, *Pew poll finds most Latinos haven’t heard of ‘Latinx.’ Only 3% use the term*, L.A. Times, (Aug. 11, 2020, 12:21 PM) (citing to Luis Noe-Bustamante, Lauren Mora, Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, Pew Research Ctr. (Aug. 11, 2020), <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/>).

[nm.org/sites/default/files/field_documents/081718-sj-blueprint-nm_002.pdf](https://www.aclu-nm.org/sites/default/files/field_documents/081718-sj-blueprint-nm_002.pdf)

[hereinafter “Smart Justice”]. Data from 2014 showed New Mexico had the highest proportion of the Latino individuals in their prison population and that one out of every thirty-seven Black men went to prison. *Id.* at 4 (citing *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, Sent’g Project (2016)). Data from 2016 to 2017 focused on the use of police force in Albuquerque showed forty-eight percent of these incidents were against Hispanic people. *Compliance Bureau, Internal Affairs-Force Division, Use of Force Report for the Years 2016-2017*, Albuquerque Police Dep’t 18 (Feb. 2019), <http://documents.cabq.gov/police/reports/use-of-force-annual-report-2016-2017.pdf>. And while the amount of use of force against white people decreased over those two years, it increased for Black and Native American people. *Id.* Indeed, in view of widespread racial injustice in New Mexico institutions, Governor Michelle Lujan Grisham recently announced a Council for Racial Justice, with a Public Safety and Law Enforcement Subcommittee, to hold state institutions “accountable for taking action to end systemic racism and ensure that all persons receive fair and equal treatment and opportunities.” *Governor Announces Council for Racial Justice*, State of N.M. (July 31, 2020), <https://www.newmexico.gov/2020/07/31/governor-announces-council-for-racial-justice/>.

These New Mexico figures align with national data about the racial disparities that pervade the criminal and juvenile justice systems. *See Criminal Justice Facts*, Sent’g Project (last visited Aug. 12, 2020), <https://www.sentencingproject.org/criminal-justice-facts/>. Soberingly, data from 2001 forecasted that one of three Black males born that year could expect to go to prison. *Id.* Hispanic men are likewise more than twice as likely to go to prison as non-Hispanic white men. *Id.* Black youth are more than five times as likely as white youth to be incarcerated and Native youth are three times as likely. *Fact Sheet: Black Disparities in Youth Incarceration*, Sent’g Project 1 (Sept. 2017), <https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf>; *Fact Sheet: Native Disparities in Youth Incarceration*, Sent’g Project 1 (Oct. 2017), <https://www.sentencingproject.org/wp-content/uploads/2017/10/Native-Disparities-in-Youth-Incarceration.pdf>. Latino youth are sixty-five percent more likely than white youth to be detained or committed; this disparity is conservative given discrepancies in many states counting Latino or Hispanic youth as white. *Fact Sheet: Latino Disparities in Youth Incarceration*, Sent’g Project 1 (Oct. 2017), <https://www.sentencingproject.org/wp-content/uploads/2017/10/Latino-Disparities-in-Youth-Incarceration.pdf>.

Racial disparities are especially pronounced when it comes to transferring youth to the adult criminal system. Nationally, Black and Hispanic youth account

for the majority of cases judicially waived from juvenile to adult court, with Black youth representing fifty-four percent and Hispanic youth twelve percent. Sarah Hockenberry & Charles Puzzanchera, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court*, Off. Juv. Just. & Delinq. Prevention (July 2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf. Native youth are 1.84 times more likely to receive an adult prison sentence than are white youth. *Children in Adult Courts, Jails, and Prisons: Basic Facts*, Campaign for Youth Just. 1 (Mar. 23, 2020), http://www.campaignforyouthjustice.org/images/factsheets/BASIC_FACTS_032320.pdf (citing Liz Ryan, *Youth in the Adult Criminal Justice System*, Campaign for Youth Just. (2012), http://cfyj.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf). Although racial disparity data is somewhat scarce in New Mexico, the ACLU-NM obtained 2019 data from the New Mexico Departments of Health and Corrections showing that while Hispanic people make up 46.4 percent of the total population in New Mexico, people classified as Hispanic constituted over seventy-one percent of those serving sentences of ten or more years for crimes committed as children. Study of Data Collected from New Mexico Department of Health and Corrections (current through Sept. 2019) (on file with the ACLU-NM). Similarly, Black people make up only two percent of the population in New Mexico yet were 5.68 percent of those

serving extreme sentences for crimes committed as children. *Id.* Native Americans are 8.8 percent of the population in New Mexico yet were over ten percent of those serving extreme sentences for crimes committed as children (a number which does not include Native youth exposed to federal prosecution.) *Id.*

These disparities can be substantially attributed to stereotypes, implicit racial bias and structural racism related to racial segregation and policing of neighborhoods with high numbers of people of color, as opposed to higher crime rates. *See, e.g.,* Smart Justice, *supra*; *Shadow Report to the United Nations Human Rights Committee*, Sent'g Project (Aug. 31, 2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/> (citing, *e.g.*, Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483, 485 (2004)); Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 *Soc. F.* 619, 642 (1996) (discussing arrest rates)); Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013-2017*, 111 *J. Nat'l Med. Ass'n* 580, 585-86 (2019) (discussing effect of neighborhood segregation on racial disparities in police shootings); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67

Am. U. L. Rev. 1513, 1554-56 (2018) (citing Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police among Inner-City Youth*, 50 Socio. Q. 235, 235-36, 250 (2009)) (Black youth often experience extensive surveillance and harmful police encounters in their communities, including constant police presence and frequent pedestrian or vehicle stops); Patricia Foxen, *Perspectives from the Latino Community on Policing and Body-Worn Cameras*, Medium (May 4, 2017), <https://medium.com/equal-future/perspectives-from-the-latino-community-on-policing-and-body-worn-cameras-47f150f71448> (documenting reactions to the hyper-policing of Latino communities).

One particularly pernicious stereotype that has plagued Black youth is the now-debunked myth of the “super-predator,” which wrongly forecast a dangerous class of teenage offenders responsible for the most heinous crimes. *See, e.g.*, Peter Annin, *Superpredators Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. News & World Rep., Mar. 17, 1996, at 68; Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52. John J. DiLulio, Jr., who coined the term in 1995, described “super-predators” as “tens of thousands of severely morally impoverished” and “super crime-prone young males,” for whom “murder [and] rape” come “naturally.” John DiLulio, *The Coming of the Super-Predators*, Weekly Standard (Nov. 27, 1995), <https://perma.cc/33B6-A3W6>. DiLulio claimed that “the trouble will be greatest in

black inner-city neighborhoods.” *Id.* In 2001, DiLulio withdrew his forecast and apologized for his flawed research; unfortunately, the damage from this pernicious myth was persistent. See Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001 at A19.

Stereotypes and implicit bias also drive Hispanic and Native youth into the justice system. Insidious and “deeply ingrained stereotypes” of Native Peoples as “lazy,” “primitive” or otherwise inferior likely leads to discrimination, including in the justice system. See E.J.R. David, *Five Facts on Native Lives and in (In)Justice System: Parallels Between the Native and Black Experiences Regarding the Justice System*, Psych. Today (Mar. 7, 2016), <https://www.psychologytoday.com/gb/blog/unseen-and-unheard/201603/five-facts-native-lives-and-the-injustice-system>. Latino youth are also subject to wrongheaded stereotypes that they are more dangerous than white, non-Latino youth, are involved in gangs or are “illegal drug traffickers.” See, e.g., Neelum Arya et al., *America’s Invisible Children: Latino Youth and the Failure of Justice*, Campaign for Youth Just. 10, 12, 19 (May 2009), http://www.campaignforyouthjustice.org/images/policybriefs/race/invisiblechildren/CFYJPB_InvisibleChildren.pdf.

Many people have internalized – often unconsciously – these and other false stereotypes, and they affect treatment of these youth in the justice system. The

research on “adultification bias” of Black youth is particularly well developed. Studies show that, compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 540 (2014). The adultification of Black youth dates back to forced child labor during slavery, and “is a form of dehumanization, robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence.” Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Ctr. On Poverty & Inequality, Georgetown L. 4, 6, 12 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> (adultification bias contributes to more punitive treatment Black girls receive in juvenile justice system). Another study found that people presented with a scenario involving a Black juvenile defendant are significantly more likely to view children to be as culpable as adults, and to favor more severe sentencing, than those presented with the same scenario involving a white juvenile defendant. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS ONE 1, 2 (2012).

Judges, like everyone else, are susceptible to implicit racial biases, as this Court acknowledged in its recent Open Letter. See Open Letter, *supra* (“[The

judiciary] need[s] to acknowledge our shortcomings and recognize our conscious and unconscious bias.”). In one study, researchers “found a strong white preference among white [trial] judges,” stronger even than that observed among a sample of white subjects from the general population obtained online. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210 (2009). Another study of trial judges found that they often rely on intuitive, rather than deliberative, decision-making processes, which risks leading to reflexive, automatic judgments, such as intuitively “associat[ing] . . . African Americans with violence.” Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 156-157 (2010). Yet another study found that “judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment.” *Id.* at 157 (internal quotation marks omitted). Judges’ implicit biases undoubtedly contribute to the fact that “at virtually every stage of the juvenile justice process, Black, Hispanic or Latino, and Native youth receive harsher treatment than white youth, even when faced with identical charges and offending histories.” Ellen Marrus & Nadia N. Seeratan, *What’s Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. Marshall L.J. 437, 440 (2015).

Implicit bias may particularly influence judges' determinations of whether a youth is amenable to treatment in the juvenile court system or should be tried as an adult. There is more room for biases to influence outcomes when decisions are highly discretionary, as in amenability hearings. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *Yale L.J.* 2626, 2628 (2013) (“[Implicit] biases are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decision making is highly discretionary.”). As Barry Feld predicted in 1978, “[t]he statutorily required conclusion of unsuitability to treatment is at best a nebulous concept [B]ecause of its vagueness, [it] is open to abuse as a convenient rationalization which may allow a court to refer when it desires to do so for a variety of irrelevant or unarticulated reasons.” Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution*, 62 *Minn. L. Rev.* 515, 529 n.49 (1978) (quoting Note, *Reference for Prosecution in Juvenile Court Proceedings*, 54 *Minn. L. Rev.* 389, 405 (1969)). In a 2014 dissertation, Arnold Daktari Alexander conducted a literature review and analyzed Pennsylvania waiver data, concluding that “race is not only a salient factor in judges’ decision-making but race is also a crucial factor in decisions to waive.” Arnold Daktari Alexander, *Examining Race Effects in Juvenile Justice Processing: A Look at Juvenile Waiver in Pennsylvania* (2004) (Ph.D. dissertation, Pennsylvania State University) (aProQuest Dissertations and Theses database (UMI No.

3147573)). This evidence of the impact of racial bias demonstrates the high risk that a judge may inaccurately assess amenability to rehabilitation and confirms the importance of setting forth a blanket rule that you cannot waive the right to appeal amenability determinations.

CONCLUSION

In *Jones*, this Court firmly established the critical role amenability hearings play in ensuring that the legal system treats children as children as a first principle. *Jones*, 2010-NMSC-012, ¶ 32. But barring a challenge to a flawed amenability hearing undermines this commitment to New Mexico’s children. Ensuring the right to appeal these amenability determinations is especially critical in light of the unique developmental vulnerabilities of children and the prevalence of racial disparities which cast a long shadow over this Court’s commitment to equal justice. *See Open Letter, supra*. Christopher’s petition provides an opportunity for this Court to address, and help to forestall, implicit judicial bias in the amenability hearing process that contributes to these inequities and results in New Mexico “giv[ing] up on” large numbers of its Hispanic, Black, and Native children. It further allows the Court to ensure that youth’s criminal procedure rights – and New Mexico’s criminal laws – reflect youths’ developmental differences, as the U.S. Supreme Court has dictated. For the foregoing reasons, *Amici* urge this Court to reverse the Court of Appeals decision barring Christopher Rodriguez from appealing his amenability

determination and remand with instructions to hear Christopher's appeal. Alternatively, *Amici* ask 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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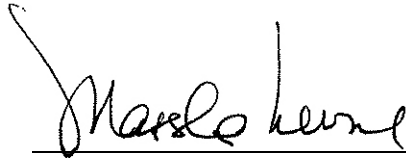
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CERTIFICATE OF COMPLIANCE

I, Marsha L. Levick, do hereby certify this 18th day of August 2020, that the Brief of *Amici* complies with New Mexico Rule of Appellate Procedure 12-213(F) because it is written in fourteen-point Times New Roman font and contains 6,777 words in the body of the brief, as calculated by Microsoft Word 2016 software.



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I hereby certify that a copy of the foregoing Amicus Brief, this 18th day of August 2020, has been electronically filed and served on the parties as follows:

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