IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-38130

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

CHRISTOPHER RODRIGUEZ,

Defendant-Petitioner.

ON WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS
APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE BRETT LOVELESS

STATE OF NEW MEXICO'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Cases from Other Jurisdictions

Constitutional Provisions

Statutes

Rules

NATURE OF THE CASE

After entering into a plea agreement in which he agreed that he would be sentenced to total of 31½ years in prison, that an amenability hearing would be held before sentencing, and that he waived his right to appeal as long as the court's sentence was imposed according to the terms of the agreement, Petitioner Christopher Rodriguez appealed the resulting judgment imposing a 31½ year prison sentence on the theory that the district court abused its discretion by finding that he was not amenable to treatment as a juvenile. The issue is whether the Court of Appeals of Appeals correctly dismissed his appeal on the ground that he waived his right to appeal in the plea agreement.

SUMMARY OF PROCEEDINGS

1. Course of Proceedings.

On July 24, 2015, Rodriguez was charged by indictment with one count of first degree willful and deliberate murder while armed, or alternatively, first degree felony murder; one count of attempted first-degree murder while armed, or alternatively, aggravated assault while armed; one count of conspiracy to commit first degree murder; one count of attempted armed robbery; two counts of aggravated burglary; four counts of residential burglary; two counts of attempted residential burglary; five counts of vehicular burglary; two counts of attempted vehicular burglary; three counts of unlawful taking of a vehicle; four counts of larceny; two

counts of theft of a credit card; seven counts of unauthorized use of a credit card; two counts of attempted unauthorized use of a credit card; and two counts of tampering with evidence. **[RP 2-13]**

On November 17, 2016, Rodriguez pled guilty to one count of aggravated burglary, two counts of conspiracy to commit aggravated burglary (one resulting in death), three counts of residential burglary, two counts of vehicular burglary, and one count of unauthorized use of a credit card; the remaining counts were dismissed. **[RP 88-93]** Because Rodriguez was 16 years old at the time of the offenses, an amenability hearing was held before Judge Brett Loveless prior to sentencing. **[5-12-17 Tr. 4-93]** In an order dated May 22, 2017, Judge Loveless concluded that Rodriguez was not amenable to treatment as a juvenile. **[RP 114-22]** On September 7, 2017, Rodriguez was sentenced to a total of 31½ years imprisonment, with all but 14 years suspended. **[RP 131-35]**

Rodriguez appealed the district court's finding that he was not amenable. **[RP 187-208]** *State v. Rodriguez*, No. A-1-CA-37324, mem. op. ¶ 1 (N.M. Ct. App. Nov. 27, 2019) (non-precedential), *cert. granted*, No. S-1-SC-38130 (N.M. July 6, 2020). In a memorandum opinion dated November 27, 2019, the Court of Appeals dismissed the appeal on the ground that Rodriguez's waiver of his right to appeal precluded appellate review. *Rodriguez*, mem. op. ¶ 9. Rodriguez filed a motion for rehearing, which the Court of Appeals denied.

On February 5, 2020, Rodriguez filed a petition for a writ of certiorari. After initially denying the petition, this Court granted a motion for reconsideration, and then granted the petition. **[7-6-20 ORD 1-2]**

2. Statement of Facts.

a. The burglaries and shootings.

Beginning at around 2:00 a.m. on June 26, 2015, Rodriguez and five other juveniles went on a crime spree in several residential Albuquerque neighborhoods, burglarizing or attempting to burglarize eight houses and stealing, burglarizing, or attempting to burglarize ten cars. **[RP 2-13, 57]** Two home owners confronted the burglars; one was shot at but not hit, and the other was shot and killed. **[State's Ex. 1 at 1-2]** Over the course of the next twelve days, police identified suspects by using surveillance video from various locations, including one video from the day of the murder showing Rodriguez trying to use a credit card taken from the slain man's home. **[State's Ex. 1 at 3]**

When police questioned one of Rodriguez's known criminal associates, he admitted that he had gone "car and house mobbing" with Rodriguez, Jeremiah King, and three other juveniles. **[State's Ex. 1 at 4]** He also told police that he had seen King shoot at one homeowner; that he heard gunshots after King, Rodriguez, and two others had gone to "mob" another house while he waited in a stolen car; and that King told him that "he shot the man" after the four ran back to the vehicle. **[State's**

Ex. 1 at 4] The group then drove to another neighborhood, where they continued to "mob" houses and vehicles. **[State's Ex. 1 at 4]**

Rodriguez later told authorities that he and King were known as the "crazy" ones in the group who were likely "to take it to the max" or "take the biggest risks," that he "took things to extremes" because it was "cooler," that he thought their friends looked up to him and King because they were older, and that he was considered King's "second in command." **[Def. Ex. A at 7]** He also reported that he "smoked marijuana and got drunk on at least ten beers" before going mobbing, and that during the burglaries he "picked up a gallon of tequila from a house and swigged from it, getting drunker." **[Def. Ex. A at 6]**

b. The plea agreement.

When Rodriguez was indicted on July 24, 2015, the charges included first degree murder. **[RP 3]** Rodriguez therefore was considered a "serious youthful offender" and faced a mandatory adult sentence. NMSA 1978, § 32A-2-3(H) (2009); NMSA 1978, § 31-18-15.2(D) (1993). On November 17, 2016, however, the State dismissed the first degree murder count as part of a plea agreement in which Rodriguez pled guilty to nine counts, including one count of aggravated burglary. **[RP 88-93]** As a result, he was considered a "youthful offender" and a "delinquent child," and no longer faced a mandatory adult sentence. Section 32A-2-3(J)(1)(k); NMSA 1978, § 32A-2-20(A) (2009).

Rodriguez did not reserve the right to appeal any issues. **[*See* RP 88-93]** On the contrary, the plea agreement expressly provided:

> WAIVER OF DEFENSES AND APPEAL: Unless this plea is rejected or withdrawn, the defendant gives up all motions, defenses, objections, or requests which he has made or could make concerning the [c]ourt's entry of judgment against him if that judgment is consistent with this agreement. The defendant specifically waives his right to appeal as long as the court's sentence is imposed according to the terms of this agreement.

[RP 91] The plea agreement also contained a "sentencing agreement," which stated:

> All Counts shall be served consecutively to each other for a total sentence of thirty-one and one-half (31½) years. Some of the charges make the defendant a "youthful offender,["] therefore an amenability hearing will need to be held to determine whether the defendant will receive a juvenile or adult sentence.

[RP 89] Additionally, a subsection titled "POTENTIAL INCARCERATION" stated: "If the court accepts this agreement, the defendant will be ordered to serve a period of incarceration up to thirty-one and one-half (31½) years." **[RP 90-91]**

c. The amenability determination.

An amenability hearing was held before Judge Brett Loveless on May 12, 2017. **[5-12-17 Tr. 4-93]** In an order dated May 22, 2017, Judge Loveless concluded that Rodriguez was not amenable to treatment as a juvenile. **[RP 114-22]** On September 7, 2017, Rodriguez was sentenced to a total of 31½ years imprisonment, with all but 14 years suspended. **[RP 131-35]** After filing a notice of appeal that he later withdrew, Rodriguez filed a motion to reconsider in which he asserted that he

had "additional mitigating factors to bring to the Court's attention." **[RP 137-45, 164-66]** That motion was denied. **[RP 182-83]** He then filed a second notice of appeal on April 19, 2018. **[RP 184]**

d. The appeal and petition for writ of certiorari.

On March 7, 2019, Rodriguez appealed his judgment and sentence, arguing that the district court abused its discretion by finding that he was not amenable. **[*See* RP 207-08]** *Rodriguez*, mem. op. ¶ 1. In a memorandum opinion dated November 27, 2019, the Court of Appeals dismissed the appeal on the ground that Rodriguez's waiver of his right to appeal precluded appellate review. *Rodriguez*, mem. op. ¶ 9. Rodriguez filed a motion for rehearing, arguing that he could not waive his right to appeal the amenability determination, but the Court of Appeals denied the motion.

On February 5, 2020, Rodriguez filed a petition for a writ of certiorari that presented one issue: "Did the Court of Appeals err when it dismissed Mr. Rodriguez's appeal, finding that Mr. Rodriguez's plea to juvenile offenses waived any constitutional defects in a subsequent amenability hearing." **[Pet. 1]** After initially denying the petition, this Court granted a motion for reconsideration, and then granted the petition "on all questions as presented in the petition." **[7-6-20 ORD 1-2]**

STANDARD OF REVIEW

Whether a defendant has waived his right to appeal by entering a guilty plea is a question of law, and is reviewed de novo. *State v. Muniz*, 2000-NMCA-089, ¶ 7, 129 N.M. 649, *rev'd on other grounds*, 2003-NMSC-021, 134 N.M. 152.

ARGUMENT

I. RODRIGUEZ 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, AND INSTEAD AGREED NOT TO APPEAL UNLESS HE WAS SENTENCED TO MORE THAN 31½ YEARS IN PRISON.

The New Mexico Constitution provides that "an aggrieved party shall have an absolute right to one appeal." N.M. Const. art. VI, § 2. But this Court has held that "a plea of guilty . . . , when voluntarily made after advice of counsel and with full understanding of the consequences, . . . operates as a waiver of statutory or constitutional rights, including the right to appeal." *State v. Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251 (quoting *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410). Thus, "a person who agrees not to be aggrieved by entering into a plea and disposition agreement, who does not allege constitutional invalidity of his plea and agreement, and who does not seek to withdraw his plea, is not an aggrieved party." *State v. Ball*, 1986-NMSC-030, ¶ 31, 104 N.M. 176.

Chavarria is instructive. The plea agreement in that case contained "no agreements as to sentencing," it stated that the maximum sentence was life

imprisonment, and expressly waived "**any and all** motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement," as well as the "right to appeal the conviction that results from the entry of this plea agreement." 2009-NMSC-020, ¶ 3. The defendant nonetheless appealed his 30-year prison sentence, arguing that it amounted to cruel and unusual punishment. *Id.* ¶¶ 5-8. This Court declined to consider the argument, explaining: "[A] voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds." *Id.* ¶ 9. The Court added: "[T]he constitutional right to appeal is waivable, and a defendant who knowingly, intelligently, and voluntarily pleads guilty, waives the right to appeal his conviction and sentence." *Id.* ¶ 16.

Here, Rodriguez's plea agreement included: (1) a recitation of the maximum penalty for each count and a "sentencing agreement" stating that "[a]ll [c]ounts shall be served consecutively to each other for a total sentence of thirty-one and one-half (31½) years"; and (2) a "waiver of defenses and appeal" stating that he "specifically waives his right to appeal as long as the court's sentence is imposed according to the terms of this agreement." **[RP 89-91]** Thus, under *Chavarria*, he waived his right to appeal, and the Court of Appeals properly dismissed his appeal on that ground.

Amici argue that the Court of Appeals' enforcement of Rodriguez's appeal waiver is "in direct conflict with this Court's holding in *Rudy B.*" **[Amicus Br. 9]** *See State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22. They misread *Rudy B.*, because the question there was whether the juvenile defendant's "explicit waiver of his right to appeal divested the Court of Appeals of jurisdiction" to hear his challenge to the constitutionality of Section 32A-2-20. *Rudy B.*, 2010-NMSC-045, ¶ 11. This Court concluded that it did not, reasoning that the Legislature "vested the Court of Appeals with subject matter jurisdiction over 'criminal actions,'" and the defendant's "waiver of his right to appeal does not transform this proceeding into something other than a 'criminal action.'" *Id.* ¶ 15. Significantly, this Court declined to decide "whether the scope of Child's waiver extended to the constitutionality of Section 32A-2-20," because the State had waived the issue by not raising it in its briefs to the Court of Appeals or in its petition for certiorari. *Id.* ¶ 16.

In any event, Rodriguez does not rely on *Rudy B.* Instead, he argues that he did not waive his right to appeal because the language of the agreement "does not specifically mention waiver of any challenge to the amenability determination."[1]

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[1] Relatedly, Rodriguez cites *State v. Singleton*, 2001-NMCA-054, ¶ 11, 130 N.M. 583, for the proposition that "there is a presumption against the waiver of constitutional rights, such as the right to appeal or to due process of law." **[BIC 11-12]** *Singleton*, however, involved the question of whether the defendant waived his right to an impartial jury by not objecting when the trial court excused a juror.

[BIC 12] He misunderstands the applicable rule. Issues that are not "specifically mentioned" in a plea agreement are not thereby reserved for appeal. Indeed, the language of the agreement in *Chavarria* did not "specifically mention" waiver of any challenge to his sentence. On the contrary, it "contained 'no agreements as to sentencing.'" *Chavarria*, 2009-NMSC-020, ¶ 3. Nonetheless, this Court held that Chavarria waived his challenge because "a defendant who knowingly, intelligently, and voluntarily pleads guilty, waives the right to appeal his conviction and sentence." *Id.* ¶ 16.

This Court has elsewhere made clear that to reserve an issue for appeal, a defendant must enter a conditional plea agreement where he "agrees to plead guilty to the offense charged but reserves one or more specific issues for appellate review following conviction." *Hodge*, 1994-NMSC-087, ¶¶ 1-3; *see* Rule 5-304(A)(2) NMRA. The critical requirements for a conditional plea are that the defendant express an intention to reserve a particular issue for appeal and that neither the prosecution nor the trial court oppose such a plea. *Hodge*, 1994-NMSC-087, ¶ 23.

Rodriguez admits that he never expressed such an intent, but complains that he should not be required to do so because he "would have to obtain the approval of the sentencing court and the State," and "[t]his dynamic of preemptively assuming

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2001-NMCA-054, ¶¶ 8-16. It did not address plea agreements, the "right to appeal," or "due process of law." *See id.*

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, undermines the juvenile's fate." **[BIC 16-17]** The argument fails for three reasons.

First, judges are expected and required to "perform all duties of judicial office fairly and impartially." Rule 21-202 NMRA. Further, as this Court observed in *Hodge*, a conditional plea "promotes judicial economy" by not requiring a defendant to "go through an entire trial" simply to preserve an issue for appellate review. *Hodge*, 1994-NMSC-087, ¶¶ 15-17. This being true, a judge surely would prefer that a defendant reserve an issue by making it a condition of his plea agreement rather than "go[ing] through an entire trial" and thereby "wast[ing] . . . judicial resources and caus[ing] delay in the trial of other cases." *See id.* This is true regardless of whether the reservation is "preemptive" or prospective. Indeed, there is little reason to believe that a judge would be more offended by a defendant's desire to hedge his bets by reserving the right to appeal a future ruling than by the stated intent to appeal a ruling that has already been made.

Second, under Rodriguez's reasoning, a defendant would never be required to reserve an issue by way of a conditional plea. After all, pleas necessarily must be entered prior to sentencing. So if a defendant can be excused from reserving the right to appeal a ruling because doing so might offend a judge and "undermine[] the [defendant's] fate" at sentencing, conditional pleas would never be required. Yet this

Court has twice held that conditional pleas should be used to reserve an issue for appeal. *Chavarria*, 2009-NMSC-020, ¶ 17; *Hodge*, 1994-NMSC-087, ¶¶ 17-19.

Third, this Court "would only be encouraging sharp practices" if it permitted a defendant to waive appeal explicitly in a plea agreement, take his chances at the amenability hearing, and then argue that he was not required to reserve the issue of amenability—and therefore did not waive appeal as to that issue—due to the "adversarial dynamic" of "preemptively presuming error." *Cf. State v. Crislip*, 1990-NMCA-054, ¶ 11, 110 N.M. 412 ("We would only be encouraging 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."), *overruled on other grounds by Santillanes v. State*, 1993-NMSC-012, ¶ 11, 115 N.M. 215, *and State v. Belanger*, 2009-NMSC-025, ¶ 36 & n.4, 146 N.M. 357.

Thus, because Rodriguez could have and should have entered a conditional plea to reserve his right to appeal the amenability ruling, Rodriguez and Amici are wrong when they argue that "[p]ermitting the waiver of challenges to defects in the amenability determination would effectively remove necessary oversight" and leave "no way to challenge defects in [the] process." **[BIC 14; Amicus Br. 7]**

II. ALTHOUGH A DEFENDANT CANNOT WAIVE THE RIGHT TO APPEAL AN ILLEGAL SENTENCE, THE AMENABILITY RULING IN THIS CASE WAS NOT ILLEGAL, SO RODRIGUEZ CANNOT AVOID HIS APPEAL WAIVER ON THAT GROUND.

Rodriguez raises a second objection to the idea that he waived his right to appeal. He argues that he did not and could not "waive[] his right to appeal an amenability determination in contravention of the requirements of Section 32A-2-20." **[BIC 10]** He thereby invokes the rule that "a plea of guilty does not waive jurisdictional errors." *State v. (Alex) Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451. With regard to sentencing, a court has subject matter jurisdiction when the matter before the court "falls within the general scope of authority conferred by the constitution or statute," and "[a] trial court's power to sentence is derived exclusively from statute." *Id.* ¶¶ 11-12. Thus, a claim that a sentence was "illegal as not authorized under the applicable statue" is jurisdictional, and not waived by a guilty plea. *State v. (Chris) Trujillo*, 2002-NMSC-005, ¶ 64 n.4, 131 N.M. 709; *State v. Tafoya*, 2010-NMSC-019, ¶ 7, 148 N.M. 391.

Contrary to Rodriguez's claim, however, this exception does not apply here because the district court complied with the applicable statutes.

A. The District Court Complied with the Applicable Statutes when It Found that Rodriguez Was Not Amenable to Treatment as a Juvenile and Imposed an Adult Sentence.

Under New Mexico's Children's Code, a juvenile is considered a "youthful offender" when found guilty of one of thirteen specified offenses, including

aggravated burglary. Section 32A-2-3(J)(1)(k). In such a case, "the court has discretion to invoke either an adult sentence or juvenile sanctions." Section 32A-2-20(A). "In order to make this critical determination, the Code requires the court to determine whether the child is amenable to treatment or is eligible for commitment to an institution for children with disabilities." *State v. Stephen F.*, 2006-NMSC-030, ¶ 12, 140 N.M. 24 (citing § 32A-2-20(B)). The trial court must hold an evidentiary hearing to make this determination. *Rudy B.*, 2010-NMSC-045, ¶¶ 1, 5, 19. It also "must make findings" on seven statutory factors set forth in Section 32A-2-20(C) "to show that the district court gave proper consideration to the issue of amenability to treatment or rehabilitation." *State v. Sosa*, 1997-NMSC-032, ¶¶ 8-9, 123 N.M. 564, *overruled on other grounds by State v. Porter*, No. S-1-SC-37111, slip op. ¶ 7 (N.M. Aug. 3, 2020); Rule 10-247(F) NMRA. If the court ultimately decides to invoke an adult sentence, it "may sentence the child to less than, but shall not exceed, the mandatory adult sentence." Section 32A-2-20(E); NMSA 1978, § 31-18-13(A) (1993).

1. The district court held an amenability hearing.

In this case, the court complied with each of these requirements. First, it held an evidentiary hearing to determine whether Rodriguez was amenable to treatment. In this respect this case is unlike *State v. Jones*, 2010-NMSC-012, ¶ 8, 148 N.M. 1, where the trial court did not hold an amenability hearing. Although Jones's

conviction was the result of a plea agreement where he agreed to an adult sentence and seemingly waived his right to an amenability hearing, this Court held that "the trial court lacks the statutory authority to impose an adult sentence on any youthful offender without complying with Section 32A-2-20. It follows that the parties lack the ability to bargain away the court's own responsibility." *Id.* ¶ 48. Recognizing this fact, the trial court in this case held the requisite amenability hearing. **[5-12-17 Tr. 4-93]**

Amici nonetheless assert that the Court of Appeals' enforcement of Rodriguez's appeal waiver "contravenes both the letter and spirit of this Court's decision" in *Jones*. **[Amicus Br. 5]** In support, they note that "*Jones* relied heavily" on *Kent v. United States*, 383 U.S. 51 (1966), and emphasize this Court's statement: "We agree with *Kent* . . . '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." **[Amicus Br. 6]** *Jones*, 2010-NMSC-012, ¶ 44. That may be true, but neither *Kent* nor *Jones* support the idea that in a case where the district court follows the statutory requirements, a defendant cannot waive the right to appeal the court's ruling. Indeed, at least two federal circuits have held that the right to appeal the transfer of a case from juvenile to adult court may be waived by a guilty plea. *See United States v.*

Ramirez, 42 Fed. Appx. 505, 506-07 (2d Cir. 2002); *Rodriguez v. Ricketts*, 798 F.2d 1250, 1253 (9th Cir. 1986).[2]

2. The district court considered and made findings as to each of the statutory factors.

Next, the court followed the statutory requirements by making findings on each of the factors listed in Section 32-A-2-20(C).

First, the court found that the "fact that a life was lost during the group's activities . . . demonstrates the seriousness of their actions," but took into consideration that Rodriguez pled guilty to aggravated burglary with a deadly weapon rather than murder. **[RP 115-16]** *See* § 32A-2-20(C)(1). Second, it found that the offenses were premeditated, violent, and aggressive, based on evidence that Rodriguez and the others had "met and planned on mobbing," had targeted homes likely to be occupied, and had continued their crime spree even "after one person had been shot at and another killed." **[RP 116]** *See* § 32A-2-20(C)(2). Third, it found that the offenses were committed with a firearm and that Rodriguez knew King had a gun, knew it had been used, and "continued on with the group with this knowledge." **[RP 116]** *See* § 32A-2-20(C)(3). Fourth, it noted that Rodriguez pled

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[2] A third has held that a guilty plea does not waive a challenge to a federal district court's decision to transfer a case for adult prosecution on the theory that such a transfer "impacts the district court's subject matter jurisdiction." *United States v. K.W.*, 21 Fed. Appx. 311, 312 (6th Cir. 2001). But K.W. does not help Rodriguez because an amenability determination does not affect the district court's subject matter jurisdiction.

guilty to crimes against property, rather than offenses against persons. **[RP 116-17]** *See* § 32A-2-20(C)(4). Fifth, it found that Rodriguez had a "tumultuous and traumatic" family environment, had abused drugs and alcohol since the sixth grade, had been stealing from cars since the seventh grade, and had a "low average" IQ due to "inconsistency in his academic experience," but did not show signs of any "impairment that would warrant inpatient care or a sheltered environment." **[RP 117-18]** *See* § 32A-2-20(C)(5). Sixth, it found that Rodriguez had eleven "referrals" for juvenile offenses dating back to 2013 and that his offenses had escalated in seriousness, including increasingly intrusive burglaries with a "high potential for physical harm to others." **[RP 118-19]** *See* § 32A-2-20(C)(6).

Finally, regarding 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 court found that Rodriguez had been charged with several assaults while detained in this case; that he had only occasionally participated in counseling; that he would need "on-going intervention" and "close supervision" for a "substantial amount of time"; that an assessment for aggressive recidivism showed that he had 19 out of 24 risk factors, many of which were "static or fixed and not subject to change"; and that the programs and counseling available at juvenile detention centers "are wholly voluntary for the child." **[RP 119-20]** *See* § 32A-2-20(C)(7).

These findings distinguish this case from *State v. Nehemiah G.*, 2018-NMCA-034, *cert. denied*, 2018-NMCERT-004. There, the trial court held an amenability hearing but declined to consider or make findings on the first four offense-specific statutory factors, reasoning that "the focus of amenability hearings and the focus of the findings is on the child, not on the particular offense committed." *Id.* ¶ 39. Further, the court's one-page written order included no findings regarding any of the statutory factors, and simply stated that "[t]he State had failed to prove" that the defendant was "not amenable to treatment." *Id.* ¶ 40. Contrasting this approach with *Sosa*, where this Court affirmed the finding of non-amenability "[i]n light of the judge's methodical documentation of his consideration of the evidence as applied to the requisite statutory factors," the Court of Appeals concluded that the lack of findings in *Nehemiah G.* amounted to an abuse of discretion. *Id.* ¶ 48 (quoting *Sosa*, 1997-NMSC-032, ¶ 10). The Court explained: "[T]he district court needed to identify the specific evidence, through methodical documentation, that supported its decision and explain how and why that evidence outweighed the numerous factors that supported a finding that Child is not amenable to treatment." *Id.* ¶ 49.

Here, unlike in *Nehemiah G.*, the record demonstrates that the district court complied with Section 32A-2-20(C), insofar as it issued a nine-page written order that methodically documented its consideration of the evidence applicable to each

statutory factor and then explained how the evidence supported its determination that Rodriguez was not amenable to treatment as a juvenile. **[RP 114-22]**

3. The district court imposed a legal sentence.

Finally, in addition to holding an amenability hearing and making findings regarding the requisite statutory factors, the district court complied with Sections 31-18-13(A) and 32A-2-20(E) by imposing a sentence that did not exceed the mandatory adult sentence. Rodriguez's guilty plea subjected him to prison sentences of 9 years for aggravated burglary, 3 years for conspiracy to commit aggravated burglary, 6 years for conspiracy to commit aggravated burglary resulting in death, 9 years for three counts of residential burglary, 3 years for two counts of auto burglary, and 18 months for unauthorized use of a credit card, for a total of 31½ years. **[RP 88-90]** *See* NMSA 1978, §§ 30-16-3 (1971), 30-16-4(A) (1963), 30-28-2 (1979), 31-18-15(A) (2007), 58-16-16(B) (1990). Consistent with the statutory penalties and the terms of the plea agreement, the district court imposed a prison sentence of 31½ years, with 17½ years suspended, for an actual prison sentence of 14 years. **[RP 131-35]**

Consequently, Rodriguez's sentence was not illegal, and he cannot avoid his appeal waiver on that ground.

B. Contrary Arguments from Rodriguez and Amici Lack Merit.

1. Arguing that the district court did not "properly take into account the evidence" does not fit within the exception for illegal sentences.

Even though the district court held an amenability hearing, considered and made findings regarding the requisite statutory factors, and imposed a legal sentence, Rodriguez asserts that the court's amenability determination was "potentially illegal" and "in contravention of the requirements of Section 32A-2-20" because it did not "properly take into account the evidence presented to it." **[*See* BIC 10-11, 15]**

The Ninth Circuit rejected a similar argument in *United States v. Bolinger*, 940 F.2d 478 (9th Cir. 1991). Bolinger entered into a plea agreement in which he waived his appellate rights and agreed that the court could depart from the sentencing guidelines, but that his prison sentence was "not to exceed 36 months." *Id.* at 479. He later argued that "because the plea agreement specified that he be sentenced under the guidelines, the alleged misapplication of the guidelines renders the sentence outside the negotiated agreement." *Id.* at 480. The Ninth Circuit rejected the argument, reasoning that the "plain meaning of the plea agreement" was that he waived his right to appeal "unless he received a term of incarceration in excess of 36 months." *Id.* The court added: "Were we to accept Bollinger's argument, his express waiver of the right to appeal the sentence would be a nullity." *Id.*

In *United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012), the Fourth Circuit likewise rejected the argument that a sentence was "illegal" based on the judge's alleged misapplication of the sentencing guidelines. The court explained:

> We have . . . used the term "illegal" to describe sentences the appeal of which survive an appellate waiver, but we have done so only where the sentence is alleged to have been beyond the authority of the district court to impose. In contrast, sentences "imposed in violation of law" include not only "illegal" sentences, . . . but also any sentence that has been touched by a legal error. In other words, not every appeal alleging a legal error in sentencing challenges that sentence as "illegal," as we have used the term in our precedent. Were we to hold otherwise, it is difficult to conceive of a limiting principle that would prevent the "illegal" sentence exception from swallowing the rule that appellate waivers are normally given effect, since nearly every appeal of a sentence involves a claim of legal error.

Id. at 539 (citations omitted).

The same reasoning applies here. Rodriguez entered into a plea agreement in which he agreed to a prison sentence of 31½ years, and waived his right to appeal "as long as the court's sentence is imposed according to the terms of this agreement." **[RP 89-91]** Although the agreement also noted that an amenability hearing was required, the "plain meaning of the plea agreement" was that he waived his right to appeal "unless he received a term of incarceration in excess of [31½ years]." *Bolinger*, 940 F.2d at 480. Were this Court to accept Rodriguez's argument, "his express waiver of the right to appeal the sentence would be a nullity," and it is "difficult to conceive of a limiting principle that would prevent the 'illegal' sentence

exception from swallowing the rule that appellate waivers are normally given effect." *Id.*; *Thornsbury*, 670 F.3d at 539.

Moreover, aside from his bald assertions that the amenability determination was "potentially illegal" and "in contravention of the requirements of Section 32A-2-20," Rodriguez does not actually argue that the determination was "illegal." Instead, he invokes "due process." **[BIC 10]** Similarly, Amici talk about an "amenability hearing without proper due process" or "without proper consideration of the evidence, or other due process deficiencies." **[Amicus Br. 7]** They thereby seem to mean that there was insufficient evidence to support the amenability ruling. *See State v. Vigil*, 2010-NMSC-003, ¶ 4, 147 N.M. 537 ("This responsibility to ensure that the State has introduced sufficient evidence to justify a finding of guilt is founded on 'the constitutional requirement of due process.'"). Indeed, this is the argument that Rodriguez makes later in his brief. [3] **[*See* BIC 17-25]**

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[3] Rodriguez spends over ten pages of his twenty-five-page brief reviewing the evidence most favorable to the defense, and arguing that the same evidence does not support the district court's amenability determination. **[*See* BIC 2-7, 17-24**] The State maintains that the totality of the evidence supports the district court's ruling. But the State has not briefed the issue here because it was not presented for review in Rodriguez's petition for writ of certiorari, and this Court specifically granted the petition "on all questions as presented in the petition" and then ordered briefing "with respect to the questions upon which this Court granted certiorari." **[Pet. 1; 7-6-20 ORD 2; 7-10-20 ORD 2]**

So understood, Rodriguez's argument fails because challenging the sufficiency of the evidence is not the same as arguing that the sentence was "illegal as not authorized under the applicable statue." *See (Chris) Trujillo*, 2002-NMSC-005, ¶ 64 n.4. On the contrary, this Court has indicated that the issue of the sufficiency of the evidence must be reserved for appellate review. *Hodge*, 1994-NMSC-087, ¶ 22. It is not jurisdictional. *Cf. State v. Lard*, 1974-NMCA-004, ¶ 6, 86 N.M. 71 (explaining that prior to adoption of Rule 5-607(E) NMRA, defendant forfeited challenge to evidentiary sufficiency by not moving for directed verdict).

2. Rodriguez waived any argument that his sentence amounted to cruel and unusual punishment.

Rodriguez also may intend to make a cruel-and-unusual-punishment argument, given his reliance below on *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). Each of those cases held that the sentences in question amounted to cruel and unusual punishment. *Miller*, 567 U.S. at 489; *Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 578. So perhaps Rodriguez means to make that argument when he asserts that the amenability determination in this case was "[un]fair," "improper," and "unjust." **[BIC 10-14]** But once again, arguing that a sentence amounts to cruel and unusual punishment is not the same as arguing it is "illegal." Indeed, the defendant in *Chavarria* challenged his sentence as cruel and unusual punishment, and this Court

held that the issue had been waived by his guilty plea. 2009-NMSC-020, ¶ 14; *accord State v. Uribe-Vidal*, 2018-NMCA-008, ¶ 28.

3. There is no evidence, and Rodriguez does not claim, that the sentence was the result of racial bias.

Rodriguez and Amici also raise the specter of amenability determinations based on racial bias. Rodriguez worries: "[I]f 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." **[BIC 14-15]** Amici similarly assert that "robust appellate rights are necessary checks on racial bias in amenability hearings." **[Amicus Br. 28]** These arguments fail because an amenability determination based on race or ethnicity would be illegal, and therefore appealable. *See Thornsbury*, 670 F.3d at 539 ("illegal" sentences include those based on race); *accord United States v. Bownes*, 405 F.3d 634, 637 (7th Cir. 2005); *United States v. Cockerham*, 237 F.3d 1179, 1182 (10th Cir. 2001); *United States v. Rosa*, 123 F.3d 94, 98 (2d Cir. 1997); *see also Garza v. Idaho*, 139 S. Ct. 738, 745 n.6 (2019) ("Lower courts have . . . applied exceptions [to appeal waivers] for . . . 'claims that a sentence is based on race discrimination.'"). But there is no evidence of racial bias in this case, and Rodriguez has not challenged the district court's ruling on this ground.

Amici do not allege actual bias either, but instead refer to various law review articles (and one dissertation) alleging that implicit bias "pervade[s] the justice system." **[Amicus Br. 19-29]** Thus, they contend that no evidence of actual bias is needed. *See id.* The are mistaken. "[T]here must be a reasonable factual basis for doubting the judge's impartiality, and a claim of bias, including a claim of an appearance of bias, cannot be based on mere speculation." *N.M. Constr. Indus. Div. & Manufactured Hous. Div. v. Cohen*, 2019-NMCA-071, ¶ 26 (citation, brackets, and quotation marks omitted).

Amici point to alleged disparities between arrestees and prison inmates compared to the general population as evidence of implicit bias, and assert that "[t]his 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." **[Amicus Br. 29]** They reason that "[t]here is more room for biases to influence outcomes when decisions are highly discretionary, as in amenability hearings," because "unsuitability to treatment is at best a nebulous concept" that, "[b]ecause of its vagueness, . . . is open to abuse as a convenient rationalization which may allow a court to refer [a case to adult court] when it desires to do so for a variety of irrelevant or unarticulated reasons." **[Amicus Br. 29]** This argument fails for two reasons.

First, Amici fail to recognize that Section 32A-2-20 requires more than a "vague" or "nebulous" finding that a juvenile is not amenable to treatment. Rather, the district court must make findings regarding each of the statutory factors listed in Section 32A-2-20(C). *Sosa*, 1997-NMSC-032, ¶ 10; *Nehemiah G.*, 2018-NMCA-034, ¶ 48. Moreover, Amici fail to explain how review will ferret out unarticulated, implicit bias in a case where the court makes the required findings—as it did here—and those findings contain no actual evidence of bias.

Secondly, if implicit bias "pervades the justice system," the "blanket rule that you cannot waive the right to appeal" should apply to adult sentencing as well, and to any other issue that a defendant might waive in a guilty plea. But then there would be no need for conditional pleas, and this is decidedly not the rule. *See Chavarria*, 2009-NMSC-020, ¶ 17; *Hodge*, 1994-NMSC-0987, ¶¶ 17-19. Moreover, if implicit bias pervades the entire justice system, it is unclear how one court's bias would be "checked" by another biased court's review, particularly where the bias is "implicit" and therefore impossible to detect in any individual case.

III. RODRIGUEZ CANNOT SHOW THAT HIS PLEA WAS NOT KNOWING AND VOLUNTARY, NOR WOULD SUCH A SHOWING JUSTIFY THE REMEDY HE SEEKS.

Finally, Amici seem to argue that juveniles should never be allowed to waive appellate review because they can never make a knowing and voluntary waiver due to "developmental differences in a variety of brain regions." **[Amicus Br. 9-16]** In

support, they assert that "United States Supreme Court case law has repeatedly recognized, based on scientific research, that children 'cannot be viewed as miniature adults.'" **[Amicus Br. 9]** They then cite four Supreme Court cases, including *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), where the Court held that "a child's age properly informs the *Miranda* custody analysis." **[Amicus Br. 9]** *J.D.B.*, 564 U.S. at 265. Rodriguez similarly argues that "[t]his Court should be especially concerned about the knowingness and voluntariness of prospective waivers . . . for juveniles" because, by enacting and enforcing statutory requirements for the admission of juvenile statements, "both the Legislature and this Court have indicated that they do not take waivers by juveniles lightly." **[BIC 16]**

The analogy is inapt. Indeed, the Legislature necessarily rejected the argument that juveniles cannot knowingly and voluntarily waive their rights by enacting legislation that contemplates the introduction of statements made by juveniles "after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." NMSA 1978, § 32A-2-14(D) (2009).

At the same time, holding that a juvenile defendant is capable of knowingly and voluntarily waiving his right to appeal does not foreclose challenging an appeal waiver on the ground that the plea in fact was not knowing and voluntary. *See State v. Turner*, 2017-NMCA-047, ¶ 32 (rejecting argument that appeal was waived by guilty plea, because "it is precisely the voluntariness of the plea that Defendant is

disputing"); *Garza*, 139 S. Ct. at 745 ("[C]ourts agree that defendants retain the right to challenge whether the waiver . . . was unknowing or involuntary.").

Rodriguez makes a half-hearted attempt to raise such a challenge when he argues that 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." **[BIC 15]** A similar argument was rejected in *United States v. Guillen*, 561 F.3d 527, 529-30 (D.C. Cir. 2009). The court there explained:

> The defendant cannot be certain of the consequences of waiving his constitutional right to trial by jury or to be represented by counsel any more than he can be certain of the consequences of waiving his right to appeal his sentence. . . . A defendant who waives trial by pleading guilty, for example, believes the sentence he is likely to receive as a result (with credit for accepting responsibility) is more attractive than facing the range of possibilities—from acquittal on all counts to conviction and the maximum sentence on all counts—discounted by their corresponding probabilities. Pleading guilty allows the defendant to narrow the range of possible penalties. The calculation a defendant makes in waiving his right to appeal his yet-to-be-imposed sentence is fundamentally similar and ought not to be treated differently.

Id. at 530; *accord United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990); *People v. Cisneros-Ramirez*, 240 Cal. Rptr. 3d 204, 211 (Ct. App. 2018). The same reasoning applies here.

In any event, Rodriguez's argument fails because a defendant who "fails to file a motion to withdraw a plea in the district court . . . cannot attack the plea for the first time on direct appeal." *State v. Andazola*, 2003-NMCA-146, ¶ 25, 134 N.M.

710. More to the point, he "cannot . . . claim for the first time on appeal that his plea was not knowing or voluntary; he is limited to seeking relief in collateral proceedings." *Id.* Yet Rodriguez has not moved to withdraw his plea, so there is no evidence, and there are no findings, regarding what he was advised or what he understood the plea agreement to say. Instead, all we have are the vague assertions of counsel, and the "mere assertions and arguments of counsel are not evidence." *State v. Hall*, 2013-NMSC-001, ¶ 28.

Moreover, even if the record established that the plea was unknowing and involuntary, the proper remedy would be to vacate the plea. *See State v. Garcia*, 1996-NMSC-013, ¶¶ 23-24, 121 N.M. 544 (where failure to advise defendant of potential penalties rendered plea unknowing and involuntary, proper remedy was to remand and allow defendant to withdraw plea); *State v. Smith*, 1990-NMCA-082, ¶ 6, 110 N.M. 534 (same). But Rodriguez is not asking to withdraw his plea. **[*See* BIC 25]** Instead, he wants an order—either from this Court or the Court of Appeals—directing the district court to "find [him] amenable to treatment in the juvenile system." **[BIC 25]** Not only is this not the proper remedy, but it would be "unfair to the State . . . when the State apparently dropped . . . charges against Defendant in exchange for his agreement to be sentenced as an adult. To do so would allow Defendant to keep both the benefit of his original bargain and of our holding today." *Jones*, 2010-NMSC-012, ¶ 52.

What is more, because Rodriguez is now 21 years old, he is by definition not "amenable to treatment in the juvenile system." This Court explained in *Rudy B.* that Section 32A-2-20(B) requires the district court to determine whether the defendant can be "rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one." *Rudy B.*, 2010-NMSC-045, ¶ 36. This is true because the maximum penalty for a youthful offender who is sentenced as a juvenile is commitment to the Child, Youth and Families Department (CYFD) until the age of 21. Section 32A-2-20(F); *see also* NMSA 1978, § 32A-2-19(B)(1)(d) (2009) (types of commitments include "(d) if the child is a youthful offender, a commitment to age twenty-one, unless sooner discharged"). But Rodriguez is now 21, so he cannot receive "treatment in the juvenile system," much less can he be "rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one." *Rudy B.*, 2010-NMSC-045, ¶ 36. Instead, any rehabilitation or treatment must be provided through the adult correction system.

This Court acknowledged this fact when it vacated the plea in *Jones*. Recognizing that the 23-year-old defendant could no longer be sentenced as a juvenile, this Court instructed that in the event of another conviction, the trial judge should "consider evidence of (1) whether Defendant is amenable to treatment or rehabilitation at his age at the time of the hearing, and (2) whether any available

facilities or sentencing alternatives exist in the adult corrections system for providing that treatment." *Jones*, 2010-NMSC-012, ¶ 56.

The Eighth Amendment does not require a different result. In *Miller v. Alabama*, the U.S. Supreme Court held that the Eighth Amendment prohibits mandatory sentences of life imprisonment without parole for juvenile defendants. 567 U.S. at 479. The Court reasoned that the "hallmark features" of youth—"transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 472, 477. The Court added that "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth." *Id.* at 472-73 (brackets, quotation marks, and citations omitted). But the Court emphasized that this did not mean that a juvenile could not or should not be sentenced as an adult:

> Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Id. at 488-89 (citations omitted).

In any event, this Court should reject Rodriguez's argument that his plea and appeal waiver were unknowing or involuntary, because he has not moved to withdraw his plea. The Court of Appeals' ruling does not foreclose such a motion. On the contrary, the court specifically observed that its ruling "does not preclude Defendant from raising his appellate issue via habeas corpus proceedings." *Rodriguez*, mem. op. ¶ 9.

CONCLUSION

Rodriguez entered into a plea agreement in which he agreed that he would be sentenced to a total of 31½ years in prison, that an amenability hearing would be held before sentencing, and that he waived his right to appeal as long as the court's sentence was imposed according to the terms of the agreement. Consistent with that agreement, the district court held the required amenability hearing, made the necessary findings, and imposed the agreed-upon sentence. Rodriguez has not moved to withdraw his plea as unknowing. Instead, and contrary to the appeal waiver in his plea agreement, he filed an appeal. The Court of Appeals properly dismissed that appeal, and this Court should affirm that dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, I filed the foregoing *State of New Mexico's Answer Brief* electronically through the Odyssey/E-File & Serve System, electronically serving Assistant Appellate Defender Allison Jaramillo at allison.jaramillo@lopdnm.us, and Amici Leon Howard at lhoward@aclu-nm.org and Marsha L. Levick at mlevick@jlc.org.

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