IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs. **No. S-1-SC-38130**

CHRISTOPHER RODRIGUEZ,

Defendant/Petitioner.

DEFENDANT-PETITIONER'S REPLY BRIEF

On Writ of Certiorari to the New Mexico Court of Appeals

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I. REPLY ARGUMENT

Juvenile defense in New Mexico has long utilized a practice where the child pleads to a youthful offender offense, often with a sentencing cap should the court find the child not amenable to treatment. This practice has never anticipated that the child could not challenge on appeal the finding that he was not amenable to treatment if there were defects in the amenability proceedings. This Court made clear in ***State v. Jones***, 2010-NMSC-012, 148 N.M. 1, that the amenability determination cannot be bargained away or waived by the child. It only follows that the child retains the right to appeal defects in the proceedings, as it affects the very authority of the district court to impose an adult sentence on the child. A sentence imposed absent statutory authority is illegal. *See* ***State v. Tafoya***, 2010-NMSC-019, ¶ 7, 148 N.M. 391 (observing that a defendant's plea agreement does not waive an appeal on the grounds that the district court was without authority to impose an illegal sentence); ***State v. Trujillo***, 2007-NMSC-017, ¶ 8, 141 N.M. 451 ("Because a [district] court does not have subject-matter jurisdiction to impose a sentence that is illegal, the legality of a sentence need not be raised in the [district] court.").

Christopher Rodriguez ["Chris"] relies on his Brief-in-Chief for any and all facts and arguments not discussed herein. He takes this opportunity to highlight a few points in response to the Plaintiff-Respondent's Answer Brief.

REPLY POINT A: Chris Did Not Waive His Right To Appeal.

The State argues that Chris waived his right to appeal by entering into a plea agreement in which he failed to reserve the right to appeal the district court's amenability determination. **[AB 7]** The State relies in large part for its argument on ***State v. Chavarria***, 2009-NMSC-020, 146 N.M. 251. However, the defendant in ***Chavarria*** was a serious youthful offender, *not* a youthful offender. ***Id.*** ¶ 3. Under the statute, the district court *had* to sentence him as an adult. **NMSA 1978, § 31-18-15.3(D) (1993)**. Therefore, any adult sentence not to exceed the maximum allowed for an adult was authorized by the statute. ***Id.***

Chris was not a serious youthful offender, but a youthful offender. As such, the district court had to make separate statutory findings in order to invoke the statutory authority to sentence him as an adult. **NMSA 1978, § 32A-2-20 (2009)**. To this extent, ***Chavarria***'s holding—that unless a sentence is not authorized by the statute it cannot be raised on appeal—supports Chris's claim. 2009-NMSC-020, ¶ 14 (holding that because defendant's "sentence was authorized by statute" his "claim may not be raised for the first time on appeal")

According to the State, three reasons support the rejection of Chris's claim that he should not be required to reserve an amenability decision. **[AB 11]** All three of these claims are specious. First, the State argues that judicial economy supports rejection of Chris's position. However, this actually cuts in Chris's favor. Otherwise,

youthful offenders will elect to go to trial where they otherwise might have pled to the underlying charges simply to protect their right to appeal the later amenability determination. This is a waste of judicial resources. It makes no sense to require pre-emptive reservation of an amenability determination that has not yet happened in order to avoid waiver.

If that is what this Court intends, then it should so hold in a published opinion and apply prospectively so as not to prejudice youthful offenders, like Chris, who on the advice of counsel entered such pleas consistent with the practice in New Mexico up until this case. *See, e.g.* ***State v. Gonzales***, 2001-NMCA-025, 130 N.M. 341, *overruled by* ***State v. Rudy B.***, 2009-NMCA-104, ¶ 47, 147 N.M. 45 (juvenile entered plea agreement to youthful offender offenses and appealed subsequent finding of non-amenability); ***State v. Rudy B.***, 2010-NMSC-045, ¶¶ 15-16, 149 N.M. 22 (holding juvenile's plea agreement with State, in which juvenile waived right of appeal, did not implicate power or competence of Court of Appeals to consider juvenile's challenge to sentence as adult); ***State v. Vallejos***, No. 34,363 (N.M. Ct. App. Mar. 10, 2016) (non-precedential) (child entered guilty plea to youthful offender offenses and Court of Appeals determined amenability hearing followed proper procedural requirements); ***State v. Nehemiah G.***, 2018-NMCA-034, ¶¶ 1, 14-16, 417 P.3d 1175 (holding the State had statutory right to appeal finding of amenability after it entered plea agreement with child); ***State v. Tafoya***, No. A-1-

CA-37275 (N.M. Ct. App. July 28, 2020) (non-precedential) (child plead guilty with an adult sentencing cap should he be found not amenable to treatment. After the court sentenced him as an adult, he appealed the amenability decision, which the Court of Appeals evaluated and affirmed). This was common practice when Chris entered his plea and a ruling that the plea results in waiver should not apply to him. *See* ***Berman v. United States***, 378 U.S. 530, 538 (1964) (per curiam) (Black, J., dissenting) ("any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence in failing to file the proper kind of pleading at precisely the prescribed moment. The [rules of criminal procedure] were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply the means to an end: the achievement of equal justice for all.")

Second, the State argues that under Chris' reasoning, a defendant would never be required to reserve an issue by way of a conditional plea. **[AB 11]** This is hyperbole. Defendants should be required to reserve the right to appeal an unfavorable ruling, such as a motion to suppress or a motion to dismiss. However, they should have the right to appeal their sentence that is imposed *after* the plea if there are problems with it. *See, e.g.* ***State v. Lavone***, 2011-NMCA-084, ¶ 1, 150

N.M. 473 (appellate court evaluated serious violent offense designation imposed at sentencing after defendant pled guilty to homicide by vehicle.)

Finally, the State argues that it would encourage "sharp practices if we permitted a defendant to waive a claim explicitly, take his chances at trial, and then rely on plain or fundamental error in the event of an adverse verdict." **[AB 12]** (citing ***State v. Crislip***, 1990-NMCA-054, ¶ 11, 110 N.M. 412, 416, *overruled by* ***Santillanes v. State***, 1993-NMSC-012, ¶ 11, 115 N.M. 215, *abrogated by* ***State v. Belanger***, 2009-NMSC-025, ¶ 11, 146 N.M. 357). However, ***Crislip***, does not deal with an amenability decision. Instead ***Crislip*** dealt with the prosecutor's refusal to grant immunity to the defendant's wife at trial. The Court held the issue was waived. ***Id***. ***Crislip*** has nothing to do with whether a plea to underlying charges prior to the amenability determination waives subsequent challenges to the amenability decision entered *after* the plea.

As ***Nehemiah G***. explained, "proceedings under the Children's Code are special statutory proceedings" and "that the State has a right to appeal under NMSA 1978, Section 39-3-7 (1966), which provides that any aggrieved party may appeal" a final judgement. 2018-NMCA-034, ¶ 14, 417 P.3d 1175. ***Rudy B.*** explained that "the Legislature vested the Court of Appeals with subject matter jurisdiction over 'criminal actions, except those in which a judgment of the district court imposes a sentence of death or life imprisonment.'" 2010-NMSC-045, ¶ 15 (citing **NMSA**

1978, § 34–5–8(A)(3) (1983)). The child's "waiver of his right to appeal does not transform this proceeding into something other than a '"criminal action."' ***Id***. The Court of Appeals had the jurisdiction to hear Chris's appeal, the State did *not* raise this issue in the Court of Appeals, and therefore the Court of Appeals erred in dismissing Chris's appeal. *Cf.* ***Rudy B***. 2010-NMSC-045, ¶ 16, ("The State did not raise the issue of Child's waiver of his right to appeal to the Court of Appeals, nor did it raise the issue to this Court in its petition for certiorari. Consequently, because this is neither a jurisdictional nor foundational issue that is integral to the resolution of the questions presented in this petition, we do not decide whether the scope of Child's waiver extended to the constitutionality of Section 32A–2–20.")

Further, as discussed below, the district court is required to make these statutory findings in order to invoke its statutory authority to sentence as an adult. Cases which evaluate the right to appeal and any such waiver outside this particular context are inapposite. *See* ***State v. Cortez***, 2007–NMCA–054, ¶ 16, 141 N.M. 623, 159 P.3d 1108 ("Cases are not precedent for issues not raised and decided.").

REPLY POINT B: The District Court's Sentence Was Illegal When It Did Not Have The Statutory Authority To Sentence Chris As An Adult Absent Clear And Convincing Evidence Chris Was Not Amenable To Treatment.

The State baldly asserts that the amenability determination was not illegal, so Chris cannot avoid waiver on that ground. **[AB 13]** The State recognizes that a claim that a sentence was illegal as not authorized by the applicable statutes is

jurisdictional and not waived by a guilty plea. Yet, the State claims that "this exception does not apply here because the district court complied with the applicable statutes." **[AB 13]**

Under the State's reasoning, a youthful offender is only entitled to an amenability hearing which results in district court findings, regardless of whether the findings are supported by clear and convincing evidence or the hearing otherwise complies with due process. The State posits that "an amenability determination does not affect the district court's subject matter jurisdiction." **[AB 16, fn. 2]** However, this Court held that "[t]he finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult." ***Jones***, 2010-NMSC-012, ¶ 38. The amenability determination affects the district court's ability and authority to sentence as an adult. So if the district court's amenability determination was made in error, then it lacks the authority to sentence as an adult. *See* ***id***. ("Put another way, the finding of non-amenability gives the court the necessary leverage to dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act.")

The State concludes that the district court imposed a legal sentence. **[AB 19]** This conclusion ignores the basic premise that a district court's authority to sentence comes exclusively from statute. *See* ***State v. Martinez***, 1998–NMSC–023, ¶ 12, 126 N.M. 39 ("A trial court's power to sentence is derived exclusively from statute.");

accord ***State v. Mabry***, 1981-NMSC-067, ¶ 18, 96 N.M. 317 ("It has long been recognized in this state that it is solely within the province of the Legislature to establish penalties for criminal behavior."). In order to sentence a child as an adult, the State must present clear and convincing evidence that the child is not amenable to treatment as a juvenile and the district court must make particular findings supported by the evidence. *See* ***Jones***, 2010-NMSC-012, ¶ 48 (explaining "the trial court lacks the statutory authority to impose an adult sentence on any youthful offender without complying with Section 32A-2-20."); ***Nehemiah G.***, 2018-NMCA-034, ¶ 23 (standard of proof in an amenability hearing is "clear and convincing evidence.") If, as in this case, the State did not present clear and convincing evidence that Chris was not amenable to treatment, then the district court did not have the authority to sentence him as an adult. Because the district court did not have the statutory authority to impose an adult sentence, the sentence is illegal.

The State asserts that Chris's argument that the district court did not properly take into account the evidence does not fit within the exception for an illegal sentence. **[AB 20]** The State relies on ***United State v. Bolinger***, 940 F.2d 478 (9th Cir. 1991), which dealt with federal sentencing guidelines. However, again, ***Bolinger*** is not a youthful offender case where the court's authority to impose an adult sentence is based on the evidence presented by the State and findings made by the Court that must be supported by such evidence. The district court must comply

with the Children's Code in sentencing a child as an adult. Chris's argument that the district court did not have such authority falls under the purview of an illegal sentence. *See* ***State v. Henry Don S.***, 1990-NMCA-029, ¶ 7, 109 N.M. 777 ("[S]entence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense."); ***State v. Crespin***, 1981-NMCA-095, ¶ 15, 96 N.M. 640 (trial court only has authority to impose penalties authorized by the legislature and penalties not authorized by statute are void).

The State also relies on ***United States v. Thornsbury***, 670 F.3d 532, 539 (4th Cir. 2012), which is another case based on federal sentencing guidelines. **[AB 21]** This case actually supports Chris's position where it explained that an illegal sentence that survives an appellate waiver is one "where the sentence is alleged to have been beyond the authority of the district court to impose." ***Thornsbury***, 670 F.3d at 539. Chris alleged that the adult sentence given by the district court in this case was beyond the authority of the district court to impose. Thus, his claim survives an appellate waiver.

Finally, the State asserts that "challenging the sufficiency of the evidence is not the same as arguing that the sentence was 'illegal as not authorized under the applicable statute.'" **[AB 23]** (citing ***State v. Trujillo***, 2002-NMSC-005, ¶ 64 n.4, 131 N.M. 709.) However, in this context it is. The district court must make findings supported by clear and convincing evidence, to authorize under the statute an adult

sentence. While the issue of sufficiency of the evidence must generally be reserved for appellate review under ***State v. Hodge***, 1994-NMSC-087, 118 N.M. 410, that does not apply in this context. *See* ***id***. ¶ 22 ("we hold that an issue of sufficiency of the evidence may be reserved for appellate review, at least if it concerns an issue of law or an issue of mixed fact and law that can be decided without a full trial.")[1]

Further, this argument displays the fundamental misunderstanding in the Court of Appeals decision and the State's attempt to uphold it here. Such a holding would require the defense to reserve at the time of the plea to the underlying charges an argument that the State will present insufficient evidence at the prospective amenability hearing, or any number of other defects with the hearing. This makes no sense. *Cf.* ***Hodge***, 1994-NMSC-087, ¶ 19 (explaining for a valid conditional plea "the defendant must preserve the alleged error by invoking a ruling by the court on a pretrial motion to suppress evidence or to dismiss. The defendant may plead guilty or nolo contendere and reserve appellate review of an adverse determination of a

[1] However, generally an argument that the evidence is insufficient does not have to be preserved. *See* ***State v. Sotelo***, 2013-NMCA-028, ¶ 30, 296 P.3d 1232 ("Defendant need not have preserved this argument because it rests on whether the evidence was sufficient to convict him of kidnapping."); ***In Re Gabriel M.***, 2002-NMCA-047, ¶ 9, 132 N.M. 124 ("Because it concerns the sufficiency of the evidence with regard to one of the elements of the crime, the issue is fundamental and can be raised for the first time on appeal."); ***State v. Stein***, 1999-NMCA-065, ¶ 9, 127 N.M. 362 (discussing that no error is more fundamental than the right not to be convicted when innocent, therefore "the question of sufficiency of the evidence to support a conviction may be raised for the first time on appeal").

pretrial motion by entering a conditional plea, in writing, specifying the issue or issues reserved for appeal.")

II. CONCLUSION

Youthful offender sentencing procedure is unique to New Mexico. The default position under the statute is that a child is amenable to treatment and this Court held it was "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. As such, "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" ***Id***. It is for these reasons the child cannot waive such determination and it cannot be bargained away during plea negotiations. ***Id***. (holding "the Legislature did not intend this responsibility to be bargained away.") In order to sentence a child as an adult, the State must prove that the child is not amenable to treatment and the district court must make evidence-based findings to invoke its authority under the statute to hand down an adult sentence. Chris's argument that the district court erred in making such findings challenges the authority of the district court to impose the adult sentence in this case—this is a claim that the sentence is not statutorily authorized and is illegal. Such claim survives appellate waiver and the Court of Appeals erred in dismissing the appeal on grounds of waiver.

For the reasons stated herein and in his Brief-in-Chief, Chris Rodriguez respectfully requests that this Court reverse the Court of Appeals.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by electronic delivery to Assistant Attorney General John Woykovsky on this the 18th day of September, 2020.

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