COPY

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOEL IRA,

Petitioner,

vs.

S-1-SC-35657

JAMES JANECKA, Warden
Lea County Correctional Facility,
Hobbs, New Mexico

Respondent. Supreme Court Cause No._____

The Honorable Jerry H. Ritter, Jr., presiding District Judge
Division I Twelfth Judicial District, County
Of Otero, State of New Mexico in Cause No. JR-1995-00142

SUPREME COURT OF NEW MEXICO
FILED
DEC 28 2015

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT FROM THE DENIAL OF HABEAS CORPUS

Petitioner, **JOEL IRA**, in accordance with ***NMRA Rule 12-501***, petitions the Supreme Court for the issuance of a Writ of Certiorari seeking review of the denial of his Habeas Corpus Petition filed and entered December 9, 2015, by the District Court, Division I, Twelfth Judicial District, County of Otero, State of New Mexico, the Honorable Jerry H. Ritter, Jr., presiding in Cause No. JR-1995-00142. Pursuant to ***NMRA 12-501(D),*** a true and correct copy of the Petition for Writ of Habeas Corpus and attachments, the response by the State of New Mexico and the District Court's denial thereof are attached as Exhibits "A", "B" and "C" respectively and by reference thereto made a part hereof.

I. DESCRIPTION OF THE PROCEEDINGS IN DISTRICT COURT RELATING TO THE PETITION

The Petition was filed on the 1st day of August, 2014, a response was filed on February 5, 2015, an evidentiary hearing was held on the 30th day of June, 2015 and the 20th day of November, 2015. Prior proceedings are detailed in Exhibit "A", Petitioner's Writ, and show an extensive history of failure of the trial judge to recognize and honor not only United States Supreme Court and New Mexico Supreme Court decisions, legislative intent as set forth in the statutes of New Mexico but modern science regarding children and their treatment.

II. SUMMARY OF EVIDENCE PRESENTED AT THE HEARING

Prior hearings, pleadings, exhibits and evidence introduced at the hearings held on two (2) days show the following: Joel Ira, a child, was fifteen (15) and younger when he had sex with a female child who was four (4) years younger than him. Both lived in the same household (they were not blood related but step siblings). The female child is bi-polar due to genetics and Joel Ira was an abused child. Joel Ira has been in custody since 1997 (eighteen (18) years).

Joel Ira is a model prisoner, has close ties to his family, especially his biological mother, grandmother, half brothers and sisters and his step-father. Joel Ira was working full time in prison as a baker and takes great pride in his work and the special goods he bakes for special occasions. He has no sexual write ups. The Courts' fear and the District Attorneys' fear he would be a mean, sorry danger to society has been proven wrong. In fact, for eighteen (18) years, he has proven

them wrong. He and family members all testified to his good work and his good behavior. He presented the Court with certificates of accomplishments. The State rebutted none of this evidence.

The State's witness indicated the female child was a mess, had been in the military but received a general discharge due to mental health issues, was bi-polar as other members of the family were, had been married and divorced and had children she gave up to her mother to care for. The former prosecuting attorney and a psychologist again claimed without having examined Joel Ira since he was a child that he had no conscience. Even if seventy (70) years from now Joel Ira had been a model prisoner, worked, stayed out of trouble and maintained close relationships with his immediate family, the psychologist believed he had no conscience. In a portion of the cross-examination, he had to admit Joel Ira was an abused child, was responsible for younger children left with him and when they had no food to eat, Joel Ira shoplifted in order to feed them. Joel Ira, as usual, never had a chance. His good behavior, rehabilitation, hard work, close family connections, recent United States Supreme Court and New Mexico Supreme Court decisions amounted to nothing. The trial court denied all relief.

III. ARGUMENT SHOWING THE DISTRICT COURT'S DECISION WAS ERRONEOUS

Joel Ira has been in jail or prison for eighteen (18) years. He has at least another seventy-three (73) years to serve for crimes occurring (if they did at all)

when he was a fifteen (15) year old boy for having sex with a girl four (4) years his junior. His sentence, his treatment, his representation violates both Constitutions, the Statutes of the State of New Mexico, United States Supreme Court and New Mexico Supreme Court decisions. The punishment is cruel, unusual, forbidden, violates Due Process and was of a child who neither understood nor comprehended nor able to protect himself and when he needed it most did not have the effective counsel he needed. In a series of cases since the sentence, the United States Supreme Court has prohibited the execution of children, (***Roper v Simmons***, 542 U.S. 551 (2005), prohibited life sentences for non-homicidal crimes (***Graham v Florida***, 130 S. Ct. 2011 (2010), prohibited life sentences without parole, (***Miller v Alabama***, 132 S.Ct. 2455 (2012), while the New Mexico Supreme Court has ruled a child cannot waive an amenability hearing, (***State v. Jones***, February 16, 2010, 148 N.M. 1, 229 P.3d 474 2010-NMSC-012) and set forth clear guidelines based on age as to any determination of a waiver of ***Miranda*** (***State v. DeAngelo M.***, Supreme Court of New Mexico, October 15, 2015--- P.3d ----2015 WL 6023323 2015 -NMSC- 033) The above cases make it clear children must be treated differently, their age considered, that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes, that courts can no longer ignore the vast number of studies and science regarding adolescent development especially a child's lack or decreased impulse control, emotion regulation,

foresight, planning ahead and reasoning. The great injustice cast upon Joel Ira must be corrected. The trial judge was wrong in the following ways:

1. The Sentence imposed upon Joel Ira violated his Eighth Amendment Right to the United States Constitution and his Art II Section 13 Right pursuant to the Constitution of New Mexico to be free from a cruel and unusual punishment as the United States Supreme Court has articulated a separate Eighth Amendment analysis for children and adolescents.

Joel Ira's sentence exceeds a life sentence in New Mexico because Joel Ira is not eligible for parole in 30 years but at the earliest in 45.75 years ((91 ½ years divided by 2 for 50% good time) thereby violating ***Roper***, ***Graham*** and ***Miller***. In ***In re J.D.B.***, 131 S.Ct. 2394 (2011), the United States Supreme Court held that courts must consider the age of a juvenile suspect in deciding whether he or she is in custody for ***Miranda*** purposes. These cases and recent New Mexico Supreme Court cases (***State v. Jones***, supra. and ***State v. DeAngelo M.***, supra, no longer ignore the vast number of studies and science regarding adolescent development especially a child's lack or decreased impulse control, emotion regulation, foresight, planning ahead and reasoning. The trial judge ignored the rules of these cases, and most importantly, the common threads that run so true through each one of them. ***Roper*** and ***Graham*** establish that children are constitutionally different from adults for sentencing purposes. ***Miller v. Alabama***, Supreme Court of the United States, June 25, 2012 132 S.Ct. 2455 183 L.Ed.2d 407.

Although we have said that the Legislature intended to treat serious youthful offenders "as adults, not as delinquent children," ***State v Muniz***, 2003–NMSC–

021, ¶ 15, 134 N.M. 152, 74 P.3d 86, the clear grant of discretion in sentencing serious youthful offenders, set forth in Sections 31–18–15.3(D) and 31–18–13(A), underscores the Legislature's intent to treat serious youthful offenders as individuals who may be rehabilitated. Joel Ira was not even a serious youthful offender but merely a youthful offender. ***State v. Tafoya***, Supreme Court of New Mexico, April 28, 2010, 148 N.M. 391, 237 P.3d 693, 2010 -NMSC- 019. Unlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children. West's ***NMSA § 32A-2-2, 5, 11, 12, 14, 17, 19 and 20.***

2. The Eighth Amendment and Article II Section 13 require that Sentences be proportionate and a sentence that is functionally equivalent to a sentence of life for a non-homicide crime violates Graham, supra.

Joel Ira's sentence for a non homicide delinquent act at age fifteen (15) should be compared to the sixteen (16) year old defendant child in ***State v. Tafoya***, 2010, 148 N.M. 391, 237 P.3d 693, 2010 -NMSC- 019 who murdered another person and gets 20 years with 15% off the sentence for earned good time while Joel Ira gets 91 1/2 years. It makes no sense and in anyone's calculation is disproportionate. Further and most importantly is the fact the New Mexico legislature, by enacting ***NMSA 31-18-15.3 (D) and 31-18-13(A),*** made it clear a child treated as an adult even in a murder case may be sentenced as an adult but cannot receive more than an adult and a Court has discretion to give less. New Mexico children convicted of crimes have a right to a chance at "reasonable"

rehabilitation. ***State v. Ira***, 2002-NMCA-037 {3}. ***Graham*** establishes a right to a "meaningful opportunity" of release or rehabilitation. 130 S. Ct. at 2030.

3. The principals of Graham and Miller apply retroactively, and New Mexico law provides greater protection.

The principals of ***Graham*** and ***Miller*** apply retroactively, and New Mexico law provides greater protection. ***Miller v. Alabama***, supra, had a companion case, decided the same day and included as part of the ***Miller*** decision. ***Jackson v. Hobbs***, Case no. 10-9647, 567 U.S. ___, was a *habeas* petition out of Arkansas. In ***Jackson***, the Supreme Court applied the principals enunciated in ***Miller*** with equal effect. This indicates that, like ***Roper***, ***Graham*** and ***Miller*** decided a new rule of substantive constitutional law that is to be applied retroactively. As Justice Bosson noted in his prescient special concurrence in the appellate decision in Joel Ira's last appeal, 2002-NMCA-037 {53, 54}, New Mexico law provides greater protection for children, thus emphasizing that the U.S. Supreme Court decisions should be accorded retroactive effect to Joel Ira.

4. <u>Procedural errors at the trial level denied Joel Ira due process</u>.

Joel Ira did not receive a preliminary hearing nor a separate amenability hearing at which the State was required to prove by clear and convincing evidence that he was not amenable to treatment as a child. ***State v. Jones***, 2010-NMSC-012; ***State v. Rudy B.***, 2010_NMSC-045. Joel Ira was denied his right to have prepared for him prior to the determination of his amenability to treatment a report as to his

amenability to treatment by the Children, Youth and Families Department. ***NMSA 1978, Section 32A-2-17A(3), State v. Jose S.***, 2007-NMCA-146. Joel Ira was denied his right to a predisposition report prepared by the Department of Corrections as required by ***NMSA* 32A-2-17A(3)(b). *State v. Jose S.***, *supra.* Although Joel Ira waived his right to presentation to a grand jury or to have a preliminary hearing, that right for a child should not subject to waiver. ***NMSA 1978, Section 32A-2-20A***, states that [a] preliminary hearing by the court or a hearing before a grand jury shall be held ...."

5. The Trial Court erred in failing to set aside the Plea Agreement in this cause and Joel Ira was denied effective assistance of counsel

Joel Ira did not have a preliminary hearing. No defense was presented. ***State v. Jones***, Supreme Court of New Mexico, February 16, 2010, 148 N.M. 1, 229 P.3d 474 and ***State v. DeAngelo M.***, Supreme Court of New Mexico, October 15, 2015--- P.3d ----2015 WL 6023323 2015 -NMSC- 033 both show the New Mexico Supreme Court requires that children understand. Joel Ira neither understood what a preliminary hearing was, how to present his defense, was not of age nor experience nor educational ability nor of intellectual capacity to understand what was going on as he has testified heretofore.

A defendant's understanding of the plea controls. ***North Carolina v. Alford***, 400 U.S. 25 (1970). ***State v. Mares***, 118 N.M. 217, 880 P.2d 314 (Ct.App. 1994), rev. on other grounds, 119 N.M. 48, 888 P.2d 930 (1994). ***State v. Robins***, 77 N.M.

644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967) (decided under former law), ***NMRA Rule 5-304*** requires that the defendant and his attorney fully understand the consequences of the plea. If the three lawyers in the courtroom didn't understand the consequences of the plea, **State v Ira**, Ct of App. 132 N.M. 8, 43 P.3d 359,2002 -NMCA- 037, how in the world could this child understand? Plea agreements absent Constitutional validity are not binding upon both parties. ***State v. Bazan***, 97 N.M. 531, 641 P.2d 1078 (Ct.App. 1982), overruled on other grounds, ***State v. Ball***, 104 N.M. 718 P.2d 686 (1986). The general rule is that a defendant is entitled to withdraw his plea if the sentence contemplated by the plea bargain is subsequently determined to be illegal or unauthorized, exactly what happened here. 87 ALR 4th, 384 (Guilty Plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized.)

Joel Ira, due to the lack of or incorrect knowledge of the Court, the prosecutor and Joel Ira's original defense attorney, as well as a waiver of a preliminary hearing and the failure to present an available defense was denied effective assistance of counsel. ***U.S.C.A. Const. Amend 6; Lafler v. Cooper***, 132 S.Ct. 1376, 182 L. Ed. 2d 398 80 USLW 4244 (2012); ***Strickland v Washington*** 466 U.S. 668, 104 S. Ct. 2052 (1984)); ***Patterson v LeMaster***, 130 N.M. 179, 21 P.3d 1032, (2001); ***State v Edwards***, 141 N.M. 491, 157 P.3d 56, (Ct of Appeals 2007).

In addition to an illegal plea agreement, the child, even though the court may have advised him of the number of years he could possibly be facing, still thought that the most he would get would be treatment for his problem and incarceration in the Juvenile Detention Centers of the State of New Mexico. This child never contemplated that the first time he would be in jail would also be his last and eternal.

PRAYER FOR RELIEF

It is time, it is right; it is legally and morally correct that the Supreme Court put an end to this great injustice and order the immediate release of Joel Ira. Joel Ira turns to the Court of last resort for him and respectfully requests such.

Respectfully moved,

GARY C. MITCHELL, P.C.
P.O. Box 2460
Ruidoso, New Mexico 88355
(575) 257-3070
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing to James A. Dickens, 1000 New York Ave., Ste. 101, Alamogordo, NM 88310, (575) 434-2507, Hector H. Balderas, Attorney General's Office, PO Drawer 1508, Santa Fe, NM 87504; Judge Jerry H. Ritter, 1000 New York Ave., Rm 203, Alamogordo, NM 88310, and Warden, c/o Lea County Correctional Facility, 6900 W. Millen, Hobbs, NM 88240, this 23rd day of December, 2015.

Gary C. Mitchell, P.C.


EXHIBIT
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STATE OF NEW MEXICO
COUNTY OF OTERO
TWELFTH JUDICIAL DISTRICT COURT

JOEL IRA,

Petitioner,

vs.

JAMES JANECKA, Warden
Lea County Correctional Facility,
Hobbs, New Mexico

Respondent.

Cause No. JR-1995-00142
Division I

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Defendant, **JOEL IRA,** by and through his attorneys, **GARY C. MITCHELL, P.C.,** and in support of his Petition for a Writ of Habeas Corpus states:

1. This Petition seeks to remedy the serious violation of the constitutional rights of Joel Ira, a child sentenced as an adult for non-homicide crimes to a sentence that is effectively life without parole.

2. Joel Ira is imprisoned or otherwise restrained at Lea County Correctional Facility, Hobbs, Lea County, New Mexico by James Janecka, Warden. Lea County Correctional Facility is a private prison, operated by The GEO Group, Inc., which contracts with the Department of Corrections, an agency of the State of New Mexico, to house prisoners including Joel Ira.

3. This petition seeks to vacate, set aside or correct an illegal sentence or order of confinement in that the sentence is constitutionally defective by sentencing the child Joel Ira to a virtual life sentence for a non-homicide crime in violation of ***Miller v Alabama***, Supreme Court of the United States, June 25, 2012, 132 S.Ct. 2455, 183 L.Ed.2d 407 and ***Graham v. Florida***, 130 S.Ct. 2011 (2010).

4. This petition seeks to vacate, set aside or correct an illegal sentence or order of confinement in that the sentence is constitutionally defective by depriving Joel Ira of his right to meaningful rehabilitation under New Mexico Constitution, Article XX, Section XX, and under U.S. Const., Am. VIII; ***Graham v. Florida***, supra.

5. This petition seeks to vacate, set aside or correct an illegal sentence or order of confinement in that the sentence is the result of ineffective assistance of counsel and violation of rights pursuant to the Constitution of the United States and the Constitution of the State of New Mexico and the refusal of the Court to set aside the child's (Joel Ira) plea.

6. This petition seeks to vacate, set aside or correct an illegal sentence or order of confinement because the proceedings in Children's Court violated the New Mexico Constitution and statutes by depriving Joel Ira of procedural rights and safeguards.

7. The facts, grounds, and law, on which Petitioner Joel Ira bases the claim are:

FACTS

Joel Ira was born February 23, 1981. He is now 32 years of age. He has been in jail or prison since age 15. He has served 17 years in a prison. He according to his sentence still has 74.5 years to go. He was not convicted of murder in the first degree nor any homicide. His crimes were having

sex with his step-sister when he was 14 and 15 and she was 8-11 years of age although her age has always been in dispute with the best evidence that she was 10-11 years of age when the acts occurred. The State's prosecutor and the Court wanted him put away for the rest of his life or at least until he was so old he was no longer a danger. Joel Ira was sacrificed to the failures of New Mexico to provide treatment for juvenile offenders, fears of prosecutors and judges for the safety of the community, and the inability of mental health doctors and providers to guarantee he could be rehabilitated. The danger they feared has never occurred. He is a model prisoner.

PROCEDURAL FACTS

Joel Ira has been in jail or prison since February 21, 1997. (R.P. 38, 428). District Judge Ritter in Otero County, New Mexico, sentenced him to ninety-one and one-half (91 ½) years for crimes allegedly committed at age fifteen (15). Offenses committed at age fourteen (14), being juvenile offenses, were run concurrently with adult sentences and the Court ordered that the Defendant not be housed at any time in a juvenile facility. (R.P. 424-428).

He was sentenced to ninety-one and one-half (91 ½) years for criminal sexual penetration in the first degree of his stepsister (no blood relation). (R.P. 424-428). The procedure that resulted in a child receiving ninety-one and one-half (91 ½) years in the New Mexico State Penitentiary for having sex with a stepsister began on October 30, 1995 when the State filed a petition alleging the child committed auto burglary. (R.P. 102). The New Mexico Public Defender Department was appointed to represent him due to his being indigent. (R.P. 7). His first appearance was waived. (R.P. 10-12). A forensic evaluation was ordered, (R.P. 14-16) although there are no results in the record proper. On January 22, 1996, a Consent Decree for the child, Joel, was entered ordering him to stay in the physical custody of Thomas and Ann Ira and placing him on probation with the Juvenile

Probation Department in Otero County, New Mexico. (R.P. 25-26). His probation was terminated on July 15 and the cause against him dismissed. (R.P. 31).

On February 20, 1997, another petition was filed alleging battery on a household member. (R.P. 32-33). On February 25, 1997, an Amended Petition alleging battery on a household member and two (2) counts of criminal sexual penetration in the first degree and one (1) count of intimidation of a witness and one (1) count of resisting, evading or obstructing an officer was filed. (R.P. 38-41). The child was detained. (R.P. 45A) and has been in detention and/or prison ever since.

The prosecutor decided to send the child to the Adult Department of Corrections and on March 3, 1997, filed a Notice of Intent to Invoke Adult Sentence. (R.P. 55-56). See also (R.P. 64-65). A Second Amended Petition was filed on March 7, 1997 alleging one (1) count of battery, nine (9) counts of criminal sexual penetration in the first degree, two (2) counts of aggravated battery, and one (1) count of intimidation of a witness. (R.P. 67-72). Appointed counsel waived his preliminary hearing. (R.P. 91).

On June 20, 1997, a Plea and Disposition Agreement was filed, with the child pleading no contest to ten (10) counts of criminal sexual penetration in the first degree, one (1) count of aggravated battery against a household member, and one (1) count of bribery or intimidation of a witness. Disposition or sentencing was in the discretion of the court. (R.P. 154-157).

On September 9, 1997, the child was sentenced to a total of one hundred eight (108) years in prison. (R.P. 227-230). A Commitment to the Penitentiary of the State of New Mexico was entered September 9, 1997. (R.P. 232). On September 26, 1997, defense counsel finally realized a horrible mistake had been made and filed a motion to invalidate proceedings alleging that counsel was

ineffective because he did not know the law and the Court had sentenced Joel to prison for offenses occurring when Joel was fourteen (14) years of age. (R.P. 234-235). A concurrent motion to modify sentence was also filed on September 30, 1997. (R.P. 236-237). Ironically, the motion to modify sentence was filed not by the defense attorney but by the prosecutor on September 30, 1997. (R.P. 236-242). It is interesting to note that in September 1997, prior to any appeals which will be discussed later, the prosecutor had already provided a Judgment and Sentence wherein the Defendant was sentenced to ninety-four and one-half (94 ½) years. This becomes particularly relevant for additional proceedings in this case after the Court of Appeals reversed and remanded for new sentencing because the Court and the prosecutor obviously had already made up their minds as to what they were going to do with Joel. In addition, the prosecutor argued in her response to the Motion to Invalidate Proceedings that the one hundred eight (108) years should stand, or in the alternative, he should receive ninety-four and one-half (94 ½) years. (R.P. 243-245). The Court entered its Findings and Conclusions on October 10, 1997. (R.P. 250-254). The Trial Court denied the Motion to Invalidate Proceedings and the Motion to Modify Sentence. (R.P. 250-254).

The Court commented prior to any appeal that it would be unreasonable to sentence the defendant only to ninety-four and one-half (94 ½) years, but even if that was all he could sentence him to, that's what he would do. (R.P. 253). The child appealed on October 16, 1997. (R.P. 258).

On October 1, 1998, in the Court of Appeals of the State of New Mexico, No. 18,915, the Court of Appeals entered its Memorandum Opinion reversing the decision of the Trial Court and remanding for a new sentencing. The Court of Appeals concluded that the Trial Court's sentence of the child was arbitrary and capricious because it was not in accordance with the law and the Trial Court had abused its discretion and the child's sentence of one hundred eight (108) years was

reversed. The case was remanded for re-sentencing consistent with the opinion of the Court of Appeals. (R.P. 314-318).

On December 3, 1999, the child was resentenced by the Court. (R.P. 354-370). On February 21, 2000, the District Court entered its Minute Order regarding re-sentencing, again sentencing the child to a period of incarceration of ninety-one and one-half (91 ½) years and sentencing the child for offenses subject only to juvenile disposition to the Department of Children, Youth and Families and directing that he be placed in a high secure facility. (R.P. 378-3789D) The Judgment and Sentence and Commitment on Mandate was entered March 2, 2000. (R.P. 371-375). The child's attorney asked for an extension of time to file his Notice of Appeal on March 8, 2000, (R.P. 377-378), and moved for reconsideration of the sentence on March 8, 2000. (R.P. 379-381). The child, through his attorney, also moved to set aside the plea agreement on March 8, 2000. (R.P. 382-384). A hearing was held on the motion to reconsider sentence and motion to set aside plea agreement on March 30, 2000. (R.P. 403-411). The Trial Court denied the motion to set aside the plea agreement on April 24, 2000. (R.P. 413-414). On April 22, 2000, another hearing was held on the motion to reconsider because another mental health and rehabilitation program had been found for the child by his attorney. (R.P. 419-421). The Court denied the motion to reconsider and on May 1, 2000, the child filed his Notice of Appeal. (R.P. 422-423).

On May 31, 2000, the Docketing Statement was filed. On June 22, 2000, the Court of Appeals filed a Notice of Proposed Summary Disposition. An extension for filing Response to Calendar Notice was granted to August 16, 2000. On July 14, 2000, the Defendant filed a Memorandum in Opposition to Summary Disposition. On August 22, 2000, the case was assigned to

the General Calendar. An extension for filing Defendant-Appellant's Brief-in-Chief was granted unto November 20, 2000.

After briefing was complete the Court of Appeals affirmed the decision of the Trial Court. A true and correct copy of the appeal and decision are attached hereto as Exhibit C and by reference thereto made a part hereof. The child filed a Petition for Writ of Certiorari to the New Mexico Court of Appeals. The Petition was denied. A true and correct copy of the Petition for Writ of Certiorari is marked Exhibit D and by reference thereto made a part hereof.

ADDITIONAL FACTS FROM HEARINGS

Joel Ira was age fourteen (14) and fifteen (15) according to the State of New Mexico when these events occurred. (R.P. 38-41). The alleged victim, his stepsister, according to the State's allegations, was eight (8) through eleven (11) years of age. (R.P. 7/10/97, T.1 thru T.2, 276).

On the 21st day of February 1997, police officers arrested Joel I. and took a statement from him. He gave them his birth date and they asked him what had happened with his stepsister.(No motion to suppress this statement was made) In his statement to police which was recorded and played for the Court, Joel acknowledged that on two (2) occasions, he engaged in sex with his stepsister. On one of those occasions, he admitted that he "poked her in the butt" and on another occasion, she had oral sex with him. He admitted that he told his stepsister he would "kick her ass" if she told. He also told the officer that on one (1) occasion, she had asked him to "suck her vagina." He said that the first time anything had ever happened sexually between he and his stepsister was when she came up to him and said that she wanted Joel to suck her and he refused. He admitted that on the day this occurred, he was smoking marijuana. The female child also told the same investigator who

interviewed Joel that Joel had touched her in an inappropriate way and that he had touched her underneath her T-shirt but on top of her panties. Joel said the two (2) incidents had occurred the week before he was arrested. (8/20/97, T.1, 144 thru T.2, 139). (Based on the child's statement he had a defense to all the other charges)

The female child was not related by blood to Joel (8/20/97, T.1, 1582-1620).

The female child, Joel's stepsister, testified that she was eleven (11) years of age and that she lived with her mother, father, a sibling, and three stepbrothers, including Joel. The female child testified that Joel "started abusing me," and this happened when he placed her finger in her vagina in the spring of 1995. The date in the spring of 1995 was suggested to her in a leading question by the prosecuting attorney. She also testified that he had put his "penis in her butt" and in her mouth and on one (1) occasion, in her vagina. She said that this occurred every other day since the spring of 1995. She said that he never hit her hard enough to knock the wind out of her but that he called her names and sometimes kicked her and that he said that if she told, he would kill her. She also said that they'd played games such as Truth and Dare where they were supposed to take a piece of clothing off. They played another game where the first team to fall asleep, the other team would have to do something bad to them such as put a soapy towel in their face. She said that Joel shoplifted once and smoked marijuana. She claimed Joel was mean to her dog Wiley and that he would squash bugs with his hand. She said that he kicked her dog because he pooped in the house. He showed them he could run his arm over a flame and not burn it and once he put a firecracker in a lizard's mouth. She then told the judge that she had nightmares that Joel would get out, find her and kill her. She told about one dream where Joel looked all over the world, including the Arctic and the Antarctic and that Joel came to her while she was in college and was eating the food in her refrigerator and she snuck up

behind him and stabbed him in the back. She remembered an incident in which Joel and her father, Thomas Ira, got into a fight. On cross-examination, she testified that she didn't say anything about any of this until they had a DARE program at school and she learned about "this stuff." She also testified that she never asked him to stop and that she thought the games were fun. The female child said that she felt sad that Joel was going to jail and that she still loved him and that there were a lot of things she liked about Joel because he protected them a lot. (7/10/97, T.1, 1 thru T.2, 276).

The investigation in this matter showed, through the police detective, that Joel was the oldest one in the family home and that he was responsible for supervising several other children, all younger than he, particularly from the time school was out to the time the parents came home. Some of the games took place in the night around twelve to one o'clock. (8/20/97, T.2, 1-71).

The above were the statements and/or the testimony of the male child and the female child. The rest of the statements heard before the Court were those of the psychologists, probation officers, police officers, social workers, program administrators and parents. Here is what they had to say.

Vicki Thomas, a psychologist, testified at sentencing that she worked with victims of child abuse and that she was acquainted with the female child. Her job was to determine the female child's emotional status and make treatment recommendations. She interviewed the child about anal penetration which the child described as quite painful, and the child also described some oral contact. The child described to her that the "sucking on her vagina" was at times pleasurable which was confusing to her. She said the oral sex on Joel was uncomfortable and she claimed that this started when she was eight (8) years old and Joel would have been thirteen (13) or fourteen (14) when it started. The doctor also testified that the child's grades had dropped significantly and that the child was very bright. Dr. Thomas described the long term consequences to the child of the abuse and the

doctor indicated that she felt that as the child got older and developed physical intimacy, this was likely to revive a number of feelings and she would have to work through those feelings and that it would be an ongoing struggle for her to get over it. She also acknowledged that the child had been sexually abused prior to any activity with Joel while the child lived in Italy. One of the problems with the sexual abuse is that someone can become more precocious sexually and interested in that sort of thing because of the thing that had happened to them before. The State made much of a choking incident but Dr. Thomas said that the child talked more about having Joel's hand over her mouth and she never related specifically the choking. She also indicated the child had made significant progress in the time she had been seeing her. The female child indicated to the psychologist a desire or wish that Joel would get some treatment. (8/20/97, T.2, 165-913).

Police Officer David Black testified his first contact with Joel was after Joel had fought with his stepfather, that Joel was very upset and angry over the situation when he talked with him. The second contact was when he was dispatched to Joel's residence based on a report of criminal sexual penetration that involved a female child. That contact was on February 21, 1997. (8/20/97, T.2, 920-1289).

Ronnie Reyes was Joel's Probation Officer. He related an incident where they had a battery referral on Joel because Joel had entered a mall and tripped a child because that child had been in an altercation with Joel's younger stepbrother. The matter was handled informally on March 21, 1995. Another referral was for taking two (2) packs of cigarettes from a motor vehicle and another referral was for a fight between Joel and his stepfather when Joel attempted to leave the residence without permission and the stepfather restrained him. He was placed on six (6) months' Consent Decree for that and given community service. He also received a referral for smoking marijuana, being truant

and resisting arrest because the boys who skipped school ran from the police officers. Then he got a referral for the sexual penetration of a minor and the child was placed in detention on February 21. He testified the child didn't feel he had done anything wrong but that he had made a mistake. The probation officer went on to say that due to the seriousness of the current allegations, the child should not be placed in the juvenile justice system, that the Court should invoke adult sanctions. The probation officer admitted he had never paneled Joel to determine what type or help would be available for the child and that the child would not qualify for any juvenile help anyway and the sole reason for not doing that was because of the seriousness of the crimes. He also admitted that paneling was essentially a monetary issue to determine whether a child would qualify for assistance and at what level so the amount of assistance could be determined, but they never even tried or attempted in Joel's case. (8/20/97, T. 1, 1347 thru T.3, 732).

Catherine Peterson, a psychotherapist, said she couldn't help Joel because he wouldn't admit to being a pedophile and he fell into the category of being a rapist, that if he went to Springer, he would reoffend, that it didn't matter that he was a child, she would diagnose everyone as a pedophile, and the fact that he was a child didn't make any difference. (8/20/97, T.3, 741 thru T.4, 129).

Unknown to Defense Counsel and only learned via a public records request in 2008, Ms. Peterson would enter into a Stipulated Order of Settlement regarding her treatment of patients for sexual offenders. That order was entered July 26, 2001, and constitutes information and evidence unavailable at the time she testified but had it been available could have been used for cross-examination to show a prejudice and bias on the part of Ms. Peterson.

Dr. Thomas J. Salb, a psychotherapist, testified he did a forensic evaluation in April of 1997 of Joel. He determined him to be competent, saw him in the detention center, acknowledged that Joel

admitted to two (2) incidents of sexual contact with the victim, and performed certain psychological tests. He reported, through his testimony, that Joel could not be treated in the State of New Mexico and he did not know of any place in the nation who could treat the child successfully, however, he had become recently involved in boot camp program in Lovington, New Mexico, and he suggested there were in-house programs in Texas and they might be able to provide some treatment. Dr. Salb diagnosed Joel as having conduct disorder with adolescent onset suffering from cannabis abuse. He also felt that Joel was not a pedophile and that Joel's behavior was opportunistic rather than a specific interest in young children. He indicated Joel was functioning in the average range of intellectual ability, he was behind in academic skills, had some limitation in short-term memory skills, and he suffered from some attention deficit, hyper-activity. Defense counsel questioned Dr. Salb regarding the effect on Joel of finding out that the man he thought was his father was actually not his father and that Joel suffered from physical abuse from his stepfather. The doctor admitted that a child with those problems would have a sense of rejection or isolation and would have possible feelings of anger and frustration toward the social system and might act out behaviorally. He indicated that the tests were simply a predictor and not necessarily a description. His bottom line was that the child, Joel, would have no chance without treatment and that he was in need of treatment and that the child appeared willing to accept psychological treatment options, although the child denied certain specific type treatment would help him. (8/20/97, T.4, 236-1838).

Police Officer Donald Reynolds was acquainted with Joel, spent time at the high school, knew that at one time, some kids who were truant were playing on a baseball field, one of them was Joel, and when he went to Joel, he resisted and had to be arrested. He also indicated Joel's father didn't know what he was going to do with Joel. He also admitted on cross-examination that there

were actually three (3) boys who were arrested for resisting and not just Joel. (8/20/97, T.5, 001-323).

Joe Ray Mills, Joel's stepfather in that he had married Joel's mother, indicated that they had lost control of Joel when he went to live with his stepfather Thomas. Joel had a hard time with Thomas. Mr. Mills indicated that he didn't condone what Joel did but that he knew that Joel had been placed in charge of his siblings and had to take care of several of the children rather than their parents taking care of them. He said to the court that Joel was not an animal, that had he known something was wrong, he would have worked with Joel. Mr. Mills and Joel had a good relationship. He had observed Thomas Ira, Joel's father, yelling and screaming at Joel and noted that they had a tough relationship. He explained his frustration with the fact that between police officers, probation officers and the court, no one had bothered to do much for Joel except wait until this case and then give him one hundred eight (108) years. He expressed his concerns in a layman's manner, testifying how can you have people who spend an hour, hour and a half, with Joel, determine what Joel is like, when he had spent considerably more time with Joel and knew a different young man. He also brought up a fact that nobody else seemed to care about, that is, the fact Joel was going through puberty, that Joel was put in control of several younger siblings or step siblings, some going through puberty, and then people wonder why this happens when there is no supervision. Mr. Mills also indicated he didn't have any more troubles with Joel than he did raising his other boys, that he was just a boy, he got in trouble which most boys are prone to do, but he never got in trouble for battering his mother or Mr. Mills, and during the time they had him, he was getting C's and B's in school. (8/20/97, T.5, 366-1256).

Social worker D.J. Gallegos had contact with the father, Thomas Ira. The father was a master sergeant stationed at Holloman Air Force Base. He indicated Joel's father was not as concerned as he thought he should be about the welfare of his son and that in fact he wanted to see his son punished. He claimed that Joel's problems were not his fault and that he didn't want Joel's brothers in the house because they were disrespectful. His impression of Joel's father, Thomas, was that he was an absent father, he was able to use the military to his advantage whenever there was a crisis or stress at home to take some remote duty assignment rather than deal with the problem. Mr. Gallegos testified to serious problems in the family which Joel was living with when these offenses occurred. (This was not the Mills family but the Ira family.) He also provided the court and counsel with some alternative sentencing. He testified about sexual offender programs in the State of Texas, a program at Desert Hills in New Mexico, a program in Mesilla Valley, New Mexico, and other programs. He discussed the problem of parental abuse with the child and the child acting out and how that could be helped and/or treated and his concern over Joel's father's activities toward Joel. (8/20/97, T.5, 1265 thru T.6, 978).

The State then called Dr. Samuel Roll who claimed to be a psychologist who had spent two (2) two hour sessions with Joel and had reviewed the police reports and such. The bottom line on Dr. Roll's testimony is that Joel had no conscience and there was no way to treat him. Dr. Roll had to admit, however, that the beatings and the rejection the child received created problems for the child and finally had to admit that of course therapy for the child would include in-house treatment, he would have to have people committed to working with him on a daily basis, there would have to be group treatment and work to help socialize him, and somebody to work with him to have him appreciate joy in life, goodness in life, close relationships and he would need somebody to lean on and he would need therapy to address the issues in his life. Dr. Roll never concluded that Joel was a

pedophile but concluded he suffered from a severe conduct disorder. (8/20/97, T.6, 999 thru T.7, 489).

The State had Dr. Miller who was the director of psychological services of the New Mexico Boys School testify. He indicated that Joel, when you considered amenability to treatment at the Boys School would be placed on the low end of rehability and that his prognosis would not be very high at Springer but he did admit they had a sexual offender treatment program at Springer but they generally tended to treat pedophiles at Springer and since Joel wasn't a pedophile, would not be as amenable to treatment. Dr. Miller indicated that one of the major problems in getting treatment for Joel was that of payment and that since New Mexico had sold them to Managed Care, there weren't facilities or programs available that were needed to take care of somebody like Joel. He indicated there were programs outside the State that he had heard of but with current funding pictures in New Mexico, a treatment program wasn't available. Dr. Miller admitted that if Joel was placed in the Boys School, he would design a course of therapy for him to follow. In fact, he said the Boys School couldn't refuse treatment and they would treat everyone that comes to the Boys School. In fact, he admitted the Boys School was a structured environment. Joel would have limits placed on his behavior, that he could keep the child until age twenty-one (21), which would be somewhere near five (5) years of treatment, although they had never kept anybody longer than two (2) years. (8/20/97, T.8, 001-1512).

On September 8, 1997, the Court heard final remarks from counsel but the Court had already prepared his own written remarks to be read at the sentencing of Joel. Those written remarks have been filed. (R.P. 213-221).

After the Court of Appeals reversed the decision of the Trial Court and remanded, different defense counsel appeared, had Joel re-evaluated and found programs to treat Joel.

On December 3, 1999, Dr. Matthews, a licensed psychologist who had worked in the State of New Mexico for twenty-two (22) years specializing in forensic psychology, and in particular, working with sexual offenders, testified regarding his evaluation of the child, Joel. He did tests of Joel that had never been done before, regarding sexual issues, sexual attitudes and sexual interests, motivation and dangerousness. Joel had some antisocial qualities, there were some aggressive qualities, some self-indulgence qualities; however, he was not a pedophile. He diagnosed him as having a conduct disorder, a substantial level of depression, a substantial level of anxiety, a prolonged level of insecurity and inadequacy, poor self-esteem, lack of confidence and immaturity. He found he had matured and had better insight than he had before while he had spent time in the New Mexico State Penitentiary. His level of depression was acute and chronic and because of the intimidation, threats and the violence he had experienced since being in the New Mexico State Penitentiary, he was extremely hyper vigilant, and because he was labeled a sexual offender in the New Mexico State Penitentiary, he had to be hyper vigilant to prevent being accosted, threatened, and intimidated. Dr. Matthews testified that children are certainly more malleable and more treatable and there is a greater likelihood they are going to respond to treatment. He pointed out through his diagnosis and his evaluation that a psychologist such as Dr. Roll simply coming in and saying that an individual lacked a conscience and couldn't be treated was wrong and that you had to do that on an individual basis. He noted there are a variety of factors that you had to consider when you deal with children, such as his intellectual functional level, his intellectual ability. The doctor found him to be of average IQ, that in fact, he had the capacity to benefit from rational therapeutic approaches, he noted that Joel had some level of motivation at this point and noted for example, that since Joel had

been incarcerated, he had obtained his GED certificate, he was involved in a drug treatment program, he was involved in a program related to interpersonal skills and involved in a program in being able to resolve personal problems. Joel expressed a need to address issues related to his offenses and based on his actions in the New Mexico State Penitentiary, and his involvement in the programs offered, he was motivated. Dr. Matthews further advised the Court the younger the individual, the more amenable they are for treatment and the more likely they are to change. Joel was still a young man and the chances he was going to respond to treatment were far better than those of a twenty-five or thirty-five-year-old. Joel had family support in Mr. and Mrs. Mills, his biological mother and stepfather, although he did not have in the man he thought to be his real father. He indicated to the Court there was potential for treatment and advised a structured long-term setting. Dr. Matthews, based on his treatment of sexual offenders, recommended comprehensive treatment, multiple levels of care, and suggested several programs and a combination of treatment in Sequoia, the Maximum Security Juvenile facility in New Mexico as well as the STOP program at Las Vegas Medical Center, programs in Colorado and Texas. Dr. Matthews pointed out that had we started Joel into such a program when this first came up and he was first sentenced, chances would be far better. A good therapy program would be approximately five (5) years. (12/3/99, T.1 thru T.3, 1625).

Sheila Mills, the child's mother, testified Joel remained in contact with his family, she visited him once a month, her children visited him every other month, his grandmother visits, Joel calls once a week and writes to the family. It was Joel's idea to get his high school diploma and the programs. (12/3/99, T4, 1299-1381).

On April 27, 2000, defense counsel for Joel presented additional programs and in particular, a program in Oklahoma that would treat his problems. In fact, Oklahoma would accept Joel without all

the funding necessary. The Court denied that alternative. (4/27/00, T.1 thru 856). Despite several alternatives, the Court refused to consider treatment options for the child.

The child, through his attorney, filed a motion to set aside the plea agreement and on March 30, 2000, the Court heard testimony and argument. Joel's prior attorney testified that he along with the Court and the prosecution were wrong about the law when the plea bargain was entered into, accepted and the Court entered its judgment. In fact, the Court of Appeals, in their decision, said they were wrong. He acknowledged that he had explored with Joel, the fact that he could get into treatment as a juvenile and even if he received an adult sentence, he could get into treatment at Las Vegas in their STOP program. He indicated Joel had an emotional age level of twelve (12) years old and he was going along with whatever his attorney said. He also advised the court, through his testimony, that neither Joel nor his attorney expected to get the kind of time the court gave, otherwise they wouldn't have entered into the plea, and that another reason for Joel entering into the plea was so that the victim would not have to testify.

Joel was called to testify and indicated that he had no knowledge of the law, had never read a law book in this field, didn't know how to use a law book and thought he was going to Las Vegas or Springer for two (2) years and that he was going to go into a treatment program. He didn't realize he was going to prison for the rest of his life. He simply wanted to get his time done.

Counsel pointed out to the court that it was an illegal plea agreement and that because it was an illegal plea agreement, it should be set aside. The Court refused to set aside the plea agreement despite the fact that it was an illegal plea agreement, despite the fact the child could not be sentenced or plea in accordance with the plea agreement as a matter of law, and despite the ruling of the Court of Appeals.

Joel had testified previously and the Court had heard testimony that Joel had committed only two (2) acts and thus Joel had a defense to all the rest. In the end, it did no good to present the Court with treatment options, or ask the plea be set aside. The Court re-sentenced Joel to ninety-one and one half (91 ½) years in prison. (R.P. 455-463).

ISSUES and the LAW

A. The Sentence imposed upon Joel Ira violated his Eighth Amendment Right to the United States Constitution to be free from a cruel and unusual punishment and his Art II Section 13 Right pursuant to the Constitution of New Mexico to be free from a cruel and unusual punishment.

1. *The eighth Amendment requires that Sentences be proportionate.*

Proportionality is central to the Eighth Amendment. The United States Supreme Court has interpreted the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "grossly disproportionate" to the crime. *See, e.g.*, ***Graham v. Florida***, 130 S.Ct. 2011, 2021 (2010) (citing ***Harmelin v. Michigan***, 501 U.S. 957, 997 (1991). It is not just historical conceptions that govern the analysis. Instead, courts must look to "evolving standards of decency that mark the progress of a maturing society." *Id.*

One of the analyses of proportionality involves a "categorical" classification of cases, which assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender. Id.* at 2022 (emphasis added). In this line of cases, holding a particular sentence unconstitutional for an entire class of offenders, the Court has found that some offenders have characteristics that make them categorically less culpable than

others who commit similar or identical crimes. *See, e.g.* ***Roper v. Simmons***, 543 U.S. 551 (2005), and ***Graham v. Florida***, *supra*.

In discussing proportionality, the ***Graham*** Court further explained that "a sentence that lacks any legitimate penological purpose is by its nature disproportionate to the offense and therefore unconstitutional." 130 S.Ct. at 2028. Relying on developmental and scientific research that demonstrated that juveniles possess a greater capacity for rehabilitation, growth, and change than do adults, the ***Graham*** Court held that the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution, and rehabilitation – were not served by imposing a life without parole sentence on a juvenile. *Id.* at 2030. ***Graham*** established that the developmental characteristics of children and adolescents are relevant to the Eighth Amendment proportionality analysis, even in noncapital cases.

2. *The United States Supreme Court has articulated a separate Eighth Amendment analysis for children and adolescents.*

a. Children's developmental differences are salient to the Eighth Amendment analysis whenever the children receive a sentence designed for adults. Recent Supreme Court precedent has applied a proportionality test to youthful offenders that distinguishes children from adults and that has concluded that children are categorically less culpable. Acknowledging the unique status of juveniles, the Court has articulated that "children are constitutionally different for purposes of sentencing," and therefore the "imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children." ***Miller v. Alabama***, 567 U.S. ___, 132 S. Ct. 2455, 2464, 2466 (2012).

Graham v. Florida, 130S.Ct. 2011 (2010) and ***Miller*** reflect the Supreme Court's most recent recognition of youth as a distinct category of offenders for sentencing purposes under the Eighth Amendment.

b. Courts must consider mitigating circumstances – especially including the child's age and disability --- before a child receives a harsh adult sentence. Joel Ira was denied a "meaningful opportunity to obtain release" when he was sentenced to a term of years that is functionally equivalent to a life sentence. *See* ***Graham***, 130 S. Ct. at 2030. As Joel Ira did not kill or intend to kill, he is not deserving of "this harshest possible penalty." ***Miller v. Alabama***, 132 S. Ct. 2455, 2469 (2012). In other words, the trial judge who sentenced Joel Ira handed out an unconstitutional sentence. The New Mexico Court of Appeals likewise violated the Supreme Court's holdings when it considered only the aggravating factors that led to Joel Ira's receiving the maximum allowable sentence for each offense and did not likewise consider whether he deserved a less severe sentence in light of his relatively young age or any other factor that would demonstrate a reduced level of culpability and capacity for rehabilitation.

3. *A sentence that is functionally equivalent to a sentence of life without parole for a juvenile convicted of a non-homicide offense violates the principles of* ***Graham v. Florida****, 130S.Ct. 2011 (2010), and violates the United States Constitution and the Constitution of New Mexico.*

The United States Supreme Court in several cases has announced the following:

In ***Roper v Simmons,*** Supreme Court of the United States, March 1, 2005,543 U.S. 551,125 S.Ct. 1183,161 L.Ed.2d 1, the Court, Justice Kennedy, held that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments;

In ***Graham v. Florida***, Supreme Court of the United States May 17, 2010 560 U.S. 48 130 S.Ct. 2011 08-7412 the Court held the Eighth Amendment prohibits imposition of a life without parole sentence on a juvenile offender who did not commit homicide. The State must give juvenile nonhomicide offender sentenced to life without parole meaningful opportunity to obtain release. ***Graham*** tells us:

Embodied in the cruel and unusual punishments ban is the "precept ... that punishment for crime should be graduated and proportioned to [the] offense." ***Weems v. United States***, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793. Further, "...the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. E.g., ***Kennedy v. Louisiana***, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525. In a second subset, cases turning on the offender's characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, ***Roper v. Simmons***, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, or whose intellectual functioning is in a low range, ***Atkins v. Virginia***, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335. In cases involving categorical rules, the Court first

considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. ***Roper***, supra, at 563, 125 S.Ct. 1183. Next, looking to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," ***Kennedy***, supra, at 128 S.Ct. at 2642, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, ***Roper***, supra, at 564, 125 S.Ct. 1183. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in ***Atkins***, ***Roper***, and ***Kennedy***. Pp. 2021 - 2023. (b) Application of the foregoing approach should convince the Court that the sentencing practice at issue is unconstitutional. Pp. 2023 - 2034."

Important for special consideration in this case (Ira) is reference in ***Graham*** to ***Sullivan v. Florida***, No. 08-7621 wherein the United States Supreme Court says:

> Another example comes from ***Sullivan v. Florida***, No. 08-7621. ***Sullivan*** was argued the same day as this case, but the Court has now dismissed the writ of certiorari in ***Sullivan*** as improvidently granted. Post, p___. The facts, however, demonstrate the flaws of Florida's system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been given opportunity after opportunity to upright himself and take advantage of the

> second and third chances he's been given, he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in ***Sullivan v. Florida***, O. T. 2009, No. 08-7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability....
>
> Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential....
>
> Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit....
>
> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

In ***Miller v Alabama*** Supreme Court of the United States June 25, 2012 132 S.Ct. 2455 183 L.Ed.2d 407 the Court, Justice Kagan, held that mandatory life imprisonment without parole for those under the age of 18 at the time of

their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

In ***Kennedy v Louisiana***, Supreme Court of the United States June 25, 2008, 554 U.S. 407 128 S.Ct. 2641 171 L.Ed.2d 525 the Court held Kennedy, J., held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.

Despite the rulings, states, including New Mexico continue to drag their feet when it comes to ridding the horror of life long sentences. The following article provides more detail of this continuing horror:

Juveniles Facing Lifelong Terms Despite Rulings
By Erik Eckholm

http://nyti.ms/1f3LTzH

JACKSONVILLE, Fla. — In decisions widely hailed as milestones, the United States Supreme Court in 2010 and 2012 acted to curtail the use of mandatory life sentences for juveniles, accepting the argument that children, even those who are convicted of murder, are less culpable than adults and usually deserve a chance at redemption.
But most states have taken half measures, at best, to carry out the rulings, which could affect more than 2,000 current inmates and countless more in years to come, according to many youth advocates and legal experts.

"States are going through the motions of compliance," said Cara H. Drinan, an associate professor of law at the Catholic University of America, "but in an anemic or hyper-technical way that flouts the spirit of the decisions."

Lawsuits now before Florida's highest court are among many across the country that demand more robust changes in juvenile justice. One of the Florida suits accuses the state of skirting the ban on life without

parole in nonhomicide cases by meting out sentences so staggering that they amount to the same thing.

Other suits, such as one argued last week before the Illinois Supreme Court, ask for new sentencing hearings, at least, for inmates who received automatic life terms for murder before 2012 — a retroactive application that several states have resisted.

The plaintiff in one of the Florida lawsuits, Shimeek Gridine, was 14 when he and a 12-year-old partner made a clumsy attempt to rob a man in 2009 here in Jacksonville. As the disbelieving victim turned away, Shimeek fired a shotgun, pelting the side of the man's head and shoulder.

The man was not seriously wounded, but Shimeek was prosecuted as an adult. He pleaded guilty to attempted murder and robbery, hoping for leniency as a young offender with norecord of violence. The judge called his conduct "heinous" and sentenced him to 70 years without parole.

Under Florida law, he cannot be released until he turns 77, at least, several years beyond the life expectancy for a black man his age, noted his public defender, who called the sentence "de facto life without parole" in an appeal to Florida's high court.
"They sentenced him to death, that's how I see it," Shimeek's grandmother Wonona Graham said.

The Supreme Court decisions built on a 2005 ruling that banned the death penalty for juvenile offenders as cruel and unusual punishment, stating that offenders younger than 18 must be treated differently from adults.

The 2010 decision, ***Graham v. Florida***, forbade sentences of life without parole for juveniles not convicted of murder and said offenders must be offered a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." The ruling applied to those who had been previously sentenced.

Cases like Shimeek's aim to show that sentences of 70 years, 90 years or more violate that decision. Florida's defense was that Shimeek's sentence was not literally "life without parole" and that the life span of a young inmate could not be predicted.
Probably no more than than 200 prisoners were affected nationally by the 2010 decision, and they were concentrated in Florida. So far, of 115 inmates in the state who had been sentenced to life for

nonhomicide convictions, 75 have had new hearings, according to the Youth Defense Institute at the Barry University School of Law in Orlando. In 30 cases, the new sentences have been for 50 years or more. One inmate who had been convicted of gun robbery and rape has received consecutive sentences totaling 170 years.

In its 2012 decision, ***Miller v. Alabama***, the Supreme Court declared that juveniles convicted of murder may not automatically be given life sentences. Life terms remain a possibility, but judges and juries must tailor the punishment to individual circumstances and consider mitigating factors.

The Supreme Court did not make it clear whether the 2012 ruling applied retroactively, and state courts have been divided, suggesting that this issue, as well as the question of de facto life sentences, may eventually return to the Supreme Court.
Advocates for victims have argued strongly against revisiting pre-2012 murder sentences or holding parole hearings for the convicts, saying it would inflict new suffering on the victims' families.

Pennsylvania has the most inmates serving automatic life sentences for murders committed when they were juveniles: more than 450, according to the Juvenile Law Center in Philadelphia. In October, the State Supreme Court found that the Miller ruling did not apply to these prior murder convictions, creating what the law center, a private advocacy group, called an "appallingly unjust situation" with radically different punishments depending on the timing of the trial.

Likewise, courts in Louisiana, with about 230 inmates serving mandatory life sentences for juvenile murders, refused to make the law retroactive. In Florida, with 198 such inmates, the issue is under consideration by the State Supreme Court, and on Wednesday it was argued before the top court of Illinois, where 100 inmates could be affected.

Misgivings about the federal Supreme Court decisions and efforts to restrict their application have come from some victim groups and legal scholars around the country.

"The Supreme Court has seriously overgeneralized about under-18 offenders," said Kent S. Scheidegger, the legal director of the Criminal Justice Legal Foundation, a conservative group in Sacramento, Calif. "There are some under 18 who are thoroughly incorrigible criminals."

Some legal experts who are otherwise sympathetic have suggested that the Supreme Court overreached, with decisions that "represent a dramatic judicial challenge to legislative authority," according to a new article in the Missouri Law Review by Frank O. Bowman III of the University of Missouri School of Law.
Among the handful of states with large numbers of juvenile offenders serving life terms, California is singled out by advocates for acting in the spirit of the Supreme Court rules.

"California has led the way in scaling back some of the extreme sentencing policies it imposed on children," said Jody Kent Lavy, the director of the Campaign for the Fair Sentencing of Youth, which has campaigned against juvenile life sentences and called on states to reconsider mandatory terms dispensed before the Miller ruling. Too many states, she said, are "reacting with knee-jerk, narrow efforts at compliance."

California is allowing juvenile offenders who were condemned to life without parole to seek a resentencing hearing. The State Supreme Court also addressed the issue of de facto life sentences, voiding a 110-year sentence that had been imposed for attempted murder.

Whether they alter past sentences or not, some states have adapted by imposing minimum mandatory terms for juvenile murderers of 25 or 35 years before parole can even be considered — far more flexible than mandatory life, but an approach that some experts say still fails to consider individual circumstances.

As Ms. Drinan of Catholic University wrote in a coming article in the Washington University Law Review, largely ignored is the mandate to offer young inmates a chance to "demonstrate growth and maturity," raising their chances of eventual release.

To give young offenders a real chance to mature and prepare for life outside prison, Ms. Drinan said, "states must overhaul juvenile incarceration altogether," rather than letting them languish for decades in adult prisons.

Shimeek Gridine, meanwhile, is pursuing a high school equivalency diploma in prison while awaiting a decision by the Florida Supreme Court that could alter his bleak prospects.

He has a supportive family: A dozen relatives, including his mother and grandparents and several aunts and uncles, testified at his sentencing in 2010, urging clemency for a child who played Pop

Warner football and talked of becoming a merchant seaman, like his grandfather.

But the judge said the fact that Shimeek had a good family, and decent grades, only underscored that the boy knew right from wrong, and he issued a sentence 30 years longer than even the prosecution had asked for.

Now Florida's top court is pondering whether his sentence violates the federal Constitution.

"A 70-year sentence imposed upon a 14-year-old is just as cruel and unusual as a sentence of life without parole," Shimeek's public defender, Gail Anderson, argued before the Florida court in September. "Mr. Gridine will most likely die in prison."
The Supreme Court did not make it clear whether the 2012 ruling applied retroactively, and state courts have been divided, suggesting that this issue, as well as the question of de facto life sentences, may eventually return to the Supreme Court.

The JuvDefend announcement listserv is administered by the National Juvenile Defender Center, http://www.njdc.info. Please direct questions or concerns regarding this list to lists@njdc.info

4. *The principals of **Graham** and **Miller** apply retroactively, and New Mexico law provides greater protection.*

***Miller v. Alabama**, supra*, had a companion case, decided the same day and included as part of the *Miller* decision. *Jackson v. Hobbs*, case no. 10-9647, 567 U.S. ___, was a *habeas* petition out of Arkansas. In *Jackson*, the Supreme Court applied the principals enunciated in *Miller* with equal effect. This indicates that, like *Roper*, *Graham* and *Miller* decided a new rule of substantive constitutional law that is to be applied retroactively. The sole question remaining is, does New Mexico follow the United States Supreme Court dictates or

continue to be a backwards, barbaric, brutal punisher of its children who commit crimes?

As Justice Bosson noted in his prescient special concurrence in the appellate decision in Joel Ira's last appeal, 2002-NMCA-037 {53, 54} New Mexico law provides greater protection for children. thus emphasizing that the U.S. Supreme Court decisions should be accorded retroactive effect to Joel Ira.

5. *A sentence of ninety-one-and-a-half years for a non-homicide offense is unconstitutional as it serves no penological purpose.*

Joel Ira was given more than a life sentence (more than 30 years before he is eligible for parole). At the time of his sentencing, Joel Ira was fifteen years old. According to the science relied on by the United States Supreme Court in ***Roper***, ***Miller***, ***Graham***, and ***J.D.B. v. North Carolina***, for boys adolescence begins around the age of eleven and does not end until around the age of twenty-six. This means that at the time of sentencing, Joel Ira was barely one-third of the way into his adolescence. He was written off as a viable human being before he had a chance to gain maturity and insight.

At sentencing, the trial judge indicated that it was his intention to incapacitate Joel Ira, rather than attempt any rehabilitation. The judge only nodded in that direction by indicating that the child would be able to avail himself of anything that might be offered in the prison setting.

According to ***Graham***, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore

unconstitutional. *Id.*, at 2028. The Court concluded that no penological justification warrants a sentence of life without parole as applied to juveniles convicted of non-homicide offenses. *Id.* As in ***Graham***, the 91 ½ year sentence meted out to Joel Ira, which virtually ensures he will die in prison, does not serve any of the traditional penological goals – deterrence, retribution, incapacitation, or rehabilitation.

Specifically, the Court in ***Graham*** found that for children these traditional penological justifications for life sentences are non-existent or so weak as to not be justified:

a. Relying on the analysis set forth in ***Roper***, the ***Graham*** Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles. "[T]hey are less likely to take possible punishment into consideration when making decisions." *Id.* At 2028-2029 (internal citations omitted.) Because youth would not likely be deterred by the fear of a life without parole sentence, this penological goal did not justify the sentence.

b. ***Graham*** echoed ***Roper's*** assessment that "the case for retribution is not as strong with a minor as with an adult." *Id.* At 2028 (citing ***Roper***, 543 U.SD. at 571). The ***Graham*** Court recognized that these considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.*

c. The ***Graham*** court also held that incapacitation could not justify the sentence of juvenile life without parole for a non-homicide offense. To justify incapacitation for life "requires the sentence to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment

questionable." *Id.* at 2029. Because adolescents' natures are transient, they must be given "a chance to demonstrate growth and maturity." *Id.* As a result, a child sent to prison should have a meaningful opportunity to rehabilitate and qualify for release after some term of years.

d. Finally, ***Graham*** logically concluded that a life without parole sentence "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal." *Id.* at 2030. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles form growth and development they could otherwise achieve, making the disproportionality of the sentence all the more evident." *Id.*

New Mexico children convicted of crimes have a right to a chance at "reasonable" rehabilitation. ***State v. Ira***, 2002-NMCA-037 {3}. ***Graham*** establishes a right to a "meaningful opportunity" of release or rehabilitation. 130 S. Ct. at 2030. The sentence imposed below and approved by the Court of Appeals denies Joel Ira *any* chance at rehabilitation or release within a reasonable period. It was the trial judge's hope that by the time Joel Ira was released Joel would be so incapacitated by age that he could not be a threat to re-offend. While the trial judge and the Court of Appeals did not have the benefit of the enlightenment provided by ***Graham*** and ***Miller***, their discussion of the systemic problems of New Mexico's generally good sentencing scheme for juveniles recognized the principals elucidated by those Supreme Court decisions. 2002-NMCA-037 {17, 18, 46-53}. The principals

of ***Graham*** and ***Miller*** have also since been incorporated into the factors to be considered when confronting sentencing of a youthful offender. NMSA 1978, Section 32A-2-20C(5) (the 2009 legislature amending the paragraph to read "the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;").

B. Procedural errors at the trial level denied Joel Ira due process.

1. *Joel Ira did not receive a separate amenability hearing at which the State was required to prove by clear and convincing evidence that he was not amenable to treatment as a child.* From the record of the first sentencing hearing, it appears that the entire proceeding was treated as a sentencing hearing. New Mexico law says that a child has a right to an amenability hearing as a hearing separate from the sentencing and that the child may not waive that right. ***State v. Jones***, 2010-NMSC-012; ***State v. Rudy B.***, 2010_NMSC-045.

2. *Joel Ira was denied his right to have prepared for him prior to the determination of his amenability to treatment a report as to his amenability to treatment by the Children, Youth and Families Department.* NMSA 1978, Section 32A-2-17A(3). ***State v. Jose S.***, 2007-NMCA-146.

3. *Joel Ira was denied his right to a predisposition report prepared by the Department of Corrections.* 32A-2-17A(3)(b). ***State v. Jose S.***, *supra.*

4. *Although Joel Ira waived his right to presentation to a grand jury or to have a preliminary hearing, that right is not subject to waiver.* NMSA 1978, Section 32A-2-20A, states that [a] preliminary hearing by the court or a hearing before a grand jury shall be held ...." Although NMRA 10-213 seems to allow for the waiver of this right, Petitioner asserts that by the same logic as ***State v. Jose S.***, *supra*, that right may not be waived.

C. The Trial Court erred in failing to set aside the Plea Agreement in this cause.

It has long been held the law of the United States and of the State of New Mexico that whenever a defendant enters a guilty plea, it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. ***North Carolina v. Alford***, 400 U.S. 25 (1970). Pursuant to S.C.R.A. 5-304, inherent therein is the requirement the child know of the exact consequences of his plea. In this case, it was admitted by all three (3) attorneys in the courtroom, including the trial judge, they were not aware of the exact consequences of the plea. In fact, they were absolutely wrong! The Court of Appeals in its prior decision in this case (No. 18,915), State v. Joel I., a child, refused to allow the child to be sentenced for acts committed under the age of fifteen (15) as an adult. The plea agreement entered in this matter subjected the child to adult sanctions for acts committed when he was fourteen (14). The plea, in short, was invalid on its face and thus should have been set aside when the child moved that it be set aside.

It is ludicrous that this child, with his psychological problems, with his lack of education, would know more about the law than the judge, the prosecutor and the

defense attorney. It is important to note that the United States Supreme Court in its recent decision in ***Apprendi v. New Jersey***, 120 S.Ct. 2348 (2000), stated clearly that when a defendant is charged with a crime, he should know what the maximum punishment is that he faces. There was no way that this child could know that.

In addition, Joel Ira had defenses. His statement to the police officer indicated there were only two (2) possible criminal sexual penetrations, not ten (10). The child pled no contest rather than guilty and the plea hearing indicates not that the child gave a statement to the court in which he confessed to each and every count, but that the prosecutor set forth a factual basis. (6/20/97, T.1, 777-1659).

A defendant's understanding of the plea controls. Since plea agreements should be interpreted in courts with what the defendant reasonably understood when he entered his plea, the issue of whether the trial court breached the plea agreement after accepting it, is a question of law that is reviewable de novo by an appellate court, and any ambiguity in the plea agreement should be construed against the state. ***State v. Mares***, 118 N.M. 217, 880 P.2d 314 (Ct.App. 1994), rev. on other grounds, 119 N.M. 48, 888 P.2d 930 (1994). ***State v. Robins***, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967) (decided under former law), requires that the defendant and his attorney fully understand the consequences of the plea. If the three lawyers in the courtroom didn't understand the consequences of the plea, how in the world could this child understand? Plea agreements absent Constitutional invalidity may be binding upon both parties. ***State v. Bazan***, 97 N.M. 531, 641 P.2d 1078 (Ct.App. 1982), overruled on other grounds, ***State v. Ball***, 104

N.M. 718 P.2d 686 (1986), but what happens when they are invalid? They are not enforceable. In this case, it was an invalid plea because it contemplated certain consequences which were not legal in the State of New Mexico at the time. The general rule is that a defendant is entitled to withdraw his plea if the sentence contemplated by the plea bargain is subsequently determined to be illegal or unauthorized, exactly what happened here. 87 ALR 4th. 384 (Guilty Plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized.) There are numerous cases set forth in the annotation (87 ALR 4th, 384) that recognize the general rule that a defendant is entitled to withdraw a plea of guilty where the plea is entered pursuant to a plea bargain contemplating an illegal sentence.

Joel Ira, due to the lack of or incorrect knowledge of the Court, the prosecutor and Joel's original defense attorney, was denied effective assistance of counsel. During plea negotiations defendants are entitled to the effective assistance of counsel. U.S.C.A. Const. Amend 6; ***Lafler v. Cooper***, 132 S.Ct. 1376, 182 L. Ed. 2d 398 80 USLW 4244 (2012) To establish the prejudice prong of the ***Strickland*** test for ineffective assistance of counsel (***Strickland v Washington*** 466 U.S. 668, 104 S. Ct. 2052 (1984)), a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Lafler***, supra. Important, in the context of pleas, to establish the prejudice prong of the ***Strickland*** test for ineffective assistance of counsel, a defendant must show the outcome of the plea process would have been different with competent advice. ***Lafner***,supra. New Mexico has held that effective assistance of counsel is

necessary during plea negotiations because the most important decision for a defendant in a criminal case is generally whether to contest a charge or enter into a plea agreement. ***Patterson v LeMaster***, 130 N.M. 179, 21 P.3d 1032, (2001), ***State v Edwards***, 141 N.M. 491, 157 P.3d 56, (Ct of Appeals 2007)

Joel never acquiesced to a plea to an illegal sentence or the opportunity for the court to give him an illegal sentence. In fact, his original trial counsel moved to withdraw it and his counsel, on remand, moved to withdraw it. Most important, he has never stated there were more than two sexual events thus only two charges. He should have gone to trial on the remainder and if he had won he would be through with his sentence.

In addition to an illegal plea agreement, the child, even though the court may have advised him of the number of years he could possibly be facing, still thought that the most he would get would be treatment for his problem and incarceration in the Juvenile Detention Centers of the State of New Mexico. This child never contemplated that the first time he would be in jail would also be his last and eternal.

D. Joel Ira was denied effective assistance of counsel when as a he child entered into a plea to charges which after sentencing confined him to prison for more than a life sentence (91.5 years) in prison.

The issue of the failure to explain the consequences of a plea has been explained above. However, there was a systemic failure to render effective assistance of counsel. A government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct a defense. ***Strickland***, supra. In Joel's case it is the absolute

and abject failure of the New Mexico Public Defender Department to properly train, provide experts in a timely manner and to provide social workers to find programs (which did exist) for children such as Joel so Judges and prosecutors would have to find another reason for such heinous sentences other than no programs for rehabilitation exist. In the years since the Public Defender Department has done so to some extent and certain lawyers within that Department have advanced the representation of children to the standard it should have been. Experts can and will be called to show just how poor and few the resources counsel for Joel had and what resources are available.

8. The grounds being raised in this petition have been raised previously in another proceeding. Joel Ira as a child appealed his sentence on the Cruel and Unusual Punishment grounds and the appellate courts of New Mexico denied his appeal. See attached a copy of the decision and by reference thereto made a part hereof which include all the grounds Joel Ira appealed.

9. Petitioner requests his conviction be set aside, or in the alternative he be sentenced in accordance with the guidelines set forth by the United States Supreme Court for the sentencing of children which should require his release from custody and a satisfaction of sentence.

10. The nature of the court proceeding resulting in the confinement was a determination in his children's court case to treat him as an adult. He was sentenced as an ***In the matter of Joel Ira***, a child, Cause No.JR-95-142 Div. 1, County of Otero, Twelfth Judicial District, State of New Mexico, the Hon. Jerry Ritter, District Judge presiding.

11. The final judgment was entered on the 2nd day of March, 2000.

12. A copy of the Judgment, Sentence and Commitment filed September 9, 1999 is attached as Exhibit "A" and by reference thereto made a part hereof. A copy of the final Judgment, Sentence and Commitment on Mandate filed March 2, 2000 is attached hereto as Exhibit "B."

13. The conviction was the result of a no contest plea.

14. Joel Ira was represented by Sam Damon of the Department of the New Mexico Public Defender, Las Cruces, New Mexico and after initial sentencing and on appeal by Gary C. Mitchell, PO Box 2460, Ruidoso, New Mexico 88345.

15. An appeal was taken. A true and correct copy of each appeal and the decision reached are attached hereto as follows and by reference thereto made a part hereof: Exhibits "C" includes the *Notice of Appeal* to the New Mexico Court of Appeals and Their *Opinion*, and "D" includes the *Petition for a Writ of Certiorari* to the New Mexico Court of Appeals and Their *Mandate* and *Order*.

16. No other appeals have been sought and no other Petitions for Writ applied.

17. Petitioner is represented by the undersigned attorney.

Respectfully moved,

GARY C. MITCHELL, P.C.
P.O. Box 2460
Ruidoso, New Mexico 88355
(575) 257-3070

Attorneys for Defendant

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF Lea)

Joel Ira , being duly sworn upon oath, deposes and says:

I, the undersigned, being first duly sworn upon my oath, state that I am the petitioner in this action. I have read the foregoing petition and know and understand its contents, and the information contained herein is true and correct to the best of my knowledge, information, and belief.

Joel Ira
JOEL IRA

Certificate of Service

I hereby certify that I have caused to be ~~faxed~~ mailed a true and correct copy of the foregoing to opposing counsel this 30th day of July, 2014.

Gary C. Mitchell, P.C.

IN THE DISTRICT COURT OF OTERO
TWELFTH JUDICIAL DISTRICT, NEW MEXICO
CHILDREN'S COURT DIVISION

Cause No: CH-95-142
Division: I

In The Matter of
JOEL IRA,
a Child.

JUDGMENT, SENTENCE AND COMMITMENT

THIS MATTER having come before the court on September 8, 1997, for sentencing, the State of New Mexico being represented by her Children's Court Attorney, Sandra A. Grisham, and the Respondent being present and represented by his attorney, Sam Z. Damon, and the Respondent having entered a plea of No Contest pursuant to Plea and Disposition Agreement to the commission of the felony crimes of:

COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM), contrary to §30-3-5(A)(C) NMSA 1978 Compilation;

COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER, contrary to §30-3-16 NMSA 1978 Compilation;

COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, contrary to §30-24-3 (A)(2) NMSA 1978 Compilation; and the State having dismissed Count I, **BATTERY AGAINST A HOUSEHOLD MEMBER**, and the court having heard testimony at an evidentiary disposition/sentencing hearing, and having reviewed the reports of expert witnesses and the pre-disposition report prepared by the Juvenile Probation and Parole Division, and having heard the arguments of counsel and having offered and heard the allocution of the respondent, and having reviewed the file and records herein, being otherwise fully advised in the premises, and having filed in written form the factors which the court took into account in reaching its decision, the court FINDS:

1. That the respondent is a youthful offender;

2. That the respondent is not amenable to treatment or rehabilitation as a child in any available facility;

3. That the respondent is not eligible for commitment to an institution for the developmentally disabled or mentally disordered; and

4. That the court should pronounce an adult sentence pursuant to §31-20-3(c), NMSA 1978 Comp.

THE JUDGMENT OF THE COURT IS THEREFORE AS FOLLOWS: that the respondent committed the offenses of COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM), §30-3-5(A)(C); COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER,§30-3-16; COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, §30-24-3 (A)(2).

IT IS THE SENTENCE OF THE COURT that the respondent is committed to the custody of the New Mexico Department of Corrections for a total of one hundred and eight years as follows: as to COUNT II, a period of eighteen years, as to COUNT III: a period of eighteen years, as to COUNT IV: a period of eighteen years, as to COUNT V, a period of eighteen years, as to COUNT VI: a period of eighteen years, as to COUNT VII: a period of eighteen years, to run consecutive to each other for a total period of incarceration of one hundred and eight years; and ~~as to COUNT VII, a period of eighteen years~~ JR, as to COUNT VIII, a period of eighteen years, as to COUNT IX: a period of three years, as to COUNT X: a period of three years, as to COUNT XI, a period of eighteen years, as to COUNT XII: a period of eighteen years, as to COUNT XIII: a period of eighteen years, and as to COUNT XIV, a period of eighteen months, all to run concurrently with each other and with the one hundred and eight years imposed for COUNTS II-VII, for a total term of incarceration on all counts of one hundred and eight years, and all followed by the statutory parole period of two years.

Respondent shall receive credit for pre-sentence confinement from February 21, 1997, to September 9, 1997, and shall receive post-sentence confinement credit from September 9, 1997, until his date of transport.

JERRY H. RITTER, JR.
District Judge, Division I

SUBMITTED BY:

SANDRA A. GRISHAM
Children's Court Attorney

APPROVED AS TO FORM:

SAM Z. DAMON
Attorney for the Defendant

COPY

FILED
DISTRICT COURT OF
OTERO COUNTY, N.M

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CHERYL C. CASTRO

CLERK_____BY_____

IN THE DISTRICT COURT OF OTERO
TWELFTH JUDICIAL DISTRICT, NEW MEXICO
CHILDREN'S COURT DIVISION

Cause No: CH-95-142
Division: I

In The Matter of
JOEL IRA,
a Child.

RECEIVED MAR 06 2000

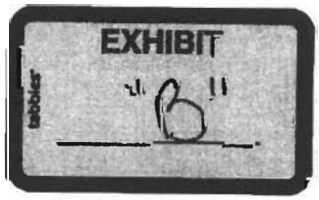
JUDGMENT, SENTENCE AND COMMITMENT ON MANDATE

THIS MATTER having come before the court on December 3, 1999, pursuant to mandate and memorandum opinion of the Court of Appeals, the State of New Mexico being represented by her Children's Court attorney, Sandra A. Grisham, and the respondent being present and represented by his attorney, Gary C. Mitchell, and the court having considered new evidence from the respondent and the allocution of the respondent with no objection from the State and the court having entered its Minute Order re Re-sentencing, containing findings of fact and conclusions of law, which are incorporated herein by reference, and the respondent having entered a plea of no contest pursuant to a Plea and Disposition Agreement to the commission of the felony crimes of:

COUNT VII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;



COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and

COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, contrary to §30-24-3 (A)(2) NMSA 1978 Compilation;

and to the delinquent acts of:

COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and

COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM), contrary to §30-3-5(A)(C) NMSA 1978 Compilation; and

COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER, contrary to §30-3-16 NMSA 1978 Compilation; and the State having dismissed Count I, **BATTERY AGAINST A HOUSEHOLD MEMBER**, the court renews its findings

1. That as to Counts VII, VIII, XI, XII, XIII, and XIV, the respondent is a youthful

offender;

2. That the respondent is not amenable to treatment or rehabilitation as a child in any available facility;

3. That the respondent is not eligible for commitment to an institution for the developmentally disabled or mentally disordered;

4. That the court should pronounce an adult sentence for the above counts pursuant to §31-20-3(c), NMSA 1978 Comp.; and

5. That the court should run any disposition on the juvenile offenses concurrently with the adult sentences, as the respondent should not be housed at any time in a juvenile facility as he is not amenable to treatment as a juvenile.

THE JUDGMENT OF THE COURT IS THEREFORE AS FOLLOWS:

that the respondent committed the offenses of COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); and COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM) when he was fourteen years old, and committed the offense of COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER,§30-3-16, when he was fifteen but it did not arise from a youthful offender offense; making those offenses delinquent acts,

and committed the following youthful offender offenses: COUNT VII: CRIMINAL

SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1);, §30-3-5(A)(C); COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, §30-24-3 (A)(2), which arose from one of the youthful offender acts, after he reached the age of fifteen.

IT IS THE SENTENCE OF THE COURT that the respondent is committed to the custody of the New Mexico Department of Corrections for a total of ninety-one and one-half years as follows: as to COUNT VII, a period of eighteen years, as to COUNT VIII: a period of eighteen years, as to COUNT XI, a period of eighteen years, as to COUNT XII, a period of eighteen years, as to COUNT XIII: a period of eighteen years, as to COUNT XIV, a period of eighteen months, all to run consecutive to each other and concurrently with the two years probation imposed for COUNTS II-VII, for a total term of incarceration on all above counts of ninety-one and one-half years, and all followed by the statutory parole period of two years.

As the respondent is not a youthful offender as to Counts II, III, IV, V, VI, IX and X, and as the court's findings and sentence as to the youthful offender counts would render any disposition of the delinquent counts moot, the court will order that the respondent be on unsupervised probation for two years as to Counts II, III, IV, V, VI, X and IX, to run concurrently with the sentence on the remaining counts, and which term

of probation has already been satisfied due to pre-sentence confinement.

Respondent shall receive credit for pre-sentence confinement from February 21, 1997, to September 9, 1997, and shall receive post-sentence confinement credit from September 9, 1997, until the date of the filing of this judgment and sentence.

The respondent may appeal this Judgment and Sentence within thirty days of its entry, and has the right to an attorney paid for by the State of New Mexico to pursue an appeal if he cannot afford an attorney.

/s/ JERRY H. RITTER, JR.
JERRY H. RITTER, JR.
District Judge, Division I

SUBMITTED BY:

SANDRA A. GRISHAM
Children's Court Attorney

APPROVED AS TO FORM:

telephonically approved 3/1/2000
GARY C. MITCHELL
Attorney for the Defendant

STATE OF NEW MEXICO
COUNTY OF OTERO
TWELFTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION

IN THE MATTER OF

JOEL IRA,

A Child.

Cause No. JR-95-142
Division I

NOTICE OF APPEAL

COMES NOW, the Child-Appellant, **JOEL IRA**, by and through his attorney, **GARY C. MITCHELL,** and hereby appeals from the Judgment, Sentence and Commitment on Mandate entered on the 2nd day of March, 2000, a true and correct copy of which is attached hereto as Exhibit "A" and by reference thereto made a part hereof. A true and correct copy of the Order Granting Extension of Time Within Which to File Notice of Appeal granting an extension to May 2, 2000, is attached hereto as Exhibit "B" and by reference thereto made a part hereof.

The opposing party is **THE STATE OF NEW MEXICO**. Plaintiff/Appellee's attorney for the State of New Mexico will be the Appellate Division of the Attorney General of the State of New Mexico, whose address is P.O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87503.

Child/Appellant's counsel will be Gary C. Mitchell, whose address is P.O. Box 2460, Ruidoso, New Mexico 88355.

This appeal is to the Court of Appeals of the State of New Mexico, pursuant to Rule 12-102B of the Rules of Appellate Procedure, in and for the State of New Mexico.

GARY C. MITCHELL
P.O. Box 2460
Ruidoso, New Mexico 88345
(505) 257-3070

ATTORNEY FOR CHILD/APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing document to the Honorable Jerry Ritter, District Judge, 1000 New York Ave., Alamogordo, New Mexico 88310; Patricia C. Rivera Wallace, Clerk of the Court of Appeals, P.O. Box 2008, Supreme Court Building, Santa Fe, New Mexico 87504-2008; Sandra Grisham, Assistant District Attorney, 1000 New York Ave., Rm. 301, Alamogordo, New Mexico 88310; Court Reporter, 1000 New York Ave., Alamogordo, New Mexico 88310; and Jan Perry, Court Administrator, 1000 New York Ave., Alamogordo, New Mexico 88310, this 28 day of April, 2000.

Gary C. Mitchell

COPY

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DISTRICT COURT OF
OTERO COUNTY, N.M

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CHERYL C. CASTRO

CLERK_____BY_____

IN THE DISTRICT COURT OF OTERO
TWELFTH JUDICIAL DISTRICT, NEW MEXICO
CHILDREN'S COURT DIVISION

Cause No: CH-95-142
Division: I

In The Matter of
JOEL IRA,
a Child.

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JUDGMENT, SENTENCE AND COMMITMENT ON MANDATE

THIS MATTER having come before the court on December 3, 1999, pursuant to mandate and memorandum opinion of the Court of Appeals, the State of New Mexico being represented by her Children's Court attorney, Sandra A. Grisham, and the respondent being present and represented by his attorney, Gary C. Mitchell, and the court having considered new evidence from the respondent and the allocution of the respondent with no objection from the State and the court having entered its Minute Order re Re-sentencing, containing findings of fact and conclusions of law, which are incorporated herein by reference, and the respondent having entered a plea of no contest pursuant to a Plea and Disposition Agreement to the commission of the felony crimes of:

COUNT VII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and

COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, contrary to §30-24-3 (A)(2) NMSA 1978 Compilation;

and to the delinquent acts of:

COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation;

COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and

COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM), contrary to §30-3-5(A)(C) NMSA 1978 Compilation; and

COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER, contrary to §30-3-16 NMSA 1978 Compilation; and the State having dismissed Count I, **BATTERY AGAINST A HOUSEHOLD MEMBER**, the court renews its findings

1. That as to Counts VII, VIII, XI, XII, XIII, and XIV, the respondent is a youthful

offender;

2. That the respondent is not amenable to treatment or rehabilitation as a child in any available facility;

3. That the respondent is not eligible for commitment to an institution for the developmentally disabled or mentally disordered;

4. That the court should pronounce an adult sentence for the above counts pursuant to §31-20-3(c), NMSA 1978 Comp.; and

5. That the court should run any disposition on the juvenile offenses concurrently with the adult sentences, as the respondent should not be housed at any time in a juvenile facility as he is not amenable to treatment as a juvenile.

THE JUDGMENT OF THE COURT IS THEREFORE AS FOLLOWS:

that the respondent committed the offenses of COUNT II: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT III: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT IV: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT V: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); and COUNT IX: AGGRAVATED BATTERY (GREAT BODILY HARM) when he was fourteen years old, and committed the offense of COUNT X: AGGRAVATED BATTERY AGAINST A HOUSEHOLD MEMBER,§30-3-16, when he was fifteen but it did not arise from a youthful offender offense; making those offenses delinquent acts,

and committed the following youthful offender offenses: COUNT VII: CRIMINAL

SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1); COUNT VIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, §30-9-11(C)(1);, §30-3-5(A)(C); COUNT XI: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE,§30-9-11(C)(1); COUNT XIII: CRIMINAL SEXUAL PENETRATION IN THE FIRST DEGREE, contrary to §30-9-11(C)(1) NMSA 1978 Compilation; and COUNT XIV: BRIBERY OR INTIMIDATION OF A WITNESS; RETALIATION AGAINST A WITNESS, §30-24-3 (A)(2), which arose from one of the youthful offender acts, after he reached the age of fifteen.

IT IS THE SENTENCE OF THE COURT that the respondent is committed to the custody of the New Mexico Department of Corrections for a total of ninety-one and one-half years as follows: as to COUNT VII, a period of eighteen years, as to COUNT VIII: a period of eighteen years, as to COUNT XI, a period of eighteen years, as to COUNT XII, a period of eighteen years, as to COUNT XIII: a period of eighteen years, as to COUNT XIV, a period of eighteen months, all to run consecutive to each other and concurrently with the two years probation imposed for COUNTS II-VII, for a total term of incarceration on all above counts of ninety-one and one-half years, and all followed by the statutory parole period of two years.

As the respondent is not a youthful offender as to Counts II, III, IV, V, VI, IX and X, and as the court's findings and sentence as to the youthful offender counts would render any disposition of the delinquent counts moot, the court will order that the respondent be on unsupervised probation for two years as to Counts II, III, IV, V, VI, X and IX, to run concurrently with the sentence on the remaining counts, and which term

of probation has already been satisfied due to pre-sentence confinement.

Respondent shall receive credit for pre-sentence confinement from February 21, 1997, to September 9, 1997, and shall receive post-sentence confinement credit from September 9, 1997, until the date of the filing of this judgment and sentence.

The respondent may appeal this Judgment and Sentence within thirty days of its entry, and has the right to an attorney paid for by the State of New Mexico to pursue an appeal if he cannot afford an attorney.

/s/ JERRY H. RITTER, JR.
JERRY H. RITTER, JR.
District Judge, Division I

SUBMITTED BY:

SANDRA A. GRISHAM
Children's Court Attorney

APPROVED AS TO FORM:

telephonically approved 3/1/2000
GARY C. MITCHELL
Attorney for the Defendant

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number_____

Filing Date:_____

Docket No. 21,375

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

JOEL IRA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
Jerry H. Ritter, Jr., District Judge

Patricia A. Madrid
Attorney General
James O. Bell
Assistant Attorney General
Santa Fe, NM

for Appellee

Gary C. Mitchell
Gary C. Mitchell, P.C.
Ruidoso, NM

for Appellant

OPINION

PICKARD, Judge.

(1) In this case, we are called upon to determine whether a 91½-year adult sentence imposed against the juvenile Defendant for brutally and repeatedly sexually abusing his younger stepsister over a two-year period is cruel and unusual punishment. Defendant also argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea. We hold that the sentence is constitutional and that the trial court did not err in refusing to allow the plea withdrawal. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

(2) This appeal arises from a series of sexual assaults and other violent attacks committed by Defendant, when he was fourteen and fifteen years old, mostly upon his stepsister, who is nearly six years younger than he is. The State charged Defendant with ten counts of first-degree criminal sexual penetration, one count of aggravated battery against a household member, one count of aggravated battery, one count of battery against a household member, and one count of intimidation of a witness. The State also filed notice of its intent to invoke adult sanctions.

(3) Under New Mexico's Children's Code, once the notice of intent to invoke adult sanctions is filed and the child is adjudged a youthful offender, the district court is given the discretion to impose either an adult sentence or juvenile disposition on the child. See NMSA 1978, § 32A-2-20(A) (1995). Prior to July 1, 1996, the definition of a youthful offender included a child, fifteen to eighteen years of age at

the time of the offense, who is adjudicated for committing at least one of a number of enumerated offenses, including aggravated battery and criminal sexual penetration. NMSA 1978, § 32A-2-3(I)(1) (1995). Effective July 1, 1996, the age range for youthful offender status was changed to cover juveniles fourteen to eighteen years of age at the time of the offense. NMSA 1978, § 32A-2-3(I)(1) (1996). If the court chooses to impose a juvenile disposition on an adjudicated youthful offender, the court may enter a judgment for the supervision, care, and rehabilitation of the child that may include an extended commitment until the child reaches the age of twenty-one. See NMSA 1978, § 32A-2-20(E) (1996); see also NMSA 1978, §§ 32A-2-19 (1996) & -23 (1995). To impose an adult sentence on an adjudicated youthful offender, the court must find that "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered." Section 32A-2-20(B). In making such findings the court is required to consider several factors, focusing on the seriousness of the offense and the likelihood of a reasonable rehabilitation of the child that would provide adequate protection of the public. Section 32A-2-20(C)(1)-(8).

(4) Following a plea hearing at which Defendant was advised that he could be sentenced as an adult on all charges for a maximum sentencing exposure of 185 years, Defendant entered into a plea and disposition agreement in which he agreed to plead no contest to all charges except for one count of battery against a household member (his father), which the State agreed to dismiss. Under the plea agreement, the district

court retained sentencing discretion, with the understanding that Defendant would argue for a juvenile disposition and the State would argue for adult sanctions.

(5) The district court held an extensive sentencing hearing to determine whether to sentence Defendant as a child or an adult. The court began by hearing about the nature and seriousness of Defendant's offenses through the testimony of Defendant's stepsister (the Victim). The Victim testified that Defendant came to live with her family during 1995, when she was eight years old and Defendant was fourteen years old. The Victim testified that Defendant was nice to her at first, but he soon began to sexually abuse her.

(6) The Victim recounted numerous instances of vaginal, oral, and anal sex that took place about every other day over the course of about two years. She also recalled times when Defendant forced her to swallow his urine and semen. The Victim described how Defendant's acts would sometimes cause her so much pain that she would stick her head into a pillow to scream, she would almost vomit at times, and she would bleed from her rectum. Defendant also had a method of signaling the Victim that another rape was about to occur; he would tap his fingers on the arm of his chair. In addition to the sexual abuse, Defendant physically abused the Victim on several occasions and frequently threatened to kill her if she ever told anyone about his actions. He once choked her to unconsciousness. The Victim also talked about Defendant's violent mistreatment of her dog and other creatures, and described how he liked to play with fire.

(7) The Victim also testified about the mental and emotional toll that she suffered

from the abuse. In particular, she indicated that her grades began to drop, she was diagnosed with Attention Deficit Disorder, and, after Defendant was finally arrested, she began to have nightmares about Defendant looking for her all over the world to kill her. In one nightmare, she stabs Defendant in the back when he finds her, and in another nightmare, Defendant finds her and stabs her to death.

(8) In an effort to assess Defendant's amenability to treatment and the threat that he posed to society, the court also received testimony from a number of mental health and juvenile justice professionals. Defendant's juvenile probation officer recounted Defendant's extensive history of prior delinquency referrals for other offenses, and he described the extent to which Defendant did or did not comply with prior rehabilitation efforts. The juvenile probation officer further noted that Defendant lacked remorse, feeling that he did not do anything wrong in this case. In light of the seriousness of Defendant's current offenses, the juvenile probation officer did not believe that Defendant was amenable to treatment in the juvenile justice system and strongly urged the court to impose an adult sentence, remarking that Defendant's case was the first time he had ever recommended adult sanctions for a juvenile offender.

(9) The court also heard testimony from the Director of Psychological Services at the New Mexico Boys' School. He opined that Defendant had a very low chance of rehabilitation and did not believe he would benefit from the treatment services offered at the Boys' School. Although the Boys' School does have a sex offender treatment program, Defendant is not the type of client the program treats because of his tendency toward combining sex with other violent, antisocial conduct. Because

Defendant was abused to some degree as a young child, had a history of hurting animals, had a fascination with fire, and exhibited violent sexual behavior, the director suggested that Defendant fit the profile of a serial offender and was of the opinion that New Mexico has no facilities to treat Defendant.

{10} The testimony received by the court from three other mental health experts who evaluated Defendant was remarkably consistent. One psychotherapist described Defendant as a pedophile who could not be successfully rehabilitated and would need a long-term institution. The other psychotherapist and clinical psychologist both diagnosed Defendant as having a severe conduct disorder, with tendencies towards violent sexual behavior and domination, that would require intensive, secured, long-term treatment. Perhaps most disturbing was their conclusion that Defendant is in effect a child without a conscience who lacks empathy or the ability to be concerned for others. All three experts noted that Defendant failed to show any remorse and refused to take responsibility for his actions. They also uniformly agreed that Defendant could not be treated successfully at the New Mexico Boys' School, and, that if sent there, he would surely re-offend upon release. To the extent that the experts believed Defendant might benefit from a long-term, intensive treatment program, the limited number of potentially available treatment programs were discussed and were generally deemed inadequate. However, even assuming that an adequate treatment program could be found, none of the experts could predict how long such treatment would take, nor could they give the court any degree of assurance that rehabilitation efforts would be successful.

(11) After considering the evidence presented at the sentencing hearing, the court issued a thoughtful and detailed explanation of its sentencing decision. Portions of that decision, which so clearly set forth the circumstances of this case and the dilemma faced by the court, are set forth below:

> In a day of extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy, this Court was told that [Defendant] is a child devoid of conscience and devoid of empathy for other human beings, most notably the victims of the heinous acts charged in this case. The experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that [Defendant] could defy the odds and become rehabilitated, and they found none. According to one, [Defendant] feels that he is not the problem here. The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if [Defendant] were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of success for [Defendant] anywhere in the country.
>
> * * *
>
> The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply.
>
> * * *

> Most compelling in this case is the expectation of the victims, particularly the eight-to-ten year old girl who was brutally and repeatedly raped and humiliated over a period of two years, that our system of justice will react in a way that recognizes the enormity of the terror and pain caused to her. Without years of effective counseling and therapy, it seems unimaginable that this little girl will grow up to be an emotionally healthy adult, with the opportunity for happiness in her adult relationships. What is the penalty that society should require for the near destruction of a life's potential?
>
> * * *
>
> This Court would like to fashion a sentence that will guarantee, or even offer hope, that [Defendant] can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
>
> The Court would like to fashion a sentence that will assure [Defendant's] victims that he will not be a serious threat to them if released before he reaches an advanced age. There is no such sentence.
>
> This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

Consequently, after weighing against Defendant virtually every statutory factor that the court must consider when arriving at a disposition for a youthful offender, the district court found that Defendant was not amenable to treatment or qualified for commitment to an institution for the developmentally disabled or mentally incompetent. Accordingly, the court imposed consecutive adult sentences for six counts of first-degree criminal sexual penetration and concurrent adult sentences for the remainder of the counts, for a total sentence of 108 years.

(12) Shortly after entry of judgment and sentence, Defendant moved to invalidate the sentencing proceedings. Under the version of the Children's Code in effect when Defendant was fourteen years old, juveniles could only be sentenced as youthful offenders and subject to adult sanctions for offenses committed while age fifteen to eighteen. See § 32A-2-3(I)(1) (1995). Consequently, Defendant argued that the district court erred by imposing adult sentences for counts that were based on acts committed by Defendant while he was fourteen years old. For similar reasons, the State moved to modify the sentence so that Defendant was subject to adult sanctions only for those counts that were based on acts committed by Defendant while he was fifteen years old. Although five of the counts for first-degree criminal sexual penetration and two aggravated battery counts involved acts committed while Defendant was fourteen years old, the district court relied on State v. Montano, 120 N.M. 218, 900 P.2d 967 (Ct. App. 1995), to conclude that adult sanctions could be imposed for all counts since Defendant was fifteen years old when he committed some of the counts. Accordingly, the district court denied Defendant's motion to invalidate the sentencing proceedings and the State's motion to modify sentence.

(13) Defendant subsequently appealed to this Court arguing, among other things, that the trial court erred in sentencing Defendant as an adult for crimes committed before he was fifteen years old. In an unpublished, memorandum opinion, this Court rejected the district court's construction of Montano and concluded that the district court erred by imposing adult sanctions for acts committed by Defendant while he was fourteen years old. See State v. Joel I., Ct. App. No. 18,915 (Filed October 1,

1998). We therefore reversed Defendant's sentence and remanded for resentencing.

(14) On remand, the district court resentenced Defendant to six consecutive adult sentences for five counts of CSP I and one count of intimidation of a witness, each committed by Defendant while he was fifteen years old, for a total sentence of 91½ years. The district court imposed a juvenile disposition for the remainder of the counts, ordered the juvenile sentence to be served concurrently to the adult sentence, and committed Defendant to the custody of the New Mexico Department of Corrections for incarceration as an adult. Defendant moved for reconsideration of the sentence and submitted additional evidence to support his renewed request for a juvenile disposition on all charges. Nonetheless, the testimony continued to reflect the reality that it was unlikely Defendant could ever be successfully rehabilitated.

(15) In addition to arguing for juvenile sanctions, Defendant moved to set aside his plea agreement, arguing that the plea was based on an invalid plea agreement because it contemplated an illegal sentence. The district court rejected all of Defendant's arguments, leaving the 91½-year sentence in place. Defendant now appeals for a second time to this Court.

DISCUSSION

(16) Defendant does not argue that the district court abused its discretion, or lacked substantial evidence, to impose adult sanctions against him as a youthful offender. Rather, Defendant argues that his sentence of 91½ years constitutes cruel and unusual punishment. Defendant further argues that the district court abused its discretion in denying Defendant's motion to set aside his plea. We address each argument in turn.

Cruel and Unusual Punishment

(17) Whether a particular sentence amounts to cruel and unusual punishment raises a constitutional question of law that we review de novo on appeal. See State v. Rueda, 1999-NMCA-033, ¶ 5, 126 N.M. 738, 975 P.2d 351. However, because a cruel and unusual punishment challenge necessarily focuses on the factual circumstances of the particular case, we view the facts in the light most favorable to the district court's decision and defer to the district court on evidentiary matters of weight and credibility. See State v. Arrington, 120 N.M. 54, 55, 897 P.2d 241, 242 (Ct. App. 1995); State v. Arrington, 115 N.M. 559, 561-62, 855 P.2d 133, 135-36 (Ct. App. 1993). Although Defendant argues that his sentence constitutes cruel and unusual punishment under both our state and federal constitutions, he does not suggest that the protections afforded under our state constitution are any greater than those provided under the federal constitution. We, therefore, will proceed without regard for whether Defendant's challenge is brought under the state or federal constitution. See Rueda, 1999-NMCA-033, ¶ 8 (noting that federal and state provisions prohibiting cruel and unusual punishment are nearly identical).

(18) To determine whether a sentence amounts to cruel and unusual punishment we must consider "'[w]hether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness.'" In re Ernesto M., Jr., 1996-NMCA-039, ¶ 22, 121 N.M. 562, 915 P.2d 318 (quoting State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990)). In this regard, we begin by comparing

the gravity of the offense against the severity of the sentence to determine whether the punishment is grossly disproportionate to the offense. Rueda, 1996-NMCA-033, ¶ 12.

{19} As set forth above, the evidence presented at Defendant's sentencing hearing showed that Defendant repeatedly raped his younger stepsister over a two-year period, degrading and demeaning his young victim with a shocking number of humiliating and painful acts. In addition to the sexual abuse of his stepsister, Defendant repeatedly threatened her with death if she ever told on him. The evidence also showed that Defendant's actions exacted an emotional and psychological toll on his stepsister that is likely to affect her for the rest of her life. In spite of the horrendous and long-lasting nature of Defendant's acts, the evidence indicates that Defendant lacks remorse for his acts and is likely to commit similar acts in the future. In sum, when comparing the gravity of the offenses committed by Defendant to the sentence imposed by the court, we cannot say that Defendant's punishment is so grossly disproportionate as to shock the general conscience or violate principles of fundamental fairness. See In re Ernesto M., Jr., 1996-NMCA-039, ¶¶ 2, 23 (holding that 30-year adult sentence against juvenile, who admitted to raping and torturing victim, does not constitute cruel and unusual punishment).

{20} Without focusing on the gravity of his offenses, Defendant emphasizes that he was only fifteen years old at the time of the acts for which he was sentenced. To be sure, the decision to sentence a child as an adult is an extreme sanction that cannot be undertaken lightly. That said, however, the imposition of a lengthy, adult sentence

on a juvenile does not, in itself. amount to cruel and unusual punishment. See In re Ernesto M., Jr., 1996-NMCA-039, ¶¶ 2, 22-23. While In re Ernesto M., Jr. involved a sentence that was considerably less than the sentence imposed in this case, sentences comparable to Defendant's have been imposed against juveniles around the country and have repeatedly withstood cruel and unusual punishment challenges. See, e.g., State v. Green, 502 S.E.2d 819, 827-34 (N.C. 1998) (holding that mandatory life sentence for thirteen-year-old convicted of a first-degree sexual offense does not constitute cruel and unusual punishment); Rodriguez v. Peters, 63 F.3d 546, 566-68 (7th Cir. 1995) (holding that it was not cruel and unusual punishment to sentence defendant, who was fifteen years old when he committed the murders, to life in prison without parole); People v. Moya, 899 P.2d 212, 219-20 (Colo. Ct. App. 1994) (holding that there is no cruel and unusual punishment violation for sentencing juvenile defendant, convicted of robbery and murder, to life imprisonment with the possibility of parole after 40 years); Brennan v. State, 754 So. 2d 1, 5, 11 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old defendant convicted of murder but reducing sentence to life imprisonment without a possibility of parole); State v. Shanahan, 994 P.2d 1059, 1061 n.1, 1062-63 (Idaho Ct. App. 1999) (holding that fifteen-year-old defendant's life sentence for murder did not constitute cruel and unusual punishment); State v. Mitchell, 577 N.W.2d 481, 488-91 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder is not cruel and unusual punishment); State v. Jensen, 579 N.W.2d 613, 614, 623-25 (S.D. 1998) (holding that life imprisonment

without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); Jackson v. Commonwealth, 499 S.E.2d 538, 554-55 (Va. 1998) (holding that imposition of death penalty upon sixteen-year-old convicted of capital murder is not cruel and unusual punishment).

(21) Although an overwhelming number of states have rejected cruel and unusual punishment challenges to adult sentences imposed on juvenile offenders, Defendant relies on Workman v. Commonwealth, 429 S.W.2d 374, 377-78 (Ky. 1968), as support for his contention that the sentence in this case is unconstitutional. In Workman, the Kentucky Court of Appeals held that a mandatory sentence of life without possibility of parole imposed on a fourteen-year-old defendant convicted of first-degree sexual offenses amounted to cruel and unusual punishment under the Kentucky State Constitution. Id. However, Workman is distinguishable for several reasons. First, Workman involved a life sentence without the possibility of parole. In contrast, Defendant was not given a life sentence in this case, and he does have the possibility of parole in this case, even though that possibility will not ripen for a very long time. Second, the defendant in Workman was fourteen years old at the time of the offense, while in this case adult sanctions were only imposed for offenses committed while Defendant was fifteen years old. Third, in Workman, the juvenile defendant committed a limited number of offenses during one attack on an elderly woman. Conversely, in this case Defendant committed multiple offenses against a very young child over the course of two years. Fourth, the opinion in Workman suggests that there was little, if any, evidence of record concerning the juvenile

defendant's amenability to treatment. The opposite is true in this case in light of the substantial evidence in this case suggesting that Defendant is not amenable to treatment. And finally, the decision in Workman must be viewed within the context of circumstances as they existed over 30 years ago. In view of the qualitative differences in juvenile crime in today's society, we question the continued vitality of the Workman decision in light of contemporary standards and concerns. See Green, 502 S.E.2d at 831 (recognizing "the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system"). In short, we find no basis for relying on Workman to conclude that the sentence imposed against Defendant in this case constitutes cruel and unusual punishment.

{22} To the extent that we must consider the gravity of Defendant's offenses and the severity of his punishment within the context of contemporary standards of elemental decency, see In re Ernesto M., Jr., 1996-NMCA-039, ¶ 22, Defendant implies that during the sentencing process the district court acted contrary to developing concepts of elemental decency. In particular, Defendant asserts that the district court ignored the possibility of juvenile treatment alternatives despite the existence of treatment programs and facilities throughout the country. However, Defendant's argument ignores the actual state of the record below. The expert testimony presented below was virtually unanimous in concluding that there were simply no programs or treatments available anywhere that could address the psychological and emotional problems that make Defendant a continuing danger to

society. And while some of the experts may have held out a faint hope that rehabilitation might be possible if Defendant's treatment were intensive enough and prolonged enough, it is undisputed in the record below that no expert could give the court any reasonable degree of assurance that Defendant could be successfully rehabilitated by the time Defendant reached the age of twenty-one, which is the point at which the court would have lost jurisdiction over Defendant had he been sentenced as a juvenile.

{23} Defendant also makes vague allegations that the district court's failure to provide Defendant with treatment alternatives was the result of a legislative unwillingness to fund adequate treatment alternatives for individuals like Defendant. Our review of the record reveals no indication that the district court's decision to forego treatment alternatives was the result of financial constraints. To the contrary, the district court's decision reflected a desire to pursue rehabilitation, but a grim realization that an attempt at rehabilitation would not be possible in this case without creating an unreasonable risk to the safety of Victim and the public at large because medicine and psychology have yet to develop reliable methods for rehabilitating individuals like Defendant.

{24} Defendant also submits an alternate basis for finding that his sentence amounts to cruel and unusual punishment, arguing that his sentence is unconstitutional because it goes beyond what is necessary to achieve the aim of public intent expressed by the legislature in the New Mexico Children's Code. See Workman, 429 S.W.2d at 378 (citing Weems v. United States, 217 U.S. 349 (1910), and Robinson v. California, 370

U.S. 660 (1962)). In this regard, Defendant seems to believe that the court's sentence was intended to exact retribution rather than encourage rehabilitation. Even if that were true, we question Defendant's assumption that a retributive sentence is somehow inconsistent with the sentencing of a juvenile as an adult. But in any event, the record simply does not support Defendant's assertion that the district court was interested in retribution to the exclusion of other considerations such as rehabilitation and protection of the public. Although Defendant's sentence is very long, the district court went to great lengths to explain that the sentence was intended as a means for protecting the public from Defendant in the face of a considerable amount of testimony demonstrating that Defendant was not amendable to current treatment methods and, as a result, would remain a threat to society. In short, we find no basis for agreeing with Defendant's contention that the district court's sentence was motivated by intentions inconsistent with contemporary standards of elemental decency or even with the legislative intent behind the Children's Code.

[25] Although we find no basis for concluding that the district court imposed an unconstitutional sentence, we cannot ignore the apparent gap in our current statutory structure for sentencing children as adults that was brought into relief by the circumstances of this case. The district court was ultimately presented with the task of fashioning a sentence that would recognize the gravity of the Defendant's offenses, and the threat that he poses to society, without ignoring the possibility for rehabilitation. But as the district court noted in its thoughtful decision, the limited jurisdiction it has over offenders sentenced as juveniles is simply inadequate when the

juvenile offender is extremely dangerous and in need of intensive treatment that, if there is any hope of rehabilitation, must extend well beyond the time that our current statutory scheme gives our courts to rehabilitate juvenile offenders.

(26) After New Mexico's Children's Code was significantly revised in 1993, our state was recognized for its innovative response to the national movement to address what was perceived as an epidemic of violent juvenile criminals. See Lisa A. Cintron, Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court, 90 Nw. U. L. Rev. 1254, 1277-82 (1996). Around the country, many states responded to violent juvenile crime with legislative initiatives that automatically transferred violent juvenile offenders to adult courts, or gave prosecutors unfettered discretion to transfer juvenile offenders into adult court, where they would be tried and sentenced as adults without regard to the individual circumstances of each child and his or her potential for rehabilitation. See Patricia Torbet, et al., State Responses to Serious and Violent Juvenile Crime, pp. 3-4, Washington DC: Office of Juvenile Justice and Delinquency Prevention (1996). Other states responded with what are known as blended sentencing schemes that give a sentencing court the discretion to impose a juvenile disposition or an adult sentence, or both, depending on the individual circumstances of each case. Id. at p. 12. New Mexico took the unique approach of providing for the trial of almost all juveniles in children's court, while still allowing the children's court to decide whether an adjudicated youthful offender should be sentenced as a juvenile or an adult. Id. at p. 12, see also Patricia Torbet, et al., Juveniles Facing Criminal Sanctions: Three States that Changed the Rules,

Washington DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (2000).

(27) Despite New Mexico's innovative approach to juvenile crime, the circumstances of this case reveal an inadequacy in our juvenile justice sentencing scheme. As noted above, when a youthful offender is sentenced as a child, the court's power over the child must end when the child reaches the age of twenty one. However, in some instances, successful rehabilitation would require a longer commitment to the rehabilitative resources of the juvenile justice system. And unfortunately, in some cases, despite providing the best treatment options available, rehabilitation will prove impossible. Because of these very real possibilities and the obligation that every sentencing court also has to protecting public safety, many courts, like the court in this case, will opt for a longer term of adult incarceration for a juvenile offender instead of risking a short-term, unsuccessful juvenile detention that would result in the premature release of a dangerous offender.

(28) The district court's dilemma in this case is not an isolated phenomenon. Indeed, a number of commentators have written extensively on the shortcomings inherent in a juvenile justice system that focuses on harsher punishment as the primary means of protecting the public from violent juvenile offenders. For example, serious doubts exist concerning the extent to which a "get tough" approach is truly effective in protecting the public from future violent crime. See Shannon F. McLatchey, Note, Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach, 10 U. Fla. J.L. & Pub. Pol'y 401, 414-16 (1999); Donna M. Bishop, Lonn

Lanza-Kaduce, & Charles E. Frazier, Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms, 10 U. Fla. J.L. & Pub. Pol'y 129, 142-46 (1998). To the extent that the movement toward the increased sentencing of juveniles as adults is an implicit recognition that violent juvenile offenders are just like adults, there is increasing evidence that many violent juvenile offenders currently sentenced as adults are in fact psychologically different from adults and, as such, are worthy of different treatment. See Eric K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice, 35 Am. Crim. L. Rev. 371, 406-09 (1998); Elizabeth S. Scott & Thomas Grisso, Symposium on the Future of the Juvenile Court: The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. Crim. L. & Criminology 137, 154-89 (1997). Similarly, valid concerns exist regarding the extent to which the juvenile justice system may be relying too heavily on psychological experts to predict a child's amenability to treatment and future dangerousness. See Catherine R. Guttman, Note, Listen to the Children: The Decision to Transfer Juveniles to Adult Court, 30 Harv. C.R.-C.L. L. Rev. 507, 538-40 (1995).

(29) Given the complexities involved in effectively dealing with violent juvenile offenders, it is easy to understand why the district court wanted an alternative that did not exist within New Mexico's current juvenile sentencing structure. While it would be unrealistic to expect a legislative solution that would completely eliminate all of the doubt and apprehension that accompanies the decision to sentence a child as an adult, a number of states around the country have enacted blended sentencing

alternatives that do give the sentencing judge the option of pursuing a juvenile, rehabilitative approach in marginal cases without sacrificing the ability to impose a long-term, adult incarceration if rehabilitation attempts prove futile. These are described in Shari Del Carlo, Comment, Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!, 75 Or. L. Rev. 1223, 1246-48 (1996) [hereinafter Del Carlo]. See also State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

(30) For example, in Texas the juvenile court is given the authority to impose lengthy, determinate sentences on juveniles for certain enumerated offenses. While the defendant is a juvenile, he remains confined in a youth facility focused on rehabilitative efforts. When the juvenile offender reaches the age of eighteen, the juvenile court is empowered to evaluate the juvenile's rehabilitative progress. At that point, the juvenile court can either continue to confine the offender in a juvenile facility for further rehabilitation efforts until the offender reaches the age of twenty one, or commit the offender to an adult prison to serve the remainder of his sentence if rehabilitation efforts are proving unsuccessful. See Del Carlo, supra, at 1246-48. Other states like Massachusetts, Rhode Island, and Colorado have similar sentencing procedures. See State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

(31) Another example of an innovative, flexible sentencing scheme exists in Minnesota. In that state, the juvenile court can simultaneously impose a juvenile disposition and an adult sentence for certain offenses. The adult sentence is stayed on the condition that the juvenile offender complies with the provisions of his juvenile

disposition. If the juvenile does violate the conditions of his juvenile disposition or commits a new offense, the juvenile court can execute the adult sentence. But if the offender does successfully complete his juvenile disposition, he is released at the age of twenty one and the adult sentence is removed. See Del Carlo, supra, at 1246-48. States such as Connecticut and Montana follow similar procedures. See State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

{32} These are some of the options that could fill the gap that cases such as this one expose in our system and that could eliminate the dilemma faced by the court below. Additionally, we note that some states have extended the jurisdiction of the juvenile court to age twenty five. See State Responses to Serious and Violent Juvenile Crime, at pp. 15. Despite the advisability of considering whether other states have adopted better ways of dealing with violent juvenile offenders, the decision to move toward such alternatives is fundamentally a policy-based decision for our Legislature. See Green, 502 S.E.2d at 829 ("'We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. . . . In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'") (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976) (internal quotation marks and citation omitted)). While we do not intend to suggest that the failure to provide such sentencing alternatives amounts to an unconstitutional sentencing scheme, we would be remiss if we did not urge our legislature to consider some of the flexible sentencing alternatives summarized above.

Withdrawal of Guilty Plea

(33) Aside from challenging the constitutionality of his sentence, Defendant also attacks the district court's refusal to set aside his guilty plea. Defendant argues that he should be allowed to withdraw his guilty plea because it is an illegal plea that was tainted by ineffective assistance of counsel. Based on the record before us, we cannot say that the district court abused its discretion in refusing to set aside Defendant's plea. See State v. Jonathan B., 1998-NMSC-003, ¶ 7, 124 N.M. 620, 954 P.2d 52 (stating that refusal to allow withdrawal of guilty plea is reviewed for an abuse of discretion).

(34) Defendant's attack on the validity of his guilty plea relies heavily on the fact that, at the time of the plea, everyone concerned, including defense counsel and the district court, misconstrued the applicable law and misunderstood the potential maximum sentence faced by Defendant. As noted above, in a prior appeal we reversed Defendant's first sentence because the district court incorrectly sentenced Defendant as an adult for crimes committed prior to July 1, 1996, while Defendant was still fourteen years old. Defendant argues that the validity of his plea should be viewed with some skepticism because the person charged with advising him on whether to plead guilty was unaware of the applicable law. Likewise, Defendant is critical of the district court's efforts to ensure that Defendant's plea was knowing, voluntary, and intelligent given that the district court was also mistaken as to the applicable law. Nevertheless, based on the arguments advanced by Defendant on appeal, we see no basis in this record for requiring that Defendant be allowed to

withdraw his plea.

(35) We disagree with Defendant's suggestion that his plea was invalid because he did not know the correct maximum penalty that he faced at the time of his plea. A criminal defendant should only be allowed to withdraw his plea when he is not adequately notified of the material consequences of the plea and such information is relevant to the decision to enter into the plea in the first place. See State v. Lozano, 1996-NMCA-075, ¶ 18, 122 N.M. 120, 921 P.2d 316. Although Defendant was misinformed that he could be sentenced as an adult for all of the charges to which he pled guilty, the incorrect information that Defendant received did not render his plea invalid because Defendant was actually advised that he could be sentenced to a longer term of adult incarceration than he actually faced or ultimately received. See Jonathan B., 1998-NMSC-003, ¶ 17 (holding that failure to accurately advise defendant of potential penalties does not render plea involuntary and unknowing if defendant suffers no prejudice by receiving sentence less than maximum possible sentence represented by the State or the court).

(36) Defendant also asserts that his plea is invalid on its face because it contemplates an illegal sentence, and as such, should not be allowed to stand. Without deciding whether a plea that contemplates an illegal sentence must be set aside, we simply note that the actual text of Defendant's plea and disposition agreement did not mandate entry of any particular sentence, much less an illegal sentence. Indeed, by his plea and disposition agreement, Defendant simply agreed to plead guilty to most of the charges against him in exchange for the State's

agreement to dismiss one of the charges. Sentencing discretion was left with the court, and the plea agreement specifically stated that Defendant would argue for a juvenile disposition and the State would argue for adult sanctions. In short, the record does not support Defendant's contention that the plea, on its face, contemplated an illegal sentence.

(37) Although the plea agreement itself may not have provided for an illegal sentence, we are not unmindful of the fact that Defendant's attorney misunderstood the applicable law at the time that he advised Defendant to plead guilty. Because Defendant's trial attorney failed to identify the applicable law, and consequently failed to accurately advise Defendant of the true maximum sentence he faced, Defendant argues the district court should have set aside his plea as the product of ineffective assistance of counsel. The State suggests that Defendant should not be allowed to withdraw his plea because this Court did not permit Defendant to withdraw his plea following his first appeal. While we rejected Defendant's claim of ineffective assistance of counsel raised in his first appeal, we did so because there was no evidentiary record to show that Defendant would have entered a different plea had counsel been aware of the correct law at the time of the plea. Accordingly, we concluded that Defendant had failed to establish a prima facie case of ineffective assistance of counsel. See State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992). But since we remanded Defendant's case for resentencing as a result of his first appeal, Defendant was able to develop a limited evidentiary record to support his claim of ineffective assistance of counsel. As such, Defendant is not

precluded from reasserting his claim of ineffective assistance of counsel to the extent that it is supported by the record developed on remand during his motion to set aside the plea.

(38) "Effective assistance of counsel is necessary during plea negotiations because the most important decision for a defendant in a criminal case is generally whether to contest a charge or enter into a plea agreement." Patterson v. LeMaster, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032. Patterson also noted that "'[i]n the plea bargain context a defendant must establish that his counsel's performance was objectively unreasonable and that but for counsel's errors, he would not have pleaded guilty and instead gone to trial.'" Id., ¶ 18 (quoting United States v. Martinez, 169 F.3d 1049, 1052-53 (7th Cir. 1999)). In this regard, "[t]he question is whether 'there is a reasonable probability' that the defendant would have gone to trial instead of pleading guilty or no contest had counsel not acted unreasonably." Patterson, 2001-NMSC-013, ¶ 18.

(39) Within the context of this case, we have little trouble concluding that the performance of Defendant's trial attorney was objectively unreasonable given that his trial attorney testified at the hearing on the motion to set aside the plea that he was unaware of the applicable law at the time that he advised Defendant to plead guilty. See In re Neal, 2001-NMSC-007, ¶ 21, 130 N.M. 139, 20 P.3d 121 ("No lawyer should approach any task without knowledge of the applicable statutes, court rules, and case law . . . ."). But even though defense counsel's performance may have been objectively unreasonable, Defendant must still demonstrate a reasonable probability

that he would have gone to trial instead of pleading guilty had his attorney not acted unreasonably. With that standard in mind, the district court could reasonably have found that Defendant would not have decided to go to trial even had his attorney properly advised him of the actual sentence that he faced.

(40) Defendant's trial attorney testified that he would have never counseled Defendant to plead to an illegal sentence had he known what the law was at the time of the plea. Even though that testimony was uncontradicted, we do not believe the district court abused its discretion in rejecting trial counsel's testimony given that the plea itself did not agree to an illegal sentence. Moreover, Defendant's trial attorney testified that he originally decided to counsel a plea to virtually all of the charges because he believed Defendant had a good chance of receiving a juvenile disposition by establishing his amenability to treatment. As such, the trial court could have discounted trial counsel's claim that he would have advised Defendant to go to trial had he known the true state of the law.

(41) We should also note that during the course of the hearing on Defendant's motion to set aside the plea, the district court appeared suspicious of the claim that Defendant would not have pleaded guilty had he known that he only could be sentenced as an adult on six counts instead of thirteen. The district court remarked that it seemed illogical for Defendant to contend that he would not have pleaded guilty had he known he was facing a maximum sentence of 91½ years even though he actually did plead no contest when he thought he was facing a sentence of 185 years. In the face of this apparent contradiction, trial counsel suggested that he might

have considered going to trial on fewer charges because he had thought he could successfully defend against some of the charges. Despite defense counsel's claim, he did not specify the substance of such a defense and did not indicate to which charges he would have had defenses. In light of this underdeveloped state of the record, we cannot say that the district court abused its discretion by refusing to set aside the plea for ineffective assistance of counsel. And given the lack of a record with regard to this aspect of Defendant's ineffective assistance of counsel claim, we do not believe that Defendant has established a prima facie case of ineffective assistance of counsel that would warrant a remand to further develop the record on this point. See Swavola, 114 N.M. at 475, 840 P.2d at 1241.

CONCLUSION

(42) We affirm the judgment and sentence.

(43) **IT IS SO ORDERED.**

LYNN PICKARD, Judge

I CONCUR:

CELIA FOY CASTILLO, Judge

RICHARD C. BOSSON, Chief Judge (specially concurring)

BOSSON, Chief Judge (specially concurring).

(44) Although the law weighs in favor of affirming Joel's sentence, I have substantial concerns regarding a system that imposes long term, adult sentences on children without affording judges the tools necessary to make sound, informed decisions.

(45) According to the record, the earliest Joel can expect to be considered for parole is after serving a sentence of forty-five years. For one so young, this is effectively a life sentence. One who goes into prison a teenager and comes out a man at the age of retirement has forfeited most of his life.

(46) A sentence of ninety years, for acts committed while Joel was fourteen and fifteen years old, is likely one of the longest sentences ever imposed on one so young in the modern history of this state. See State v. Gonzales, 2001-NMCA-025, ¶ 5, 130 N.M. 341, 24 P.3d 776 (affirming twenty-two-year adult sentence where the defendant pleaded guilty to second degree murder, aggravated burglary, aggravated battery, and two counts of aggravated assault); In re Ernesto M., 1996-NMCA-039, ¶¶ 1-2, 121 N.M. 562, 915 P.2d 318 (Ct. App. 1996) (affirming thirty year adult sentence for seventeen year old, who had raped, beaten, and kidnapped a convenience store clerk). And this was not even a murder case. If Joel had eventually killed his victim, perhaps to protect himself from prosecution for his other crimes, he could have received a life sentence as an adult, but would have become eligible for parole after a "mere" thirty years. Thus, although Joel commits crimes

which, however gruesome, are less than first degree murder, he receives a sentence that is effectively fifty percent longer. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (stating that rape, although a serious crime, does not compare with the unjustified taking of a human life and is to be treated differently than murder in conducting a proportionality analysis).

(48) The problem with this sentence lies not just with the number of years, but more importantly with the process that seemingly made this sentence inevitable. As I read the record below, it was as much the lack of sentencing alternatives, as the particular merits of Joel's circumstances, that compelled this sentence. The Children's court judge was put in a classic dilemma. If he wanted to afford Joel a reasonable chance to redeem himself, the judge had to put society at risk. If the judge sentenced Joel as a juvenile, Joel would go free at age twenty-one, regardless of whether or not he proved to be truly amenable to rehabilitation. If, on the other hand, the judge wanted to maximize the protection of society, the judge had to assume the worst—that Joel was not amenable to treatment and rehabilitation as a juvenile—and sentence him then, and forevermore, as an adult. Although, in a technical sense, the court could choose its sentence, the harsh reality of our flawed system made it a Hobson's choice. The court essentially had no choice but to protect society at the expense of the child.

(49) The judge was not insensitive to this dilemma. At the final sentencing hearing, the

court characterized its role as that of "a judge searching for options." Yet, he recognized the effective lack of any such options, thanks to the faulty amenability process. The judge emphasized the need for "a system that would allow us to experiment and protect the community at the same time," a decision that the court "dearly wish[ed he] could make . . . in this case." Instead, the judge had "to make a prediction [now] . . . as the only decision I'll get a chance to make." Forcing the judge to make that decision now meant that, in order to protect society, he had no choice but to sentence Joel as an adult and, in the court's own words (concurring in defense counsel's characterization), "throw away the child." The court was brutally frank in its reasoning. The sentence was ninety years so that, even with the possibility of meritorious time reductions and parole eligibility, Joel will not leave prison until he is at an age when, biologically speaking, he will be too old a man to pose a serious threat of re-offending. The court regretfully concluded, "I take no joy at all in finding that [this] is the only option I have."

(50) I enthusiastically join that portion of the majority opinion that calls for improvements in the Children's Code. Children's court judges need more flexible tools in order to adequately address the unique problems presented by youthful offenders. Judges need the power to sentence juveniles conditionally, first as juveniles and later as adults, depending upon whether subsequent review indicates that adult sentencing is warranted. With conditional sentencing, courts could take advantage of the therapeutic and

rehabilitative services that are uniquely available for juveniles, and would have the opportunity to observe how a child actually performs until turning twenty-one. When the juvenile became of age, the judge would have a record of performance upon which to base a more informed, predictive decision about the probability for success versus the risk to society. Conditional sentencing affords the juvenile one last opportunity for redemption, while retaining institutional control over the juvenile for the protection of society; this seems to be a win-win proposition.

(51) New Mexico, unfortunately, does not have such a system in place. Instead, we ask the impossible of our Children's court. We expect judges to make life-long, predictive decisions, without the possibility of later review, about the kind of adults these juveniles will turn out to be, twenty, thirty, and forty years into the future. We do not, however, equip our judges with adequate and timely information to make such decisions as informed as they could be.

(52) We demand that judges determine, now, whether a child is "amenable to treatment or rehabilitation as a child in available facilities," pursuant to NMSA 1978, Section 32A-2-20(B)(1) (1996). We do not, however, afford judges the opportunity to experiment, under controlled conditions, to see how a child actually responds to treatment. Thus, the amenability determination is fraught with risk and, as a practical matter, forces judges to err on the side of caution in making amenability decisions. A lot rides on the wisdom of

these amenability decisions. In the interest of protecting society, judges have to assume the worst about a juvenile, which can translate into a lengthy adult sentence on the chance that a juvenile may re-offend. And let us not forget that, under the present system, sixteen-year-old boys, once they are deemed not "amenable" to rehabilitation in juvenile facilities, serve lengthy adult sentences in the company of full-grown and very dangerous men. See generally Martin Forst, Jeffrey Fagan & T. Scott Vivona, Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, 40 Juv. & Fam. Ct. J. 1, 9 (1989) (stating that juveniles in adult prisons are particularly vulnerable to being made victims).

(53) Thus, in my mind, the process that compelled this ninety-year sentence is what makes its severity in this case so suspect. Cf. Hicks v. Oklahoma, 447 U.S. 343, 343 (1980) (holding that it violates due process of law for a convicted state prisoner to be sentenced under a mandatory punishment statute where, under state law, he was entitled to the benefit of a discretionary state sentencing statute); Willeford v. Estelle, 637 F.2d 271, 272 (5th Cir. 1981) (remanding for post-conviction relief where defendant, under state law, should have been entitled to an exercise of discretion in sentencing by the trial judge, who had erroneously believed that he was statutorily bound to impose a sentence of life imprisonment). It is not that the punishment does not fit the crime in the abstract. It is that the punishment exceeds the crime in the particular context of compelling a judge to act out

of fear; to impose upon a child the worst possible sentence, instead of a sentence based upon what the court felt the child truly deserved. "The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal." Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting, joined by Brennan, Marshall, & Stevens, JJ.) (emphasis added).

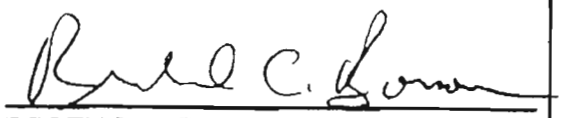
(54) Defendant's status as a juvenile makes this flawed process all the more suspect in a constitutional sense. It is generally a tenet of constitutional law that children merit special consideration in assessing whether a punishment is cruel and usual under the Constitution. See, e.g., Thompson v. Oklahoma, 487 U.S. 815-16, 838 (1988) (holding that it constitutes cruel and unusual punishment to sentence a fifteen- year-old to death, and stating that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult"). Youthfulness goes into assessing the overall culpability of a defendant, which, in turn, is a factor in evaluating the proportionality of a punishment vis a vis a particular crime committed by a particular youthful offender. See Eddings v. Oklahoma, 455 U.S. 104, 115 n.11, 116 (1982) (noting that the age of a minor is a "relevant mitigating factor of great weight" in death penalty cases, and noting that "adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. . . [and] deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms

than adults" (internal quotation marks and citation omitted)). What might be proportional for an adult is not necessarily proportional for a child. See generally Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 723 (1998) (arguing that the age of a juvenile should serve as a trigger for a heightened proportionality analysis, taking into account the background and traits of a young offender in the determination of criminal culpability).

(55) The Children's Code, unlike adult sentencing codes, requires us first to consider whether the defendant is amenable to rehabilitation; this is because, constitutionally speaking, kids are different. "[O]ur courts are especially solicitous of the rights of juveniles." State v. Hunter, 2001-NMCA-078, ¶ 12, ___ N.M. ___, 33 P.3d 296. The Children's Code balances the needs of the child with the needs of society in ways that the adult criminal code and its courts do not. See NMSA 1978, § 32A-1-3(A) (1999) (stating that the purpose of the Children's Code is to make the child's health and safety "the paramount concern"); § 32A-2-20(D) (providing that, even where a child is sentenced as an adult, such a sentence may be "less than, but shall not exceed, the mandatory adult sentence"); State v. Javier M., 2001-NMSC-030, ¶¶ 25, 33, 39, ___ N.M. ___, 33 P.3d 1 (concluding that the legislature intended to provide children with greater constitutional protections during investigatory detention than that afforded to adults); In re Francesca L., 2000-NMCA-019, ¶¶ 8-9, 12-13, 128 N.M. 673, 997 P.2d 147 (affirming suppression of

statements where it was unclear if juvenile had voluntarily waived rights, and noting that the legislature intended children to be treated differently and afforded more protection). Under our law, not all youthful offenders are sentenced as adults, but only those "not amenable to treatment or rehabilitation as a child in available facilities." Section 32A-2-20(B)(1). Before requiring judges to make a decision of such consequence, we owe it to the court, to the victim, to the juvenile, and to society as a whole, to inform these decisions as much as practicable. Conditional sentencing, subject to later review, would make those decisions infinitely more informed than our present system.

(57) Regrettably, I must concur in affirming Joel's sentence, because existing constitutional authority gives me no choice. It ought to be different, and if it were in my power, I would elect to make it different. Suffice it to say that I concur with grave reservations about the lack of alternatives that make this sentence inevitable.



RICHARD C. BOSSON, Chief Judge

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

27355

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

JOEL I.

Child-Appellant.

No. _____
Ct. App. No. 21,375

SUPREME COURT OF NEW MEXICO
FILED
FEB - 8 2002

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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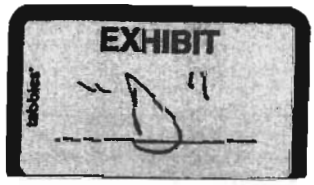

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

COMES NOW, Child-Appellant, **JOEL IRA,** by and through his attorney, **GARY C. MITCHELL,** and pursuant to S.C.R.A. 12-502, petitions the Supreme Court to issue unto the Court of Appeals its' Writ of Certiorari and as grounds for the Petition, states as follows:

I. DATE OF ENTRY OF THE DECISION

The Court of Appeals of the State of New Mexico entered its' Memorandum Opinion in *State of New Mexico v. Joel Ira*, Docket No. 21,375, on January 24, 2002, a true and correct copy being attached hereto as Exhibit "A" and by reference made a part hereof. The Petition for Writ of Certiorari will be timely filed if filed by the close of business on the 12th day of February, 2002.

II. QUESTIONS PRESENTED FOR REVIEW

1. ***Does sentencing a child to 91 ½ yearsof incarceration violate the child's right to be free from cruel and unusual punishment under the New Mexico and United States Constitutions?***

2. ***Did the Trial Court err in failing to set aside the plea agreement in this cause because it contemplated an illegal and invalid sentence?***

3. ***Does the sentencing of Joel Ira, a child, as an adult, violate Joel Ira's constitutional rights to Due Process, his right to trial by jury, his right to have the case against him proved beyond a reasonable doubt, in violation of his Constitutional rights as granted to him by the New Mexico and the United States Constitutions?***

III. FACTS MATERIAL TO THE QUESTIONS PRESENTED FOR REVIEW

His name is Joel. He was born February 23, 1981. Joel has been in jail or prison since February 21, 1997. A district judge in Otero County sentenced him originally to 108 years for

10 counts of criminal sexual penetration, 1 count of aggravated battery against a household member and 1 count of intimidation of a witness, committed at ages 14 and 15.

Joel comes from a broken home. Joel was the oldest child in a home with his father and stepmother and responsible for supervising several younger children. Joel was 13, 14 & 15 at relevant times. Joel suffered from rejection, isolation, was limited as to short-term memory, had some attention deficit and hyper activity and had received physical abuse from his father. The man Joel lived with who he called his father he learned was not actually his biological father. Joel had a tough time with his "father" Thomas and Thomas basically abandoned him, according to social workers.

On October 1, 1998, the Court of Appeals, in No. 18,915, entered its Memorandum Opinion reversing the judgment of the trial court and remanded for a new sentencing because the plea agreement allowed and the sentence of the court imposed adult sanctions for acts committed when Joel was 14. The district judge, upon re-sentencing, sentenced the child to 91 ½years. What was the procedure that resulted in a child receiving 91 ½years in the New Mexico State Penitentiary?

Joel Ira was age 14 and 15 at the time of the offenses which the State alleges occurred. There are serious questions as which offenses occurred at age 14 and which occurred at age 15. Joel's statement to police and played to the court was that on two occasions, he engaged in sex with his stepsister. Joel said that the two incidents had occurred the week before he was arrested. The alleged victim, his stepsister and no blood relation, was age 8 through 11. The female child claimed that Joel had sex with her numerous times beginning when she was 8 years old and continued until she was 11 years of age. There is a major factual dispute between the female child and Joel as to what kind of threats were made, the number of sexual acts and the extent of sexual abuse and the degree of any intimidation.

The child, through appointed counsel, entered into a plea agreement with the State in which the child pled no contest to 10 counts of criminal sexual penetration, 1 count of aggravated battery

against a household member and 1 count of intimidation of a witness, offenses occurring when he was age 14 and 15. The plea agreement allowed the court to sentence from a range of a term within the Children's Juvenile Justice System or treat the child as an adult and sentence him as an adult. The plea agreement allowed the court to sentence the child for offenses allegedly committed when he was age fourteen (14) as an adult, when in fact the law, as decided by the Court of Appeals in its' decision overturning the trial court's judgment, did not allow such. The trial judge, the prosecutor and the defense counsel were in error about the law and the Court of Appeals so held. Despite the error, the child received adult sanctions. The court refused to set aside the plea agreement at re-sentencing and allow the child to proceed to trial.

At the original sentencing when the trial judge, the prosecutor and defense counsel were all in error about the law, the trial judge heard from numerous people at sentencing regarding the amenability of Joel for treatment. Several witnesses testified there was no help for Joel within the Juvenile Justice System, that Joel would have no chance without treatment and that he was in need of treatment, that Joel had not had proper parenting, that Joel's father was not concerned about the welfare of his son and that his father was absent. In fact, there were some sexual offender programs suggested to the trial judge but the State's psychologist, who had spent only two 2 hour sessions with Joel, felt Joel had no conscience and there was no way to treat him. The director of Psychological Services of the New Mexico Boys School felt that Joel was placed on the low end of rehabilitaty and that his prognosis would not be very high at Springer but did admit there was a sexual offender treatment program at Springer, but they generally tended to treat pedophiles at Springer and since Joel wasn't a pedophile, would not be amenable to treatment. The State's psychologist also indicated one of the major problems in getting treatment for Joel was that of payment and because New Mexico had sold themselves to managed care, there weren't facilities or programs available to take care of somebody like Joel. He indicated there were programs outside the state that he had heard of, but there was no current funding within the State of New Mexico to provide for treatment at those programs. The trial court entered a lengthy expose as

to why he had to give the sentence basically indicating that the need to protect society was far greater than the need to try to rehabilitate the child and that the lengthiest prison sentence that he could give ensured the child would not be out of prison until he had reached such an old age that he wasn't likely to commit any more sexual offenses.

After the Court of Appeals reversed the 108 year sentence, the matter remanded, additional facts were given to the court regarding Joel's good conduct in the penitentiary, his work toward his GED and other programs, his continued contact with his family, particularly his mother, and numerous programs throughout the nation that Joel could be admitted to, although none gave a guarantee that Joel would not re-offend. The child's psychologist, who interviewed the child at length, advised the court that the younger the individual, the more amenable they were to treatment and the more likely they were to change, that Joel was still a young man and the chances he was going to respond to treatment were far better than those of a 25 or 35 year old, that he had support from his mother and her husband (his stepfather), there was potential for treatment in, the psychologist advised, a structured long term setting. The psychologist, Dr. Matthews, based on his treatment of sexual offenders, recommended comprehensive treatment, multiple levels of care, and suggested several programs with a combination of treatment in Sequoia, the maximum security juvenile facility in New Mexico, as well as the STOP program in Las Vegas Medical Center, and programs in Colorado and Texas. Dr. Matthews pointed out that had the court started Joel into such a program when his case first came up and when he was first sentenced, chances would be far better. He felt that a good therapy program would be approximately 5 years. Despite this, the court re-sentenced Joel to 91 ½ years.

The child, through his present attorney, after the matter was remanded to the trial court, filed a motion to set aside the plea agreement. The trial court heard testimony and argument. Joel's prior attorney testified that he, along with the court and the prosecution, were wrong about the law when the plea bargain was entered into, accepted and the court entered its judgment. Joel's prior attorney acknowledged that he had explored with Joel the fact that he could get into

treatment as a juvenile, and even if he received an adult sentence, he could get into treatment in Las Vegas in their STOP program. He indicated that Joel had an emotional age level of 12 years and was going along with whatever his attorney said to do. He also advised the court, through his testimony, that neither Joel nor his attorney expected to get the kind of time the court gave, otherwise they would never have entered into the plea and that another reason for Joel entering into the plea was so that the victim would not have to testify. Joel testified indicating he had no knowledge of the law, had never read a law book, didn't know how to use a law book and thought he was going to Las Vegas or Springer for two years and that he was going to go into a treatment program. He didn't realize he was going to prison for the rest of his life. He simply wanted to get his time done. There is no question that the plea agreement contemplated an illegal sentence. The trial court refused to set aside the plea agreement despite the fact that the child could not be sentenced or plea in accordance with the plea agreement as a matter of law and despite the ruling of the Court of Appeals. In fact, Joel had testified previously and the court had heard testimony that Joel had committed only two sexual acts at age 15 and that Joel had a defense to the rest. In the end, it did no good to present the court with treatment options or ask that the plea be set aside. Joel's prophetic statement when asked by the court at his first sentencing if he had anything to say, turned out to be very true. His words were "*this is my first time in jail and it is going to be my last*". The court's sentence of 91 ½ years means for all practical purposes, Joel's sentence would be his first, last and final sentence.

While the case was on appeal the second time to the Court of Appeals from the 91 ½year sentence, Appellate counsel moved to amend the docketing statement, allow supplementation of briefs and oral argument if necessary on the issue that Section 32A-2-1, et.seq. of the Children's Code was unconstitutional after the decision of the United States Supreme Court in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). The basis that Section 32A-2-1, et seq. of the Children's Code was unconstitutional was that ***Apprendi*** holds that the Due Process Clause requires a jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the

statutory maximum. It was the position of Joel's Appellate attorney that a jury had to decide beyond a reasonable doubt whether he was amenable to treatment or rehabilitation as a child at available facilities or eligible for commitment to an institution for the developmentally disabled or mentally disordered pursuant to N.M.S.A. 1978, Section 32A-2-20(B). Joel's sentence, pursuant to ***Apprendi***, if ***Apprendi*** were followed, is a sentence that at the maximum, would have been confinement not exceeding the age of 21 years. The Court of Appeals never ruled on the Motion to Amend the Docketing Statement, Allow Supplementation of Briefs, and Oral Argument if Necessary, although Appellate counsel had filed it and raised it and asked that the Court of Appeals to consider it.

IV. THE BASIS FOR GRANTING OF THE WRIT OF CERTIORARI AND ARGUMENT

The decision of the Court of Appeals is in conflict with the Eighth Amendment of the United States Constitution and Sect. 13, Article 2 of the Constitution of the State of New Mexico, in that the sentence that Joel received was cruel and unusual. Three approaches have been used to determine whether a punishment is cruel and unusual.

The first approach is to determine whether in light of all the circumstances, the punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness. ***Workman v. Commonwealth of Kentucky***, 429 S.W.2d 374. This decision should always be made in light of developing concepts of decency. This resolves itself into a matter of conscience with these principles to be applied to the individual case and without attention to ancient authorities. ***Lee v. Tahash***, 352 F.2d 970 (8th Cir. 1965).

The second approach is one of conscience with the test pitting the offense against the punishment and if they are found to be greatly disproportionate, then the punishment becomes cruel and unusual. ***Weems v. United States***, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793.

The third approach or test is whether the punishment goes beyond what is necessary to

achieve the aim of the public intent that is expressed by legislative act? If it exceeds any legislative penal aim, it is cruel and unusual. ***Weems v. United States***, supra., ***Robinson v. State of California***, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2 758.

This case presents a significant question of law and an issue of substantial public justice that should be determined by the Supreme Court. The sentencing of a 15 year old boy to 91 ½ years at the New Mexico State Penitentiary for an offense that was not murder (he would be eligible for parole much sooner [30 years] had it been murder) should be a question that the Supreme Court should consider. The Supreme Court, based on developing concepts of decency, should determine whether this sentence shocks the general conscience and violates the principles of fundamental fairness. In addition, it should be the Supreme Court that conducts the test that pits the offense against the punishment and determines whether they are greatly disproportionate and the Supreme Court should, in addition, determine whether the legislative intent expressed by the legislative act and the punishment involved goes beyond what is necessary to achieve the aim of that legislative intent.

The district judge and the prosecutor in this case adjudicated this child to be forever irredeemable and subjected Joel, a 15 year old child to hopeless life-long imprisonment and segregation. This is not a usual or acceptable response to childhood criminality even when the criminality amounts to criminal sexual penetration of a stepsister. The sentence flies in the face of the humanitarian instincts of all people, not only the judiciary. Developing concepts of elementary decency mean that we not only look to the law, but to science, particularly medicine and psychology that been developed over the years. We have learned that we can treat people. Joel Ira was never found to be a pedophile. The tragedy in Joel's case, according to the prosecutor, is that we have no treatment facilities in New Mexico, either because of money, politics or the like. The fact we decide to sentence a young man to 91 ½years because we can't afford him is hardly a sound conscionable basis for a lifelong sentence. It is as mean, viscious, and deplorable as a hospital refusing to treat people because they have no money. The measure

of a society should never be how it treats its most powerful, but how it treats the least fortunate among them.

In fact, there were programs available to Joel, but the Court did not want to utilize them because there were no 100% guarantees that Joel would be rehabilitated. The Court of Appeals' decision in Joel's case spends many pages discussing how the legislature should correct this problem. It is the great irony in this case that everybody seems to feel that the legislature needs to do something regarding a "blended" type sentence, come up with a "more innovative approach to juvenile crime" and look at the "inadequacies of our 'Juvenile Justice Sentencing Scheme'". In fact, the Court of Appeals' decision goes far beyond what we typically see in giving suggestions, hopefully to the legislature as to how to correct this problem. It appears that in order for there to be change, we have to sacrifice a human being. That human being in this case has a name and his name is Joel. What was done to him and has been done to him is outrageous, unusual and cruel. The Supreme Court should state such and correct it.

The Court of Appeals affirmed the trial court' s decision in refusing to set aside a plea agreement that everyone acknowledges, including the Court of Appeals in its prior decision, the trial judge, the prosecutor and the defense counsel, was illegal because it subjected the child to an adult sanction for acts committed when he was age fourteen (14) when in fact the law did not allow such. The plea, in short, was invalid on its face. Under the law of the United States and the State of New Mexico, whenever a defendant enters a guilty plea, it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. ***North Caroline v. Alford,*** 400 U.S. 25 (1970). In fact, according to the Supreme Court Rules, particularly 5-304, inherent therein is the requirement that a child know the exact consequences of his plea. In this case, as admitted by all three attorneys in the courtroom, including the trial judge, they were wrong about the exact consequences of the plea. A child, when he is sentenced, should know what the maximum punishment is that he faces. ***Apprendi***, supra. Joel Ira did not know when he entered into the plea agreement what the maximum punishment was that he faced because his

lawyer, the prosecutor and the trial judge, were wrong. He thought he was going to get treatment. In addition, the child has defenses. His statement to the police officer indicated there were only two possible criminal sexual penetrations, not ten. The child pled no contest rather than guilty and the plea hearing indicates not that the child gave a statement to the court in which he confessed each and every count, but that the prosecutor gave a factual basis. A defendant's understanding of the plea is what controls since plea agreements should be interpreted in courts with what the defendant reasonably understood when he entered his plea, the issue of whether the trial court breached the plea agreement after accepting it is a question of law that is reviewed de novo by an appellate court and any ambiguity in the plea agreement should be construed against the state. *State v. Mares*, 118 N.M. 217, 880 P.2d 314 (Ct.App. 1994), reversed on other grounds, 119 N.M. 48, 888 P.2d 930 (1994). In fact, when a plea bargain is subsequently determined to be illegal or unauthorized, the general rule is that a defendant is entitled to withdraw his plea if the sentence contemplated by the plea bargain is subsequently determined to be illegal or unauthorized. See 87 ALR 4^{h}, 384. The child should have been allowed to withdraw his plea agreement in this case because it contemplated an illegal, invalid and improper sentence and was never entered into with proper acknowledgment of the maximum penalties he faced because all the lawyers in the courtroom were wrong.

The undersigned counsel is aware since he was one of the attorneys handling the ***Apprendi*** issues before the Supreme Court on Writs of Certiorari which the Supreme Court has recently quashed, that the Supreme Court has allowed the Court of Appeals' decisions regarding ***Apprendi*** to stand and has refused to rule on the ***Apprendi*** issues. However, in Joel Ira's case, the decision of the United States Supreme Court in ***Apprendi v. New Jersey*** , supra, indicates clearly the problems that one has when they are not entitled to a jury trial or proof beyond a reasonable doubt. This child never had a chance.

VI. PRAYER FOR RELIEF

There are those times and cases which cry out for someone, somewhere to correct a great injustice. The law can be extremely cruel when it is not tempered with human decency. Human decency demands we never, ever give up on a child.

The statements of the trial judge and the judges from the Court of Appeals indicate our present juvenile system provides no chance for Joel, thus condemning him to punishment a thousand times more severe than his crimes. We must not turn our heads from the reality of a child's life or a child's hell when confined forever in an adult prison.

He entered into a plea agreement invalid on its face, thinking he was going to get treatment in a system we are now told offers no hope, and at present, has been told he has no hope for a trial, no hope for a fair sentence, no hope for a system which will treat him. He is only sustained by one great last hope - that the Supreme Court of the State of New Mexico will hear him. On behalf of Joel, I respectfully request you issue the Writ.

Respectfully submitted,

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ATTORNEY FOR CHILD-
APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing to counsel of record, this 8th day of February, 2002.

Gary C. Mitchell

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number_____

Filing Date:_____

Docket No. 21,375

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

JOEL IRA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
Jerry H. Ritter, Jr., District Judge

Patricia A. Madrid
Attorney General
James O. Bell
Assistant Attorney General
Santa Fe, NM

for Appellee

Gary C. Mitchell
Gary C. Mitchell, P.C.
Ruidoso, NM

for Appellant

Exh A

OPINION

PICKARD, Judge.

(1) In this case, we are called upon to determine whether a 91½-year adult sentence imposed against the juvenile Defendant for brutally and repeatedly sexually abusing his younger stepsister over a two-year period is cruel and unusual punishment. Defendant also argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea. We hold that the sentence is constitutional and that the trial court did not err in refusing to allow the plea withdrawal. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

(2) This appeal arises from a series of sexual assaults and other violent attacks committed by Defendant, when he was fourteen and fifteen years old, mostly upon his stepsister, who is nearly six years younger than he is. The State charged Defendant with ten counts of first-degree criminal sexual penetration, one count of aggravated battery against a household member, one count of aggravated battery, one count of battery against a household member, and one count of intimidation of a witness. The State also filed notice of its intent to invoke adult sanctions.

(3) Under New Mexico's Children's Code, once the notice of intent to invoke adult sanctions is filed and the child is adjudged a youthful offender, the district court is given the discretion to impose either an adult sentence or juvenile disposition on the child. See NMSA 1978, § 32A-2-20(A) (1995). Prior to July 1, 1996, the definition of a youthful offender included a child, fifteen to eighteen years of age at

the time of the offense, who is adjudicated for committing at least one of a number of enumerated offenses, including aggravated battery and criminal sexual penetration. NMSA 1978, § 32A-2-3(I)(1) (1995). Effective July 1, 1996, the age range for youthful offender status was changed to cover juveniles fourteen to eighteen years of age at the time of the offense. NMSA 1978, § 32A-2-3(I)(1) (1996). If the court chooses to impose a juvenile disposition on an adjudicated youthful offender, the court may enter a judgment for the supervision, care, and rehabilitation of the child that may include an extended commitment until the child reaches the age of twenty-one. See NMSA 1978, § 32A-2-20(E) (1996); see also NMSA 1978, §§ 32A-2-19 (1996) & -23 (1995). To impose an adult sentence on an adjudicated youthful offender, the court must find that "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered." Section 32A-2-20(B). In making such findings the court is required to consider several factors, focusing on the seriousness of the offense and the likelihood of a reasonable rehabilitation of the child that would provide adequate protection of the public. Section 32A-2-20(C)(1)-(8).

(4) Following a plea hearing at which Defendant was advised that he could be sentenced as an adult on all charges for a maximum sentencing exposure of 185 years, Defendant entered into a plea and disposition agreement in which he agreed to plead no contest to all charges except for one count of battery against a household member (his father), which the State agreed to dismiss. Under the plea agreement, the district

court retained sentencing discretion, with the understanding that Defendant would argue for a juvenile disposition and the State would argue for adult sanctions.

(5) The district court held an extensive sentencing hearing to determine whether to sentence Defendant as a child or an adult. The court began by hearing about the nature and seriousness of Defendant's offenses through the testimony of Defendant's stepsister (the Victim). The Victim testified that Defendant came to live with her family during 1995, when she was eight years old and Defendant was fourteen years old. The Victim testified that Defendant was nice to her at first, but he soon began to sexually abuse her.

(6) The Victim recounted numerous instances of vaginal, oral, and anal sex that took place about every other day over the course of about two years. She also recalled times when Defendant forced her to swallow his urine and semen. The Victim described how Defendant's acts would sometimes cause her so much pain that she would stick her head into a pillow to scream, she would almost vomit at times, and she would bleed from her rectum. Defendant also had a method of signaling the Victim that another rape was about to occur; he would tap his fingers on the arm of his chair. In addition to the sexual abuse, Defendant physically abused the Victim on several occasions and frequently threatened to kill her if she ever told anyone about his actions. He once choked her to unconsciousness. The Victim also talked about Defendant's violent mistreatment of her dog and other creatures, and described how he liked to play with fire.

(7) The Victim also testified about the mental and emotional toll that she suffered

from the abuse. In particular, she indicated that her grades began to drop, she was diagnosed with Attention Deficit Disorder, and, after Defendant was finally arrested, she began to have nightmares about Defendant looking for her all over the world to kill her. In one nightmare, she stabs Defendant in the back when he finds her, and in another nightmare, Defendant finds her and stabs her to death.

(8) In an effort to assess Defendant's amenability to treatment and the threat that he posed to society, the court also received testimony from a number of mental health and juvenile justice professionals. Defendant's juvenile probation officer recounted Defendant's extensive history of prior delinquency referrals for other offenses, and he described the extent to which Defendant did or did not comply with prior rehabilitation efforts. The juvenile probation officer further noted that Defendant lacked remorse, feeling that he did not do anything wrong in this case. In light of the seriousness of Defendant's current offenses, the juvenile probation officer did not believe that Defendant was amenable to treatment in the juvenile justice system and strongly urged the court to impose an adult sentence, remarking that Defendant's case was the first time he had ever recommended adult sanctions for a juvenile offender.

(9) The court also heard testimony from the Director of Psychological Services at the New Mexico Boys' School. He opined that Defendant had a very low chance of rehabilitation and did not believe he would benefit from the treatment services offered at the Boys' School. Although the Boys' School does have a sex offender treatment program, Defendant is not the type of client the program treats because of his tendency toward combining sex with other violent, antisocial conduct. Because

Defendant was abused to some degree as a young child, had a history of hurting animals, had a fascination with fire, and exhibited violent sexual behavior, the director suggested that Defendant fit the profile of a serial offender and was of the opinion that New Mexico has no facilities to treat Defendant.

{10} The testimony received by the court from three other mental health experts who evaluated Defendant was remarkably consistent. One psychotherapist described Defendant as a pedophile who could not be successfully rehabilitated and would need a long-term institution. The other psychotherapist and clinical psychologist both diagnosed Defendant as having a severe conduct disorder, with tendencies towards violent sexual behavior and domination, that would require intensive, secured, long-term treatment. Perhaps most disturbing was their conclusion that Defendant is in effect a child without a conscience who lacks empathy or the ability to be concerned for others. All three experts noted that Defendant failed to show any remorse and refused to take responsibility for his actions. They also uniformly agreed that Defendant could not be treated successfully at the New Mexico Boys' School, and, that if sent there, he would surely re-offend upon release. To the extent that the experts believed Defendant might benefit from a long-term, intensive treatment program, the limited number of potentially available treatment programs were discussed and were generally deemed inadequate. However, even assuming that an adequate treatment program could be found, none of the experts could predict how long such treatment would take, nor could they give the court any degree of assurance that rehabilitation efforts would be successful.

(11) After considering the evidence presented at the sentencing hearing, the court issued a thoughtful and detailed explanation of its sentencing decision. Portions of that decision, which so clearly set forth the circumstances of this case and the dilemma faced by the court, are set forth below:

> In a day of extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy, this Court was told that [Defendant] is a child devoid of conscience and devoid of empathy for other human beings, most notably the victims of the heinous acts charged in this case. The experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that [Defendant] could defy the odds and become rehabilitated, and they found none. According to one, [Defendant] feels that he is not the problem here. The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if [Defendant] were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of success for [Defendant] anywhere in the country.
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> * * *
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> The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply.
>
> * * *

> Most compelling in this case is the expectation of the victims, particularly the eight-to-ten year old girl who was brutally and repeatedly raped and humiliated over a period of two years, that our system of justice will react in a way that recognizes the enormity of the terror and pain caused to her. Without years of effective counseling and therapy, it seems unimaginable that this little girl will grow up to be an emotionally healthy adult, with the opportunity for happiness in her adult relationships. What is the penalty that society should require for the near destruction of a life's potential?
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> * * *
>
> This Court would like to fashion a sentence that will guarantee, or even offer hope, that [Defendant] can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
>
> The Court would like to fashion a sentence that will assure [Defendant's] victims that he will not be a serious threat to them if released before he reaches an advanced age. There is no such sentence.
>
> This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

Consequently, after weighing against Defendant virtually every statutory factor that the court must consider when arriving at a disposition for a youthful offender, the district court found that Defendant was not amenable to treatment or qualified for commitment to an institution for the developmentally disabled or mentally incompetent. Accordingly, the court imposed consecutive adult sentences for six counts of first-degree criminal sexual penetration and concurrent adult sentences for the remainder of the counts, for a total sentence of 108 years.

(12) Shortly after entry of judgment and sentence, Defendant moved to invalidate the sentencing proceedings. Under the version of the Children's Code in effect when Defendant was fourteen years old, juveniles could only be sentenced as youthful offenders and subject to adult sanctions for offenses committed while age fifteen to eighteen. See § 32A-2-3(I)(1) (1995). Consequently, Defendant argued that the district court erred by imposing adult sentences for counts that were based on acts committed by Defendant while he was fourteen years old. For similar reasons, the State moved to modify the sentence so that Defendant was subject to adult sanctions only for those counts that were based on acts committed by Defendant while he was fifteen years old. Although five of the counts for first-degree criminal sexual penetration and two aggravated battery counts involved acts committed while Defendant was fourteen years old, the district court relied on State v. Montano, 120 N.M. 218, 900 P.2d 967 (Ct. App. 1995), to conclude that adult sanctions could be imposed for all counts since Defendant was fifteen years old when he committed some of the counts. Accordingly, the district court denied Defendant's motion to invalidate the sentencing proceedings and the State's motion to modify sentence.

(13) Defendant subsequently appealed to this Court arguing, among other things, that the trial court erred in sentencing Defendant as an adult for crimes committed before he was fifteen years old. In an unpublished, memorandum opinion, this Court rejected the district court's construction of Montano and concluded that the district court erred by imposing adult sanctions for acts committed by Defendant while he was fourteen years old. See State v. Joel I., Ct. App. No. 18,915 (Filed October 1,

1998). We therefore reversed Defendant's sentence and remanded for resentencing.

(14) On remand, the district court resentenced Defendant to six consecutive adult sentences for five counts of CSP I and one count of intimidation of a witness, each committed by Defendant while he was fifteen years old, for a total sentence of 91½ years. The district court imposed a juvenile disposition for the remainder of the counts, ordered the juvenile sentence to be served concurrently to the adult sentence, and committed Defendant to the custody of the New Mexico Department of Corrections for incarceration as an adult. Defendant moved for reconsideration of the sentence and submitted additional evidence to support his renewed request for a juvenile disposition on all charges. Nonetheless, the testimony continued to reflect the reality that it was unlikely Defendant could ever be successfully rehabilitated.

(15) In addition to arguing for juvenile sanctions, Defendant moved to set aside his plea agreement, arguing that the plea was based on an invalid plea agreement because it contemplated an illegal sentence. The district court rejected all of Defendant's arguments, leaving the 91½-year sentence in place. Defendant now appeals for a second time to this Court.

DISCUSSION

(16) Defendant does not argue that the district court abused its discretion, or lacked substantial evidence, to impose adult sanctions against him as a youthful offender. Rather, Defendant argues that his sentence of 91½ years constitutes cruel and unusual punishment. Defendant further argues that the district court abused its discretion in denying Defendant's motion to set aside his plea. We address each argument in turn.

Cruel and Unusual Punishment

(17) Whether a particular sentence amounts to cruel and unusual punishment raises a constitutional question of law that we review de novo on appeal. See State v. Rueda, 1999-NMCA-033, ¶ 5, 126 N.M. 738, 975 P.2d 351. However, because a cruel and unusual punishment challenge necessarily focuses on the factual circumstances of the particular case, we view the facts in the light most favorable to the district court's decision and defer to the district court on evidentiary matters of weight and credibility. See State v. Arrington, 120 N.M. 54, 55, 897 P.2d 241, 242 (Ct. App. 1995); State v. Arrington, 115 N.M. 559, 561-62, 855 P.2d 133, 135-36 (Ct. App. 1993). Although Defendant argues that his sentence constitutes cruel and unusual punishment under both our state and federal constitutions, he does not suggest that the protections afforded under our state constitution are any greater than those provided under the federal constitution. We, therefore, will proceed without regard for whether Defendant's challenge is brought under the state or federal constitution. See Rueda, 1999-NMCA-033, ¶ 8 (noting that federal and state provisions prohibiting cruel and unusual punishment are nearly identical).

(18) To determine whether a sentence amounts to cruel and unusual punishment we must consider "'[w]hether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness.'" In re Ernesto M., Jr., 1996-NMCA-039, ¶ 22, 121 N.M. 562, 915 P.2d 318 (quoting State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990)). In this regard, we begin by comparing

the gravity of the offense against the severity of the sentence to determine whether the punishment is grossly disproportionate to the offense. Rueda, 1996-NMCA-033, ¶ 12.

(19) As set forth above, the evidence presented at Defendant's sentencing hearing showed that Defendant repeatedly raped his younger stepsister over a two-year period, degrading and demeaning his young victim with a shocking number of humiliating and painful acts. In addition to the sexual abuse of his stepsister, Defendant repeatedly threatened her with death if she ever told on him. The evidence also showed that Defendant's actions exacted an emotional and psychological toll on his stepsister that is likely to affect her for the rest of her life. In spite of the horrendous and long-lasting nature of Defendant's acts, the evidence indicates that Defendant lacks remorse for his acts and is likely to commit similar acts in the future. In sum, when comparing the gravity of the offenses committed by Defendant to the sentence imposed by the court, we cannot say that Defendant's punishment is so grossly disproportionate as to shock the general conscience or violate principles of fundamental fairness. See In re Ernesto M., Jr., 1996-NMCA-039, ¶¶ 2, 23 (holding that 30-year adult sentence against juvenile, who admitted to raping and torturing victim, does not constitute cruel and unusual punishment).

(20) Without focusing on the gravity of his offenses, Defendant emphasizes that he was only fifteen years old at the time of the acts for which he was sentenced. To be sure, the decision to sentence a child as an adult is an extreme sanction that cannot be undertaken lightly. That said, however, the imposition of a lengthy, adult sentence

on a juvenile does not, in itself, amount to cruel and unusual punishment. See In re Ernesto M., Jr., 1996-NMCA-039, ¶¶ 2, 22-23. While In re Ernesto M., Jr. involved a sentence that was considerably less than the sentence imposed in this case, sentences comparable to Defendant's have been imposed against juveniles around the country and have repeatedly withstood cruel and unusual punishment challenges. See, e.g., State v. Green, 502 S.E.2d 819, 827-34 (N.C. 1998) (holding that mandatory life sentence for thirteen-year-old convicted of a first-degree sexual offense does not constitute cruel and unusual punishment); Rodriguez v. Peters, 63 F.3d 546, 566-68 (7th Cir. 1995) (holding that it was not cruel and unusual punishment to sentence defendant, who was fifteen years old when he committed the murders, to life in prison without parole); People v. Moya, 899 P.2d 212, 219-20 (Colo. Ct. App. 1994) (holding that there is no cruel and unusual punishment violation for sentencing juvenile defendant, convicted of robbery and murder, to life imprisonment with the possibility of parole after 40 years); Brennan v. State, 754 So. 2d 1, 5, 11 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old defendant convicted of murder but reducing sentence to life imprisonment without a possibility of parole); State v. Shanahan, 994 P.2d 1059, 1061 n.1, 1062-63 (Idaho Ct. App. 1999) (holding that fifteen-year-old defendant's life sentence for murder did not constitute cruel and unusual punishment); State v. Mitchell, 577 N.W.2d 481, 488-91 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder is not cruel and unusual punishment); State v. Jensen, 579 N.W.2d 613, 614, 623-25 (S.D. 1998) (holding that life imprisonment

without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual punishment); Jackson v. Commonwealth, 499 S.E.2d 538, 554-55 (Va. 1998) (holding that imposition of death penalty upon sixteen-year-old convicted of capital murder is not cruel and unusual punishment).

(21) Although an overwhelming number of states have rejected cruel and unusual punishment challenges to adult sentences imposed on juvenile offenders, Defendant relies on Workman v. Commonwealth, 429 S.W.2d 374, 377-78 (Ky. 1968), as support for his contention that the sentence in this case is unconstitutional. In Workman, the Kentucky Court of Appeals held that a mandatory sentence of life without possibility of parole imposed on a fourteen-year-old defendant convicted of first-degree sexual offenses amounted to cruel and unusual punishment under the Kentucky State Constitution. Id. However, Workman is distinguishable for several reasons. First, Workman involved a life sentence without the possibility of parole. In contrast, Defendant was not given a life sentence in this case, and he does have the possibility of parole in this case, even though that possibility will not ripen for a very long time. Second, the defendant in Workman was fourteen years old at the time of the offense, while in this case adult sanctions were only imposed for offenses committed while Defendant was fifteen years old. Third, in Workman, the juvenile defendant committed a limited number of offenses during one attack on an elderly woman. Conversely, in this case Defendant committed multiple offenses against a very young child over the course of two years. Fourth, the opinion in Workman suggests that there was little, if any, evidence of record concerning the juvenile

defendant's amenability to treatment. The opposite is true in this case in light of the substantial evidence in this case suggesting that Defendant is not amenable to treatment. And finally, the decision in Workman must be viewed within the context of circumstances as they existed over 30 years ago. In view of the qualitative differences in juvenile crime in today's society, we question the continued vitality of the Workman decision in light of contemporary standards and concerns. See Green, 502 S.E.2d at 831 (recognizing "the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system"). In short, we find no basis for relying on Workman to conclude that the sentence imposed against Defendant in this case constitutes cruel and unusual punishment.

(22) To the extent that we must consider the gravity of Defendant's offenses and the severity of his punishment within the context of contemporary standards of elemental decency, see In re Ernesto M., Jr., 1996-NMCA-039, ¶ 22, Defendant implies that during the sentencing process the district court acted contrary to developing concepts of elemental decency. In particular, Defendant asserts that the district court ignored the possibility of juvenile treatment alternatives despite the existence of treatment programs and facilities throughout the country. However, Defendant's argument ignores the actual state of the record below. The expert testimony presented below was virtually unanimous in concluding that there were simply no programs or treatments available anywhere that could address the psychological and emotional problems that make Defendant a continuing danger to

society. And while some of the experts may have held out a faint hope that rehabilitation might be possible if Defendant's treatment were intensive enough and prolonged enough, it is undisputed in the record below that no expert could give the court any reasonable degree of assurance that Defendant could be successfully rehabilitated by the time Defendant reached the age of twenty-one, which is the point at which the court would have lost jurisdiction over Defendant had he been sentenced as a juvenile.

(23) Defendant also makes vague allegations that the district court's failure to provide Defendant with treatment alternatives was the result of a legislative unwillingness to fund adequate treatment alternatives for individuals like Defendant. Our review of the record reveals no indication that the district court's decision to forego treatment alternatives was the result of financial constraints. To the contrary, the district court's decision reflected a desire to pursue rehabilitation, but a grim realization that an attempt at rehabilitation would not be possible in this case without creating an unreasonable risk to the safety of Victim and the public at large because medicine and psychology have yet to develop reliable methods for rehabilitating individuals like Defendant.

(24) Defendant also submits an alternate basis for finding that his sentence amounts to cruel and unusual punishment, arguing that his sentence is unconstitutional because it goes beyond what is necessary to achieve the aim of public intent expressed by the legislature in the New Mexico Children's Code. See Workman, 429 S.W.2d at 378 (citing Weems v. United States, 217 U.S. 349 (1910), and Robinson v. California, 370

U.S. 660 (1962)). In this regard, Defendant seems to believe that the court's sentence was intended to exact retribution rather than encourage rehabilitation. Even if that were true, we question Defendant's assumption that a retributive sentence is somehow inconsistent with the sentencing of a juvenile as an adult. But in any event, the record simply does not support Defendant's assertion that the district court was interested in retribution to the exclusion of other considerations such as rehabilitation and protection of the public. Although Defendant's sentence is very long, the district court went to great lengths to explain that the sentence was intended as a means for protecting the public from Defendant in the face of a considerable amount of testimony demonstrating that Defendant was not amendable to current treatment methods and, as a result, would remain a threat to society. In short, we find no basis for agreeing with Defendant's contention that the district court's sentence was motivated by intentions inconsistent with contemporary standards of elemental decency or even with the legislative intent behind the Children's Code.

(25) Although we find no basis for concluding that the district court imposed an unconstitutional sentence, we cannot ignore the apparent gap in our current statutory structure for sentencing children as adults that was brought into relief by the circumstances of this case. The district court was ultimately presented with the task of fashioning a sentence that would recognize the gravity of the Defendant's offenses, and the threat that he poses to society, without ignoring the possibility for rehabilitation. But as the district court noted in its thoughtful decision, the limited jurisdiction it has over offenders sentenced as juveniles is simply inadequate when the

juvenile offender is extremely dangerous and in need of intensive treatment that, if there is any hope of rehabilitation, must extend well beyond the time that our current statutory scheme gives our courts to rehabilitate juvenile offenders.

(26) After New Mexico's Children's Code was significantly revised in 1993, our state was recognized for its innovative response to the national movement to address what was perceived as an epidemic of violent juvenile criminals. See Lisa A. Cintron, Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court, 90 Nw. U. L. Rev. 1254, 1277-82 (1996). Around the country, many states responded to violent juvenile crime with legislative initiatives that automatically transferred violent juvenile offenders to adult courts, or gave prosecutors unfettered discretion to transfer juvenile offenders into adult court, where they would be tried and sentenced as adults without regard to the individual circumstances of each child and his or her potential for rehabilitation. See Patricia Torbet, et al., State Responses to Serious and Violent Juvenile Crime, pp. 3-4, Washington DC: Office of Juvenile Justice and Delinquency Prevention (1996). Other states responded with what are known as blended sentencing schemes that give a sentencing court the discretion to impose a juvenile disposition or an adult sentence, or both, depending on the individual circumstances of each case. Id. at p. 12. New Mexico took the unique approach of providing for the trial of almost all juveniles in children's court, while still allowing the children's court to decide whether an adjudicated youthful offender should be sentenced as a juvenile or an adult. Id. at p. 12, see also Patricia Torbet, et al., Juveniles Facing Criminal Sanctions: Three States that Changed the Rules,

Washington DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (2000).

(27) Despite New Mexico's innovative approach to juvenile crime, the circumstances of this case reveal an inadequacy in our juvenile justice sentencing scheme. As noted above, when a youthful offender is sentenced as a child, the court's power over the child must end when the child reaches the age of twenty one. However, in some instances, successful rehabilitation would require a longer commitment to the rehabilitative resources of the juvenile justice system. And unfortunately, in some cases, despite providing the best treatment options available, rehabilitation will prove impossible. Because of these very real possibilities and the obligation that every sentencing court also has to protecting public safety, many courts, like the court in this case, will opt for a longer term of adult incarceration for a juvenile offender instead of risking a short-term, unsuccessful juvenile detention that would result in the premature release of a dangerous offender.

(28) The district court's dilemma in this case is not an isolated phenomenon. Indeed, a number of commentators have written extensively on the shortcomings inherent in a juvenile justice system that focuses on harsher punishment as the primary means of protecting the public from violent juvenile offenders. For example, serious doubts exist concerning the extent to which a "get tough" approach is truly effective in protecting the public from future violent crime. See Shannon F. McLatchey, Note, Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach, 10 U. Fla. J.L. & Pub. Pol'y 401, 414-16 (1999); Donna M. Bishop, Lonn

Lanza-Kaduce, & Charles E. Frazier, Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms, 10 U. Fla. J.L. & Pub. Pol'y 129, 142-46 (1998). To the extent that the movement toward the increased sentencing of juveniles as adults is an implicit recognition that violent juvenile offenders are just like adults, there is increasing evidence that many violent juvenile offenders currently sentenced as adults are in fact psychologically different from adults and, as such, are worthy of different treatment. See Eric K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice, 35 Am. Crim. L. Rev. 371, 406-09 (1998); Elizabeth S. Scott & Thomas Grisso, Symposium on the Future of the Juvenile Court: The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. Crim. L. & Criminology 137, 154-89 (1997). Similarly, valid concerns exist regarding the extent to which the juvenile justice system may be relying too heavily on psychological experts to predict a child's amenability to treatment and future dangerousness. See Catherine R. Guttman, Note, Listen to the Children: The Decision to Transfer Juveniles to Adult Court, 30 Harv. C.R.-C.L. L. Rev. 507, 538-40 (1995).

(29) Given the complexities involved in effectively dealing with violent juvenile offenders, it is easy to understand why the district court wanted an alternative that did not exist within New Mexico's current juvenile sentencing structure. While it would be unrealistic to expect a legislative solution that would completely eliminate all of the doubt and apprehension that accompanies the decision to sentence a child as an adult, a number of states around the country have enacted blended sentencing

alternatives that do give the sentencing judge the option of pursuing a juvenile, rehabilitative approach in marginal cases without sacrificing the ability to impose a long-term, adult incarceration if rehabilitation attempts prove futile. These are described in Shari Del Carlo, Comment, Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!, 75 Or. L. Rev. 1223, 1246-48 (1996) [hereinafter Del Carlo]. See also State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

(30) For example, in Texas the juvenile court is given the authority to impose lengthy, determinate sentences on juveniles for certain enumerated offenses. While the defendant is a juvenile, he remains confined in a youth facility focused on rehabilitative efforts. When the juvenile offender reaches the age of eighteen, the juvenile court is empowered to evaluate the juvenile's rehabilitative progress. At that point, the juvenile court can either continue to confine the offender in a juvenile facility for further rehabilitation efforts until the offender reaches the age of twenty one, or commit the offender to an adult prison to serve the remainder of his sentence if rehabilitation efforts are proving unsuccessful. See Del Carlo, supra, at 1246-48. Other states like Massachusetts, Rhode Island, and Colorado have similar sentencing procedures. See State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

(31) Another example of an innovative, flexible sentencing scheme exists in Minnesota. In that state, the juvenile court can simultaneously impose a juvenile disposition and an adult sentence for certain offenses. The adult sentence is stayed on the condition that the juvenile offender complies with the provisions of his juvenile

disposition. If the juvenile does violate the conditions of his juvenile disposition or commits a new offense, the juvenile court can execute the adult sentence. But if the offender does successfully complete his juvenile disposition, he is released at the age of twenty one and the adult sentence is removed. See Del Carlo, supra, at 1246-48. States such as Connecticut and Montana follow similar procedures. See State Responses to Serious and Violent Juvenile Crime, at pp. 12-14.

(32) These are some of the options that could fill the gap that cases such as this one expose in our system and that could eliminate the dilemma faced by the court below. Additionally, we note that some states have extended the jurisdiction of the juvenile court to age twenty five. See State Responses to Serious and Violent Juvenile Crime, at pp. 15. Despite the advisability of considering whether other states have adopted better ways of dealing with violent juvenile offenders, the decision to move toward such alternatives is fundamentally a policy-based decision for our Legislature. See Green, 502 S.E.2d at 829 ("'We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. . . . In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'") (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976) (internal quotation marks and citation omitted)). While we do not intend to suggest that the failure to provide such sentencing alternatives amounts to an unconstitutional sentencing scheme, we would be remiss if we did not urge our legislature to consider some of the flexible sentencing alternatives summarized above.

Withdrawal of Guilty Plea

(33) Aside from challenging the constitutionality of his sentence, Defendant also attacks the district court's refusal to set aside his guilty plea. Defendant argues that he should be allowed to withdraw his guilty plea because it is an illegal plea that was tainted by ineffective assistance of counsel. Based on the record before us, we cannot say that the district court abused its discretion in refusing to set aside Defendant's plea. See State v. Jonathan B., 1998-NMSC-003, ¶ 7, 124 N.M. 620, 954 P.2d 52 (stating that refusal to allow withdrawal of guilty plea is reviewed for an abuse of discretion).

(34) Defendant's attack on the validity of his guilty plea relies heavily on the fact that, at the time of the plea, everyone concerned, including defense counsel and the district court, misconstrued the applicable law and misunderstood the potential maximum sentence faced by Defendant. As noted above, in a prior appeal we reversed Defendant's first sentence because the district court incorrectly sentenced Defendant as an adult for crimes committed prior to July 1, 1996, while Defendant was still fourteen years old. Defendant argues that the validity of his plea should be viewed with some skepticism because the person charged with advising him on whether to plead guilty was unaware of the applicable law. Likewise, Defendant is critical of the district court's efforts to ensure that Defendant's plea was knowing, voluntary, and intelligent given that the district court was also mistaken as to the applicable law. Nevertheless, based on the arguments advanced by Defendant on appeal, we see no basis in this record for requiring that Defendant be allowed to

withdraw his plea.

(35) We disagree with Defendant's suggestion that his plea was invalid because he did not know the correct maximum penalty that he faced at the time of his plea. A criminal defendant should only be allowed to withdraw his plea when he is not adequately notified of the material consequences of the plea and such information is relevant to the decision to enter into the plea in the first place. See State v. Lozano, 1996-NMCA-075, ¶ 18, 122 N.M. 120, 921 P.2d 316. Although Defendant was misinformed that he could be sentenced as an adult for all of the charges to which he pled guilty, the incorrect information that Defendant received did not render his plea invalid because Defendant was actually advised that he could be sentenced to a longer term of adult incarceration than he actually faced or ultimately received. See Jonathan B., 1998-NMSC-003, ¶ 17 (holding that failure to accurately advise defendant of potential penalties does not render plea involuntary and unknowing if defendant suffers no prejudice by receiving sentence less than maximum possible sentence represented by the State or the court).

(36) Defendant also asserts that his plea is invalid on its face because it contemplates an illegal sentence, and as such, should not be allowed to stand. Without deciding whether a plea that contemplates an illegal sentence must be set aside, we simply note that the actual text of Defendant's plea and disposition agreement did not mandate entry of any particular sentence, much less an illegal sentence. Indeed, by his plea and disposition agreement, Defendant simply agreed to plead guilty to most of the charges against him in exchange for the State's

agreement to dismiss one of the charges. Sentencing discretion was left with the court, and the plea agreement specifically stated that Defendant would argue for a juvenile disposition and the State would argue for adult sanctions. In short, the record does not support Defendant's contention that the plea, on its face, contemplated an illegal sentence.

(37) Although the plea agreement itself may not have provided for an illegal sentence, we are not unmindful of the fact that Defendant's attorney misunderstood the applicable law at the time that he advised Defendant to plead guilty. Because Defendant's trial attorney failed to identify the applicable law, and consequently failed to accurately advise Defendant of the true maximum sentence he faced, Defendant argues the district court should have set aside his plea as the product of ineffective assistance of counsel. The State suggests that Defendant should not be allowed to withdraw his plea because this Court did not permit Defendant to withdraw his plea following his first appeal. While we rejected Defendant's claim of ineffective assistance of counsel raised in his first appeal, we did so because there was no evidentiary record to show that Defendant would have entered a different plea had counsel been aware of the correct law at the time of the plea. Accordingly, we concluded that Defendant had failed to establish a prima facie case of ineffective assistance of counsel. See State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992). But since we remanded Defendant's case for resentencing as a result of his first appeal, Defendant was able to develop a limited evidentiary record to support his claim of ineffective assistance of counsel. As such, Defendant is not

precluded from reasserting his claim of ineffective assistance of counsel to the extent that it is supported by the record developed on remand during his motion to set aside the plea.

(38) "Effective assistance of counsel is necessary during plea negotiations because the most important decision for a defendant in a criminal case is generally whether to contest a charge or enter into a plea agreement." Patterson v. LeMaster, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032. Patterson also noted that "'[i]n the plea bargain context a defendant must establish that his counsel's performance was objectively unreasonable and that but for counsel's errors, he would not have pleaded guilty and instead gone to trial.'" Id., ¶ 18 (quoting United States v. Martinez, 169 F.3d 1049, 1052-53 (7th Cir. 1999)). In this regard, "[t]he question is whether 'there is a reasonable probability' that the defendant would have gone to trial instead of pleading guilty or no contest had counsel not acted unreasonably." Patterson, 2001-NMSC-013, ¶ 18.

(39) Within the context of this case, we have little trouble concluding that the performance of Defendant's trial attorney was objectively unreasonable given that his trial attorney testified at the hearing on the motion to set aside the plea that he was unaware of the applicable law at the time that he advised Defendant to plead guilty. See In re Neal, 2001-NMSC-007, ¶ 21, 130 N.M. 139, 20 P.3d 121 ("No lawyer should approach any task without knowledge of the applicable statutes, court rules, and case law . . . ."). But even though defense counsel's performance may have been objectively unreasonable, Defendant must still demonstrate a reasonable probability

that he would have gone to trial instead of pleading guilty had his attorney not acted unreasonably. With that standard in mind, the district court could reasonably have found that Defendant would not have decided to go to trial even had his attorney properly advised him of the actual sentence that he faced.

(40) Defendant's trial attorney testified that he would have never counseled Defendant to plead to an illegal sentence had he known what the law was at the time of the plea. Even though that testimony was uncontradicted, we do not believe the district court abused its discretion in rejecting trial counsel's testimony given that the plea itself did not agree to an illegal sentence. Moreover, Defendant's trial attorney testified that he originally decided to counsel a plea to virtually all of the charges because he believed Defendant had a good chance of receiving a juvenile disposition by establishing his amenability to treatment. As such, the trial court could have discounted trial counsel's claim that he would have advised Defendant to go to trial had he known the true state of the law.

(41) We should also note that during the course of the hearing on Defendant's motion to set aside the plea, the district court appeared suspicious of the claim that Defendant would not have pleaded guilty had he known that he only could be sentenced as an adult on six counts instead of thirteen. The district court remarked that it seemed illogical for Defendant to contend that he would not have pleaded guilty had he known he was facing a maximum sentence of 91½ years even though he actually did plead no contest when he thought he was facing a sentence of 185 years. In the face of this apparent contradiction, trial counsel suggested that he might

have considered going to trial on fewer charges because he had thought he could successfully defend against some of the charges. Despite defense counsel's claim, he did not specify the substance of such a defense and did not indicate to which charges he would have had defenses. In light of this underdeveloped state of the record, we cannot say that the district court abused its discretion by refusing to set aside the plea for ineffective assistance of counsel. And given the lack of a record with regard to this aspect of Defendant's ineffective assistance of counsel claim, we do not believe that Defendant has established a prima facie case of ineffective assistance of counsel that would warrant a remand to further develop the record on this point. See Swavola, 114 N.M. at 475, 840 P.2d at 1241.

CONCLUSION

{42} We affirm the judgment and sentence.

{43} **IT IS SO ORDERED.**

LYNN PICKARD, Judge

I CONCUR:

CELIA FOY CASTILLO, Judge

RICHARD C. BOSSON, Chief Judge (specially concurring)

BOSSON, Chief Judge (specially concurring).

(44) Although the law weighs in favor of affirming Joel's sentence, I have substantial concerns regarding a system that imposes long term, adult sentences on children without affording judges the tools necessary to make sound, informed decisions.

(45) According to the record, the earliest Joel can expect to be considered for parole is after serving a sentence of forty-five years. For one so young, this is effectively a life sentence. One who goes into prison a teenager and comes out a man at the age of retirement has forfeited most of his life.

(46) A sentence of ninety years, for acts committed while Joel was fourteen and fifteen years old, is likely one of the longest sentences ever imposed on one so young in the modern history of this state. See State v. Gonzales, 2001-NMCA-025, ¶ 5, 130 N.M. 341, 24 P.3d 776 (affirming twenty-two-year adult sentence where the defendant pleaded guilty to second degree murder, aggravated burglary, aggravated battery, and two counts of aggravated assault); In re Ernesto M., 1996-NMCA-039, ¶¶ 1-2, 121 N.M. 562, 915 P.2d 318 (Ct. App. 1996) (affirming thirty year adult sentence for seventeen year old, who had raped, beaten, and kidnapped a convenience store clerk). And this was not even a murder case. If Joel had eventually killed his victim, perhaps to protect himself from prosecution for his other crimes, he could have received a life sentence as an adult, but would have become eligible for parole after a "mere" thirty years. Thus, although Joel commits crimes

which, however gruesome, are less than first degree murder, he receives a sentence that is effectively fifty percent longer. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (stating that rape, although a serious crime, does not compare with the unjustified taking of a human life and is to be treated differently than murder in conducting a proportionality analysis).

(48) The problem with this sentence lies not just with the number of years, but more importantly with the process that seemingly made this sentence inevitable. As I read the record below, it was as much the lack of sentencing alternatives, as the particular merits of Joel's circumstances, that compelled this sentence. The Children's court judge was put in a classic dilemma. If he wanted to afford Joel a reasonable chance to redeem himself, the judge had to put society at risk. If the judge sentenced Joel as a juvenile, Joel would go free at age twenty-one, regardless of whether or not he proved to be truly amenable to rehabilitation. If, on the other hand, the judge wanted to maximize the protection of society, the judge had to assume the worst—that Joel was not amenable to treatment and rehabilitation as a juvenile—and sentence him then, and forevermore, as an adult. Although, in a technical sense, the court could choose its sentence, the harsh reality of our flawed system made it a Hobson's choice. The court essentially had no choice but to protect society at the expense of the child.

(49) The judge was not insensitive to this dilemma. At the final sentencing hearing, the

court characterized its role as that of "a judge searching for options." Yet, he recognized the effective lack of any such options, thanks to the faulty amenability process. The judge emphasized the need for "a system that would allow us to experiment and protect the community at the same time," a decision that the court "dearly wish[ed he] could make . . . in this case." Instead, the judge had "to make a prediction [now] . . . as the only decision I'll get a chance to make." Forcing the judge to make that decision now meant that, in order to protect society, he had no choice but to sentence Joel as an adult and, in the court's own words (concurring in defense counsel's characterization), "throw away the child." The court was brutally frank in its reasoning. The sentence was ninety years so that, even with the possibility of meritorious time reductions and parole eligibility, Joel will not leave prison until he is at an age when, biologically speaking, he will be too old a man to pose a serious threat of re-offending. The court regretfully concluded, "I take no joy at all in finding that [this] is the only option I have."

(50) I enthusiastically join that portion of the majority opinion that calls for improvements in the Children's Code. Children's court judges need more flexible tools in order to adequately address the unique problems presented by youthful offenders. Judges need the power to sentence juveniles conditionally, first as juveniles and later as adults, depending upon whether subsequent review indicates that adult sentencing is warranted. With conditional sentencing, courts could take advantage of the therapeutic and

rehabilitative services that are uniquely available for juveniles, and would have the opportunity to observe how a child actually performs until turning twenty-one. When the juvenile became of age, the judge would have a record of performance upon which to base a more informed, predictive decision about the probability for success versus the risk to society. Conditional sentencing affords the juvenile one last opportunity for redemption, while retaining institutional control over the juvenile for the protection of society; this seems to be a win-win proposition.

{51} New Mexico, unfortunately, does not have such a system in place. Instead, we ask the impossible of our Children's court. We expect judges to make life-long, predictive decisions, without the possibility of later review, about the kind of adults these juveniles will turn out to be, twenty, thirty, and forty years into the future. We do not, however, equip our judges with adequate and timely information to make such decisions as informed as they could be.

{52} We demand that judges determine, now, whether a child is "amenable to treatment or rehabilitation as a child in available facilities," pursuant to NMSA 1978, Section 32A-2-20(B)(1) (1996). We do not, however, afford judges the opportunity to experiment, under controlled conditions, to see how a child actually responds to treatment. Thus, the amenability determination is fraught with risk and, as a practical matter, forces judges to err on the side of caution in making amenability decisions. A lot rides on the wisdom of

these amenability decisions. In the interest of protecting society, judges have to assume the worst about a juvenile, which can translate into a lengthy adult sentence on the chance that a juvenile may re-offend. And let us not forget that, under the present system, sixteen-year-old boys, once they are deemed not "amenable" to rehabilitation in juvenile facilities, serve lengthy adult sentences in the company of full-grown and very dangerous men. See generally Martin Forst, Jeffrey Fagan & T. Scott Vivona, Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, 40 Juv. & Fam. Ct. J. 1, 9 (1989) (stating that juveniles in adult prisons are particularly vulnerable to being made victims).

(53) Thus, in my mind, the process that compelled this ninety-year sentence is what makes its severity in this case so suspect. Cf. Hicks v. Oklahoma, 447 U.S. 343, 343 (1980) (holding that it violates due process of law for a convicted state prisoner to be sentenced under a mandatory punishment statute where, under state law, he was entitled to the benefit of a discretionary state sentencing statute); Willeford v. Estelle, 637 F.2d 271, 272 (5th Cir. 1981) (remanding for post-conviction relief where defendant, under state law, should have been entitled to an exercise of discretion in sentencing by the trial judge, who had erroneously believed that he was statutorily bound to impose a sentence of life imprisonment). It is not that the punishment does not fit the crime in the abstract. It is that the punishment exceeds the crime in the particular context of compelling a judge to act out

of fear; to impose upon a child the worst possible sentence, instead of a sentence based upon what the court felt the child truly deserved. "The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal." Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting, joined by Brennan, Marshall, & Stevens, JJ.) (emphasis added).

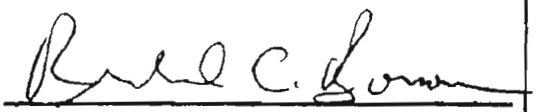
(54) Defendant's status as a juvenile makes this flawed process all the more suspect in a constitutional sense. It is generally a tenet of constitutional law that children merit special consideration in assessing whether a punishment is cruel and usual under the Constitution. See, e.g., Thompson v. Oklahoma, 487 U.S. 815-16, 838 (1988) (holding that it constitutes cruel and unusual punishment to sentence a fifteen- year-old to death, and stating that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult"). Youthfulness goes into assessing the overall culpability of a defendant, which, in turn, is a factor in evaluating the proportionality of a punishment vis a vis a particular crime committed by a particular youthful offender. See Eddings v. Oklahoma, 455 U.S. 104, 115 n.11, 116 (1982) (noting that the age of a minor is a "relevant mitigating factor of great weight" in death penalty cases, and noting that "adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. . . [and] deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms

than adults" (internal quotation marks and citation omitted)). What might be proportional for an adult is not necessarily proportional for a child. See generally Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 723 (1998) (arguing that the age of a juvenile should serve as a trigger for a heightened proportionality analysis, taking into account the background and traits of a young offender in the determination of criminal culpability).

(55) The Children's Code, unlike adult sentencing codes, requires us first to consider whether the defendant is amenable to rehabilitation; this is because, constitutionally speaking, kids are different. "[O]ur courts are especially solicitous of the rights of juveniles." State v. Hunter, 2001-NMCA-078, ¶ 12, ___ N.M. ___, 33 P.3d 296. The Children's Code balances the needs of the child with the needs of society in ways that the adult criminal code and its courts do not. See NMSA 1978, § 32A-1-3(A) (1999) (stating that the purpose of the Children's Code is to make the child's health and safety "the paramount concern"); § 32A-2-20(D) (providing that, even where a child is sentenced as an adult, such a sentence may be "less than, but shall not exceed, the mandatory adult sentence"); State v. Javier M., 2001-NMSC-030, ¶¶ 25, 33, 39, ___ N.M. ___, 33 P.3d 1 (concluding that the legislature intended to provide children with greater constitutional protections during investigatory detention than that afforded to adults); In re Francesca L., 2000-NMCA-019, ¶¶ 8-9, 12-13, 128 N.M. 673, 997 P.2d 147 (affirming suppression of

statements where it was unclear if juvenile had voluntarily waived rights, and noting that the legislature intended children to be treated differently and afforded more protection). Under our law, not all youthful offenders are sentenced as adults, but only those "not amenable to treatment or rehabilitation as a child in available facilities." Section 32A-2-20(B)(1). Before requiring judges to make a decision of such consequence, we owe it to the court, to the victim, to the juvenile, and to society as a whole, to inform these decisions as much as practicable. Conditional sentencing, subject to later review, would make those decisions infinitely more informed than our present system.

(57) Regrettably, I must concur in affirming Joel's sentence, because existing constitutional authority gives me no choice. It ought to be different, and if it were in my power, I would elect to make it different. Suffice it to say that I concur with grave reservations about the lack of alternatives that make this sentence inevitable.



RICHARD C. BOSSON, Chief Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ENTERED

No. 21375

COURT OF APPEALS OF NEW MEXICO
FILED
APR 2 9 2002

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

Otero County
JR-95-143

JOEL IRA,

Defendant-Appellant.

RECEIVED MAY 0 1 2002

MANDATE TO DISTRICT COURT CLERK
(Applicable items are indicated by an "X" below.)

1. _x_ Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. _x_ This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. ___ Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision/order attached hereto.

4. _x_ You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. ___ District Court Clerk's Record returned herewith:
___tapes; ___transcript; ___depositions; ___ other

6. ____ Exhibits filed herein shall be:
_____picked up at this Clerk's Office forthwith.
_____ returned by this Clerk's Office.

7. ___ Costs bill is assessed as follows:

8. ___ Attorney fees on appeal are granted as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this _____ day of _____, 2002.

(SEAL)

Clerk of the Court of Appeals of the State of New Mexico

cc: Counsel w/out attachments

ATTEST: A true copy
Clerk of the Court of Appeals
of the State of New Mexico
BY: E. Montoya

THE SUPREME COURT OF THE STATE OF NEW MEXICO
April 4, 2002

NO. 27,355

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

JOEL I., a child,

Defendant-Petitioner.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Patricio M. Serna, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeal number **21375.**

IT IS SO ORDERED.

WITNESS, The Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of April, 2002.

(S E A L)

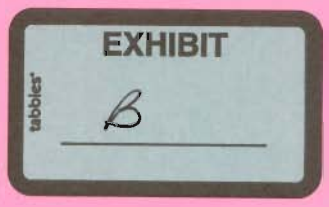
Madeline Garcia

Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY

Madeline Garcia

Clerk of the Supreme Court
of the State of New Mexico



EXHIBIT
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STATE OF NEW MEXICO
COUNTY OF OTERO
TWELFTH JUDICIAL DISTRICT COURT

2015 FEB -5 PM 2:55

STATE OF NEW MEXICO,

Plaintiff,

COPY

vs.

JOEL IRA,

Defendant,

No. D-1215-JR-199500142
Judge Jerry H. Ritter, Jr.

STATE'S RESPONSE TO
PETITION FOR HABEAS CORPUS

COMES NOW the State of New Mexico, by and through its Deputy District Attorney, James A. Dickens, respectfully requests that the Court deny Defendant's Petition for Habeas Corpus, and toward that result would inform the Court of the following facts and law:

FACTUAL AND PROCEDURAL BACKGROUND

This Habeas Petition arises from a series of sexual assaults and other violent attacks committed by Defendant Joel Ira, when he was fourteen and fifteen years old, upon his stepsister, who was six years younger.[1] The State charged Defendant with ten counts of first-degree Criminal Sexual Penetration, one count of Aggravated Battery Against a Household Member,

[1] *The Factual and Procedural Background* is largely copied from **State v. Ira**, 2002-NMCA-037, ¶¶ 1-15, 132 N.M. 8, 10-14, 43 P.3d 359, 361-65.

one count of Aggravated Battery, one count of Battery Against a Household Member, and one count of Bribery or Intimidation of a Witness. The State filed notice of its intent to invoke adult sanctions.

Following a plea hearing at which Defendant was advised that he could be sentenced as an adult on all charges for a maximum sentencing exposure of 185 years, Defendant entered into a plea and disposition agreement in which he agreed to plead no contest to all charges except for one count of Battery Against a Household Member, which the State dismissed. Under the plea agreement, the District Court retained sentencing discretion, with the understanding that Defendant would argue for a juvenile disposition and the State would argue for adult sanctions. The district court held an extensive hearing to determine whether to sentence Defendant as a child or an adult. The court began by hearing about the nature and seriousness of Defendant's offenses through the testimony of Defendant's stepsister (the Victim). The Victim testified that Defendant came to live with her family during 1995, when she was eight years old and Defendant was fourteen years old. The Victim testified that Defendant was nice to her at first, but he soon began to sexually abuse her.

The Victim recounted numerous instances of vaginal, oral, and anal sex that took place about every other day over the course of about two years. She also recalled times when Defendant forced her to swallow his urine and semen. The Victim described how Defendant's acts would sometimes cause her so much pain that she would stick her head into a pillow to scream, she would almost vomit at times, and she would bleed from her rectum. Defendant also had a method of signaling the Victim that another rape was about to occur; he would tap his

fingers on the arm of his chair. In addition to the sexual abuse, Defendant physically abused the Victim on several occasions and frequently threatened to kill her if she ever told anyone about his actions. He once choked her to unconsciousness. The Victim also talked about Defendant's violent mistreatment of her dog and other creatures[2], and described how he liked to play with fire.

The Victim also testified about the mental and emotional toll that she suffered from the abuse. In particular, she indicated that her grades began to drop, she was diagnosed with Attention Deficit Disorder, and, after Defendant was finally arrested, she began to have nightmares about Defendant looking for her all over the world to kill her. In one nightmare, she stabs Defendant in the back when he finds her, and in another nightmare, Defendant finds her and stabs her to death.

In an effort to assess Defendant's amenability to treatment and the threat that he posed to society, the district court also received testimony from a number of mental health and juvenile justice professionals. Defendant's juvenile probation officer recounted Defendant's extensive history of prior delinquency referrals for other offenses, and he described the extent to which Defendant did or did not comply with prior rehabilitation efforts. The juvenile probation officer further noted that Defendant lacked remorse, feeling that he did not do anything wrong in this case. In light of the seriousness of Defendant's current offenses, the juvenile probation officer did not believe that Defendant was amenable to treatment in the juvenile justice system and strongly urged the court to impose an adult sentence, remarking that Defendant's case was the first time he had ever recommended adult sanctions for a juvenile offender.

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[2] The most dramatic was lighting-off a firecracker inside a pet lizard.

The court also heard testimony from the Director of Psychological Services at the New Mexico Boys' School. He opined that Defendant had a very low chance of rehabilitation and did not believe he would benefit from the treatment services offered at the Boys' School. Although the Boys' School does have a sex offender treatment program, Defendant is not the type of client the program treats because of his tendency toward combining sex with other violent, antisocial conduct. Because Defendant was abused to some degree as a young child, had a history of torturing animals, had a fascination with fire, and exhibited violent sexual behavior, the director suggested that Defendant fit the profile of a serial offender and was of the opinion that New Mexico has no facilities to treat Defendant.

The testimony received by the court from three other mental health experts who evaluated Defendant was remarkably consistent. One psychotherapist described Defendant as a pedophile who could not be successfully rehabilitated and would need a long-term institution. The other psychotherapist and clinical psychologist both diagnosed Defendant as having a severe conduct disorder, with tendencies towards violent sexual behavior and domination, that would require intensive, secured, long-term treatment. Perhaps most disturbing was their conclusion that Defendant is in effect a child without a conscience who lacks empathy or the ability to be concerned for others. All three experts noted that Defendant failed to show any remorse and refused to take responsibility for his actions. They also uniformly agreed that Defendant could not be treated successfully at the New Mexico Boys' School, and, that if sent there, he would surely re-offend upon release. To the extent that the experts believed Defendant might benefit from a long-term, intensive treatment program, the limited number of potentially available

treatment programs were discussed and were generally deemed inadequate. However, even assuming that an "adequate" treatment program could be found, none of the experts predicted long treatment could give the court any degree of assurance that rehabilitation efforts would be successful. In fact, Samuel Roll, Ph.D. wrote, "Unfortunately the level and degree of psychological treatment which would be necessary for even a modest chance for a positive prognosis is not available in New Mexico. It is probably no longer available anywhere in the country."[3]

After considering the evidence presented at the sentencing hearing, the court issued a thoughtful and detailed explanation of its sentencing decision. Portions of that decision, which so clearly set forth the circumstances of this case and the dilemma faced by the court, are set forth below:

> In a day of extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy, this Court was told that [Defendant] is a child devoid of conscience and devoid of empathy for other human beings, most notably the victims of the heinous acts charged in this case. The experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that [Defendant] could defy the odds and become rehabilitated, and they found none. According to one, [Defendant] feels that he is not the problem here. The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if [Defendant] were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of

[3] Samuel Roll's, Ph.D. report dated August 18, 1997. This report is not attached as a State's Exhibits due to its confidential nature. It ise being submitted to the Court separately as a sealed document.

success for [Defendant] anywhere in the country.
* * *
The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply.
* * *
Most compelling in this case is the expectation of the victims, particularly the eight-to-ten year old girl who was brutally and repeatedly raped and humiliated over a period of two years, that our system of justice will react in a way that recognizes the enormity of the terror and pain caused to her. Without years of effective counseling and therapy, it seems unimaginable that this little girl will grow up to be an emotionally healthy adult, with the opportunity for happiness in her adult relationships. What is the penalty that society should require for the near destruction of a life's potential?
* * *
This Court would like to fashion a sentence that will guarantee, or even offer hope, that [Defendant] can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
The Court would like to fashion a sentence that will assure [Defendant's] victims that he will not be a serious threat to them if released before he reaches an advanced age. There is no such sentence.
This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.
Consequently, after weighing against Defendant virtually every statutory factor that the court must consider when arriving at a disposition for a youthful offender, the district court found that Defendant was not amenable to treatment or qualified for commitment to an institution for the developmentally disabled or mentally incompetent. Accordingly, the court imposed consecutive adult sentences for six

counts of first-degree criminal sexual penetration and concurrent adult sentences for the remainder of the counts, for a total sentence of 108 years.

Sentencing Memorandum attached as Exhibit #1.

Shortly after entry of judgment and sentence, Defendant moved to invalidate the sentencing proceedings. Under the version of the Children's Code in effect when Defendant was fourteen years old, juveniles could only be sentenced as youthful offenders and subject to adult sanctions for offenses committed while age fifteen to eighteen. See § 32A-2-3(I)(1) (1995). Consequently, Defendant argued that the district court erred by imposing adult sentences for counts that were based on acts committed by Defendant while he was fourteen years old. For similar reasons, the State moved to modify the sentence so that Defendant was subject to adult sanctions only for those counts that were based on acts committed by Defendant while he was fifteen years old. In an unpublished opinion, the Court of Appeals concluded that the district court erred by imposing adult sanctions for acts committed by Defendant while he was fourteen years old. **See State v. Joel I.**, Ct. App. No. 18,915 (Filed October 1, 1998). The Defendant's sentence was vacated and the matter was remanded for resentencing.

On remand, the district court resentenced Defendant to six consecutive adult sentences for five counts of CSP I and one count of intimidation of a witness, each committed by Defendant while he was fifteen years old, for a total sentence of 91 1/2 years. The district court imposed a juvenile disposition for the remainder of the counts, ordered the juvenile sentence to be served concurrently to the adult sentence, and committed Defendant to the custody of the New Mexico Department of Corrections for incarceration as an adult. Defendant moved for

reconsideration of the sentence and submitted additional evidence to support his renewed request for a juvenile disposition on all charges. Nonetheless, the testimony continued to reflect the reality that it was unlikely Defendant could ever be successfully rehabilitated. In addition to arguing for juvenile sanctions, Defendant moved to set aside his plea agreement, arguing that the plea was based on an invalid plea agreement because it contemplated an illegal sentence. The district court rejected all of Defendant's arguments, leaving the 91 1/2 -year sentence in place.

Defendant appealed for a second time to the Court of Appeals. Defendant did not argue that the district court abused its discretion, or lacked substantial evidence, to impose adult sanctions against him as a youthful offender. Rather, Defendant argued that his sentence of 91 1/2 years constitutes cruel and unusual punishment. Additionally, Defendant argued that the district court abused its discretion in denying Defendant's motion to set aside his plea. Defendant argued that he should have been allowed to withdraw his guilty plea because it was an illegal plea that was tainted by ineffective assistance of counsel. The district court's decisions were affirmed. **State v. Ira**, 2002-NMCA-037, 132 N.M. 8, 43 P.3d 359.

DEFENDANT'S SENTENCE IS NOT CRUEL OR UNUSUAL PUNISHMENT

The Defendant argues that a sentence of 91 1/2 years is cruel and unusual punishment and is thus prohibited by the Eight Amendment to the United States Constitution. The Defendant previously argued this same grounds for reversal in his 1998 direct appeal, at his re-sentencing in 2000 and on his direct appeal in 2000. Each and every time he has raised this issue the courts have found it without merit and denied his relief. The Defendant seeks a rehearing based on two

recent cases from the United States Supreme Court. **Graham v. Florida**, 560 U.S. 48; 130 S.Ct. 2100; 176 L.Ed.2d. 825 (2009) and **Miller v. Alabama**, 132 S.Ct. 2455; 183 L.Ed.2d 407 (2012). However, neither of these cases provide the Defendant with any relief both because they are not retroactive and because they do not prohibit either the sentence announced by the District Court nor the method by which the District Court arrived at its decision.

A. Neither **Graham** or **Miller** should be applied Retroactively.

In order for Defendant to obtain resentencing under **Graham** and **Miller**, he must establish that: (1) he received a sentence of life without parole and (2) the holdings of **Graham** and **Miller** apply retroactively. The Defendant's sentence was handed down by the District Court in March of 2000. The Defendant's direct appeal was denied in January of 2002. Thus, the Defendant must prove that **Graham** and **Miller** decisions are retroactive. The retroactivity of both the **Graham** and **Miller** decisions are questionable with courts across the country reaching contrary decisions. **See, People v. Carp**, 496 Mich. 440, 451, 852 N.W.2d 801, 808 (2014) ("Miller's bar against categorically imposing life without parole on juvenile offenders was not a federally retroactively applicable substantive rule because it only stated how such a sentence was to be imposed." Thus, it was not retroactive.); **Chambers v. State**, 831 N.W.2d 311, 331 (Minn. 2013) ("Consequently, the rule announced in **Miller v. Alabama**, is a new rule of criminal constitutional procedure that is neither substantive nor a watershed rule that alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Therefore, Chambers is not entitled to the retroactive benefit of the **Miller** rule in a post-

conviction proceeding."(citation removed); **cf. Diatchenko v. DA**, 466 Mass. 655, 656, 1 N.E.3d 270, 274 (2013) (finding **Miller** was retroactive).

The present case is very similar to the issue facing the Minnesota Supreme Court in **Chambers v. State**, 831 N.W.2d 311 (Minn. 2013). In that case defendant Chambers was convicted of a homicide crime committed while he was a juvenile. He was sentenced to life-without-parole. The defendant's conviction was finalized well before either **Graham** or **Miller**. In a habeas petition Chambers sought to a review of his sentence pursuant to **Graham**. The district court denied his petition as untimely under Minnesota law. The Minnesota Supreme Court ruled that Chambers habeas based on **Graham** was properly dismissed because Chambers was charged with a homicide crime and, thus, **Graham** did not apply to his case. Likewise, **Graham** does not apply to the present case. **Graham** only prohibits sentences of life without the possibility of parole. Defendant Ira does have the guaranteed right to parole and never faced a sentence of life without the possibility of parole.

While defendant Chambers' case was pending the habeas hearing, the U.S. Supreme Court announced the **Miller** decision. Chambers' requested that the Minnesota courts apply **Miller** retroactively. The Minnesota Supreme Court refused to retroactively apply **Miller**.

B. Neither **Graham** nor **Miller** provide grounds for the relief sought by Defendant.

The Supreme Court in **Graham v. Florida** held that U.S. Constitution Amendment VIII prohibited the imposition of a sentence of *life-without-parole* on a juvenile offender who committed a nonhomicide crime. **Graham**, 560 U.S. 48, 72. However, the Defendant seeks to

expand the Supreme Court's holding beyond this limited holding to prohibit what the defense refers to as a virtual life sentence. This argument was specifically rejected in **Graham** when the Court wrote:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Graham, 560 U.S. 48, 75. This point was driven home in Justice Alito's dissent when he wrote, "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." **Graham**, 560 U.S. 48, 124. The sentence in the present case is 91 1/2 years. New Mexico, unlike Florida, provides the Defendant with the possibility of reducing his sentence by half. Thus, the Defendant could, just as contemplated by the **Graham** decision, demonstrate maturity and rehabilitation and obtain his freedom in 45 3/4 years.

In **Miller v. Alabama** the U.S. Supreme Court was confronted with a case where two 14-year-old offender were convicted of murder. Alabama law *required* a sentence of *life-without-parole*. "In neither case did the sentencing authority have any discretion to impose a

different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." **Miller**, 132 S.Ct. 2455, 2460. The Court held, "Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' **Graham v. Florida**, 560 U.S. 48, and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " **Miller**, 132 S.Ct. 2455, 2460 (2012).

Throughout its decision the Court emphasized its objection to the *mandatory* nature of the Alabama sentencing authority. The Court wrote, "We thought the mandatory scheme flawed because it gave no significance to the character and record of the individual offender or the circumstances of the offense, and exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors... Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the mitigating qualities of youth." **Miller**, 132 S.Ct. 2455, 2467 (internal quotation marks and citations removed for clarity). Additionally, the Court wrote:

> So **Graham** and **Roper** and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It

> prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. **See, e.g., Graham**, 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B. v. North Carolina*, 564 U.S. ___, ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 132 S.Ct. 2455, 2468. The Court, therefore, struck down Alabama's *mandatory* sentencing scheme. However, immediately after announcing its ruling, the Court reiterated its holding in **Graham** that "A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation". **Miller**, 132 S.Ct. 2455, 2469 (quoting **Graham v. Florida**, 560 U.S. 48. Internal quotation marks removed). This ruling actually supports the district court's finding in the present matter, because the district court gave great consideration to Defendant's history, present emotional development and hope of future rehabilitation with treatment. The district court weighed all of the factors raised by the **Miller** decision and properly sentenced Defendant to 91 1/2 years.

Neither **Graham** and **Miller** are applicable to Defendant's case because he was not sentenced to life without the possibility of parole. Defendant was convicted of 10 counts of criminal sexual penetration in the first degree (each count had a basic sentence of 18 years);

Aggravated Battery against a Household Member and Bribery or Intimidation of a Witness. None of these counts required a mandatory sentence of life without the possibility of parole. Defendant's crimes took place over 2 1/2 to 3 years. In its sentencing memorandum the district court noted that with the application of the Earned Meritorious Reduction Act, Defendant could be granted release in half of his sentence; 45 3/4 years. Thus Defendant could be released in his early 60s.

The Defendant's sentence is not a defacto sentenced of life without the possibility of parole. **See, State v. Springer**, 2014 S.D. 80, ¶ 16, 856 N.W.2d 460 ("Our analysis begins by observing that Springer did not receive a mandatory life sentence without the possibility for parole; he received a 261-year term-of-years sentence with the possibility for parole after he serves 33 years of his sentence."). Jurisdictions across the country have held that **Graham** and **Miller** do not extend to de facto life sentences or life sentences with the opportunity for parole. **See State v. Vang**, 847 N.W.2d 248, 262-63 (Minn. 2014) (holding **Miller** inapplicable to a life sentence with the possibility of parole in 30 years); **State v. Williams**, 2014 WI App 16, 352 Wis. 2d 573, 842 N.W.2d 536 (Wis. Ct. App. 2014) (per curiam) (holding **Graham** inapplicable to homicide cases and **Miller** only applicable to sentences of mandatory life without parole); **Bunch v. Smith**, 685 F.3d 546, 551-53 (6th Cir. 2012) (holding **Graham** inapplicable to term-of-years sentences and declaring that if the United States Supreme Court wishes to expand its holding, it must do so explicitly); **Ellmaker v. State**, 329 P.3d 1253 (Kan. Ct. App. 2014) (per curiam) (holding that **Miller** does not apply to a mandatory 50-year sentence because it is not the functional equivalent of life without parole); **Adams v. State**, 288 Ga. 695, 707 S.E.2d

359, 365 (Ga. 2011) (holding **Graham** inapplicable to term-of-years sentences); **State v. Brown**, 118 So. 3d 332 (La. 2013) (declining to extend **Miller** to lengthy term-of-years sentences); and **State v. Kasic**, 228 Ariz. 228, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011) (holding **Graham** inapplicable to term-of-years sentences).

Additionally, it bears notice that the **Graham** and **Miller** decisions were concerned with life sentences without the possibility of parole from a single charge. Defendant was charged with multiple crimes spread over 2.5 to 3 years. Many courts have held **Miller** does not apply where the lengthy sentence is the result of aggregate sentences. **See, e.g., State v. Null**, 836 N.W.2d 41, 73 (Iowa 2013); **Bunch v. Smith**, 685 F.3d 546, 550-51 (6th Cir. 2012) (holding **Miller** does not apply to an eighty-nine-year sentence resulting from consecutive fixed-term sentences for multiple nonhomicide offenses), **cert. denied**, 569 U.S. ___, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013); **Walle v. State**, 99 So. 3d 967, 972-73 (Fla. Dist. Ct. App. 2012) (holding **Miller** does not apply where the defendant received a ninety-two-year aggregate sentence). The Louisiana Supreme Court upheld aggregated sentences for an aggravated kidnapping and four counts of robbery, concluding that aggregating the sentences, even if they arose from the same criminal episode, did not offend **Graham's** prohibition on a sentence of life without parole in non-homicide cases. **See Brown**, 118 So.3d at 332-33, 342. In **Brown**, the court recognized that **Graham** precluded a sentence of life without parole for any given non-homicide offense (in that case, aggravated kidnapping), but held that nothing in **Graham** required reformation of the convicting court's determination that the kidnapping and robbery sentences run consecutively. **Id.** In so doing, the court relied on the Sixth Circuit's decision in **Bunch**, which upheld a

cumulative sentence of 89 years for non-homicide offenses. **See id.** at 337 (citing **Bunch**, 685 F.3d at 551). **See also, Carmon v. State**, 2014 Tex. App. LEXIS 13914, 12-13 (Tex. App. Houston 1st Dist. Dec. 30, 2014)("[A]ppellant committed capital murder, killing two people, eight months after an unrelated aggravated robbery. Nothing in **Graham** precludes the later sentences—for a different criminal episode and for a homicide offense of the most serious kind—from running consecutively."). Neither **Graham** nor **Miller** provide grounds for the relief sought by Defendant.

IF THERE WERE ANY PROCEDURAL ERRORS, THEY DID NOT PREJUDICE DEFENDANT'S ABILITY TO PRESENT HIS CASE FOR A JUVENILE ADJUDICATION.

Defendant claims that procedural errors in Defendant's original sentencing in 1998 require resentencing. Specifically the Defendant claims that the district court failed to hold an amenability hearing when he was initially sentenced. Defendant's argument ignores that the Defendant underwent four hearing relating to his amenability to treatment; September 1998, December 1999, March 2000 and finally April 2000. At the beginning of the March 2000 hearing the parties agreed that the records from all the hearings would be considered as a whole. Additionally, Defendant's claim that the district court did not consider amenability is ludicrous considering that amount of time and testimony presented by both sides as to Defendant's amenability to treatment. The New Mexico Court of Appeals recognized that the hearing were to determine amenability. **State v. Ira**, 2002-NMCA-037, ¶ 8 "In an effort to assess Defendant's amenability to treatment and the threat that he posed to society, the court also received testimony

from a number of mental health and juvenile justice professionals." The district court clearly understood the necessity to determining Defendant amenability to treatment. Defendant's argument was clearly rejected by the New Mexico Court of Appeals. The Appellate Court wrote:

> After considering the evidence presented at the sentencing hearing, the court issued a thoughtful and detailed explanation of its sentencing decision. Portions of that decision, which so clearly set forth the circumstances of this case and the dilemma faced by the court, are set forth below:
>
> > In a day of extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy, this Court was told that [Defendant] is a child devoid of conscience and devoid of empathy for other human beings, most notably the victims of the heinous acts charged in this case. The experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that [Defendant] could defy the odds and become rehabilitated, and they found none. According to one, [Defendant] feels that he is not the problem here. The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if [Defendant] were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of success for [Defendant] anywhere in the country.
> > * * *
> > The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply.
> > * * *
> > Most compelling in this case is the expectation of the victims, particularly the eight-to-ten year old girl who was brutally and repeatedly raped and humiliated over a period of two years, that our system of justice will react in a way that recognizes the enormity of the terror and pain caused to her. Without years of effective counseling and therapy, it seems unimaginable that this little girl will

> grow up to be an emotionally healthy adult, with the opportunity for happiness in her adult relationships. What is the penalty that society should require for the near destruction of a life's potential?
> * * *
> This Court would like to fashion a sentence that will guarantee, or even offer hope, that [Defendant] can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
> The Court would like to fashion a sentence that will assure [Defendant's] victims that he will not be a serious threat to them if released before he reaches an advanced age. There is no such sentence.
> This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

> Consequently, after weighing against Defendant virtually every statutory factor that the court must consider when arriving at a disposition for a youthful offender, the district court found that Defendant was not amenable to treatment or qualified for commitment to an institution for the developmentally disabled or mentally incompetent. Accordingly, the court imposed consecutive adult sentences for six counts of first-degree criminal sexual penetration and concurrent adult sentences for the remainder of the counts, for a total sentence of 108 years.

State v. Ira, 2002-NMCA-037, ¶ 11.

As part of its determination of Defendant's amenability, the district court received psychological reports from Thomas J. Salb, M.A. (dated May 14, 1997) and Samuel Roll, Ph.D. (dated August 18, 1997)(These reports are not attached as State's Exhibits due to their confidential nature. They are being submitted to the Court separately as sealed documents.) Salb's report indicated that he was supervised by Will D. Parsons, Ph.D. It appears from the record that Dr. Roll's report was completed due to a stipulated order by the parties after

Defendant's change of plea. *Stipulated Order for Psychological Evaluations and for Transport,* attached as State's Exhibit #2. It is clear that this report was completed in order to fulfill the requirement of NMSA 1978, Section 32A-2-17A(3). Dr. Roll's report is focused on treatment needs and programs available to Defendant. He wrote, "Unfortunately the level and degree of psychological treatment which would be necessary for even a modest chance for a positive prognosis is not available in New Mexico. It is probably no longer available anywhere in the country." Thus, NMSA 1978, Section 32A-2-17A(3) was satisfied.

Due to the age of the case it is unclear if a predispositional report was completed by the Department of Corrections. Defendant claims that the lack of this predispositional report requires a new sentencing hearing. He directs the Court to **State v. Jose S.**, 2007-NMCA-146. The decision in **Jose S.** was decided seven (7) years after Defendant's sentence became final. There is nothing in **Jose S.** that indicates that the district court should apply the case retroactively.

Even if **Jose S.** is applied retroactively, the **Jose S.** Court recognized that NMRA 1978, 5-113(A) provides that, "error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice." "In the absence of prejudice, there is no reversible error." **State v. Fernandez**, 117 N.M. 673, 676, 875 P.2d 1104, 1107 (Ct. App. 1994); **cf. In re Ernesto M., Jr.**, 1996 NMCA 39, P 10, 121 N.M. 562, 915 P.2d 318 (concluding that the child failed to show how the trial court's determination that the child was

not amenable to treatment would have been different had trial court weighed statutory factors in a different order). The **Jose S.** Court ruled that the defendant was "thwarted in his attempt to show prejudice [by the lack of both the **pre-amenability report and the predispositional report**] because the reports do not exist. [Defendant] has no way of demonstrating that the reports would be favorable to him and contrary to the trial court's determination because the reports were never created. This inability to demonstrate prejudice is itself prejudicial to [Defendant]." **Jose S.**, 2007-NMCA-146, ¶ 21 (emphasis added). The court's decision is understandable considering the district court in **Jose S.** found the child not amenable after both the State's and the child's experts testified that the child was amenable. The present case is substantially different because the district court heard "extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy" and all "[the] experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if [Defendant] were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of success for [Defendant] anywhere in the country." *Sentencing Memorandum*, attached as State's Exhibit #1. The Defendant had a full and fair chance in four separate hearings to present any treatment program that presented a substantial likelihood of success. The Defendant utter failed to present any viable program.

Defendant Ira's claim that he cannot waive a preliminary hearing is flatly without merit and contrary to the explicit language of NMRA 10-213(B), 1978. Section B of Rule 10-213 reads, "Probable cause determination. Within fifteen (15) days after a notice of intent to invoke

an adult sentence is filed, a preliminary hearing will be conducted by the court unless the case is presented to a grand jury **or the respondent child waives the right to a preliminary hearing or grand jury**. If the case is presented to a grand jury, the provisions of Section 31-6-1 et seq. shall apply, except as otherwise provided in these rules." (emphasis added).

DEFENDANT'S FINAL TWO ARGUMENTS WERE FULLY LITIGATED IN HIS DIRECT APPEALS.

Defendant Ira's final two arguments (ineffective assistance of counsel and the legality of the written plea agreement) were raised in both of his prior direct appeals. The Court should deny the claims as res judicata. The case law generally encourages the bringing of ineffective assistance of counsel claims in habeas proceedings. However, if the grounds for the claim were fully litigated before the direct appeal, it is in the district court's discretion to apply res judicata. In **Duncan v. Kerby**, 1993-NMSC-011, ¶ 6, 115 N.M. 344, 347, 851 P.2d 466, 469, the New Mexico Supreme Court wrote:

> Our view of the nature of res judicata in the habeas corpus setting as an equitable, discretionary, and flexible judicial doctrine leads us to conclude that the decision to give preclusive effect to an ineffective assistance of counsel claim rejected on direct appeal but raised again in habeas corpus proceedings is within the sound discretion of the reviewing court. Courts reviewing habeas corpus petitions should decide whether particular claims are res judicata based on relevant facts and circumstances, including whether or not a full evidentiary hearing on counsel's effectiveness was previously conducted when that claim is at issue.

When Defendant Ira raised ineffective assistance in his second appeal, the New Mexico Court of Appeals wrote:

> While we rejected Defendant's claim of ineffective assistance of counsel raised in

> his first appeal, we did so because there was no evidentiary record to show that Defendant would have entered a different plea had counsel been aware of the correct law at the time of the plea. Accordingly, we concluded that Defendant had failed to establish a prima facie case of ineffective assistance of counsel. **See State v. Swavola**, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992). But since we remanded Defendant's case for resentencing as a result of his first appeal, Defendant was able to develop a limited evidentiary record to support his claim of ineffective assistance of counsel.

State v. Ira, 2002-NMCA-037, ¶ 37. The **Ira** Court reviewed the record and upheld the district court's denial of the Defendant's ineffective claim finding that the Defendant failed to prove that he was prejudiced by his attorney's actions. **Id.**, 2002-NMCA-037, ¶ 41. Clearly the defense understood that they had a full and fair hearing as to these two issues as they have waited 15 years before bringing the present petition.

Defendant tries to re-couch his claim of ineffective assistance by now claiming that the Office of the Public Defender as a whole lacked the financial resources to properly represent their client at his initial sentencing in 1998. While this claim seems to be the argument *du jour* in the Twelfth Judicial District, it ignores that Defendant came back before the district court for resentencing in 2000 with attorney Gary Mitchell. In March of 2000, Mr. Mitchell argued that the lack of financial resources was the sole reason that the defense could not find a treatment program for Defendant. At the end of the March 2000 hearing the district court encouraged Mr. Mitchell to find any program anywhere that would provide a reasonable chance at rehabilitation for Defendant. In direct response to Mr. Mitchell's claim that a lack of resources by the State was preventing him from protecting his client's interests the district court stated:

> I'd like to point out that I have not, to my knowledge, placed a constraint upon you over the State's ability to pay. I don't know if I would if it was properly

> brought before me, but I am not aware of any program of any kind that was presented to me that would accept the child. I know in the last hearing some programs were mentioned and the program directors then came and testified and said now that we know more he is not eligible. So consider yourself free from the restriction from the restraint to pay and tell me if you'd like another hearing to present a program. *** Recognize my quandary though; I need evidence that a program will be effective so the community can be safe within the constraints available to me under the law.

Hearing on March 30, 2000, tape #2 of 2. With this clear mandate from the district court, Defendant requested another hearing to present additional treatment programs. That hearing was held in April of 2000. At that hearing once again the district court found that the treatment programs presented were unsatisfactory. The district court stated:

> Counsel, I will restate, from my role in this cause as a judge searching for options, that the tragedy is that there is not a system that will allow us to experiment and protect the community at the same time. There is not a sentencing structure that I am aware of or that has been brought to my attention where we could send Joel Ira to a program that might have a chance to evaluate him later in a program before the risk to the community goes up; and make a decision then wether "yes" it is working and he is now an acceptable risk or "no" it is not and we have to go back to square one or at that time as Mr. Mitchell puts it "throw away the child". I dearly wish that I could make that kind of decision in this case. Instead, I have to make a prediction and essentially let it go as the only decision I will get a chance to make.
>
> And under those circumstances, the finding that I have made that Joel Ira is what in as adult would be called a psychopath; that is a person without a conscience and in who the development of a conscience is not likely based on the best available thinking in the matter that has been [made] available to me. With that kind of person, the kind of programs that we have are not likely to work. And were I to send him to one of those programs the likelihood, if not certainty, is that at the end of the program the community would be at very great risk. I take no joy at all in finding that is the only option that I have. But it flows from the finding that Joel Ira is a psychopath.
>
> So as hopeful as I was about this treatment program that was given through the

> notice, and as hopeful as I can hear Mr. Mitchell is and as hopeful as I am sure Ms. Grisham would be if she thought it would really work, it does not appear that it will. So I will not be referring Joel Ira to the program.

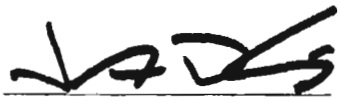
Hearing on April 27, 2000, tape #1 of 1. Defendant appealed the district court's decision. The Court of Appeals recognized that, even freed from financial restraints, treatment was not possible for this defendant. The **Ira** Court wrote:

> Defendant also makes vague allegations that the district court's failure to provide Defendant with treatment alternatives was the result of a legislative unwillingness to fund adequate treatment alternatives for individuals like Defendant. Our review of the record reveals no indication that the district court's decision to forego treatment alternatives was the result of financial constraints. To the contrary, the district court's decision reflected a desire to pursue rehabilitation, but a grim realization that an attempt at rehabilitation would not be possible in this case without creating an unreasonable risk to the safety of Victim and the public at large because medicine and psychology have yet to develop reliable methods for rehabilitating individuals like Defendant.

State v. Ira, 2002-NMCA-037, ¶ 23. These issues have been fully litigated and should be denied.

WHEREFORE, State of New Mexico respectfully requests that the Court deny Defendant's Petition for Habeas Corpus.

Respectfully Submitted by:



James A. Dickens
Deputy District Attorney
1000 New York Ave. Ste 101
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CERTIFICATE OF DELIVERY

I hereby certify that I caused to de delivered a true and correct copy of the foregoing pleading to defense counsel, Gary C. Mitchell, on this 5th day of ~~January~~ Feb, 2015.

James A. Dickens
Deputy District Attorney

IN THE DISTRICT COURT OF OTERO COUNTY
TWELFTH JUDICIAL DISTRICT, NEW MEXICO
CHILDREN'S COURT

FILED
DISTRICT COURT OF
OTERO COUNTY N.M.
97 SEP -8 PM 12:52
ALICE BACA BAKER
CLERK ____ BY ____

IN THE MATTER OF

JOEL IRA,

A CHILD.

No. **CH-95-142**
Division I

These written remarks will be read at the sentencing of Joel Ira on September 8, 1997, and added to the court file thereafter. Copies will be provided to the prosecuting attorney and defense counsel for their reference thereafter. The Office of the District Attorney will be instructed to draft a Judgment and Sentence in conformity herewith.

1. Background

The purpose of today's hearing is to determine the final disposition or sentencing of Joel Ira, who was born February 23, 1981. By a Second Amended Petition filed March 7, 1997, Joel Ira was accused of fourteen illegal acts, among them ten charges of Criminal Sexual Penetration in the First Degree, occurring between March 25, 1995, and February 20, 1997, all involving the same victim, Joel Ira's half-sister who was eight years old at the time of the first penetration and ten years old at the time of the most recent. Other charges included Battery Against a Household Member (later dismissed), Aggravated Battery with Great Bodily Harm (alleging that Joel Ira choked his half-sister until she passed out), Aggravated Battery Against a Household Member (alleging that Joel Ira choked his step-brother), and Intimidation of a Witness (wherein the State alleged that Joel Ira told his half-sister that he would kill her if she told about the rapes).

Through a plea agreement filed June 20, 1997, Joel Ira pled No Contest to all of the

[redacted]

counts except Battery Against a Household Member, which was dismissed.

Throughout the process, Joel Ira was on notice that the State would request that he be subject to adult sentencing as a Youthful Offender.

2. Youthful Offender Status

The first issue for this Court is whether or not Joel Ira should be considered a Delinquent Offender, where disposition is directed toward his own best interests, or within the much more serious category of a Youthful Offender, potentially subject to the same penalties that face an adult who committed the same acts.

By law, the Court has considered the following factors to determine whether or not Joel Ira should be considered a Youthful Offender.

The sole factor that does not support Youthful Offender status in this case is that a firearm was not used in commission of the offenses.

The seriousness of the alleged offenses weighs heavily toward imposition of adult sanctions. Criminal Sexual Penetration in the First Degree is one of the most serious charges imaginable in our system of justice. The penalty prescribed, eighteen years incarceration, is the longest prison term less than a life sentence which our statutes authorize. Moreover, the legislature has decreed that a judge may not suspend any portion of the sentence for a first degree felony, but must impose the entire eighteen years. The people of New Mexico, and certainly this Court, consider the offenses herein to be extremely serious.

Also weighing toward Youthful Offender status is the nature of these offenses as violent, premeditated and willful. There is evidence in the record that Joel Ira perpetrated these rapes not only through sexual games but also through intimidation and force. The charges plead to include

vaginal, oral and anal rape. After one forcible sodomy, where his victim screamed from the pain, Joel Ira's penis was covered in his victim's blood from an anal tear. As noted earlier, Joel Ira was able to cover his acts, for a time, and continue his reign of terror by threatening this ten year old girl that he would kill her if she told. He choked her to unconsciousness once. He also, according to the evidence, established a system whereby, drumming or tapping his fingers on the arm of his chair, he signaled to this little girl that another rape was about to occur. Joel Ira also involved other young children in his plans, both within and outside of his family.

The law instructs a judge to give greater weight to offenses against persons, rather than property offenses, especially if personal injury resulted. These factors weigh in favor of youthful offender status.

The court should consider the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, emotional attitude and pattern of living. The experts agree that Joel Ira is neither developmentally disabled nor mentally disordered as those terms are used in the New Mexico Children's Code. The picture painted of Joel Ira in these proceedings is that of a young man of average intellectual and average or greater physical development who was allowed to make many of the choices that structured his life, from where he lived to what he did with his time. There were instances of defiance of parental authority, even to the point of physical threat or attack. Certainly, Joel Ira's lifestyle was not one to be envied, and it appears that he either lacked or ignored the kind of intensive guidance that every young person deserves. In sum, it is difficult to assess the legislature's intent with regard to this case, but it would seem to weigh in favor of requiring Joel Ira to accept adult consequences for his conduct.

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The record and previous history of the child, again, show indications of defiance of authority, even to the point of physical intimidation and assault. The one positive indicator was the successful completion of probation under a prior consent decree, but that bright spot can't be removed from the context of the violations of the law that necessitated the consent decree in the first place. A child who follows the law after such an experience can be said to be rehabilitated; a child who moves on to much more serious crimes can be considered a continuing threat to society. Joel Ira appears to be the latter.

Finally, and both the most telling and the most tragic factor regarding Joel Ira, is consideration of 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 record shows that Joel Ira participated in counseling through the Children in Need of Services Program as a result of a prior referral, and apparently without effect. In a day of extraordinary testimony by some of the most experienced and qualified experts in the field of juvenile corrections and psychotherapy, this Court was told that Joel Ira is a child devoid of conscience and devoid of empathy for other human beings, most notably the victims of the heinous acts charged in this case. The experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that Joel Ira could defy the odds and become rehabilitated, and they found none. According to one, Joel Ira feels that he is not the problem here. The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the

public if Joel Ira were released from custody. When asked if that circumstance is a failing on the part of the State to provide services its citizens should expect, the experts doubted whether there is a program with any hope of success for Joel Ira anywhere in the country. At the same time, they said that Joel Ira does not suffer from any developmental disability or mental disorder that would make him eligible for those methods of treatment.

This Court finds that Joel Ira is not amenable to treatment or rehabilitation as a child in available facilities, and not eligible for commitment to an institution for the developmentally disabled or mentally disordered.

In sum, the people of the State of New Mexico have elected a legislature to draft laws that determine what is the right thing for the government, including the Courts, to do in a variety of important circumstances, including these most tragic. The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply. Based upon considering of the factors set forth by the Legislature, Joel Ira is such a person, and should be deemed a Youthful Offender as that term is defined by New Mexico law.

3. Sentencing options

The finding of Youthful Offender status allows this court to impose either a juvenile or

adult sentence, with the limitation that any juvenile sentence may include commitment to the Children, Youth and Families Department only until age 21. There is not the slightest credible evidence that Joel Ira will be less of a threat to his former victims or society at large after five years in CYFD custody, and therefore this Court determines that a juvenile sentence is inappropriate under the facts and circumstances of this case.

4. Sentencing Decision

Each of the ten counts of Criminal Sexual Penetration in the First Degree carries a term of incarceration of eighteen years. In contrast to lesser crimes, incarceration for a First Degree felony cannot be suspended or deferred. (The Court notes that after reading of these remarks, the prosecutor and defense attorney pointed out that suspension of a portion of a first degree felony sentence is permissible in cases involving juveniles; the other purposes served by sentencing herein weigh against suspension of the term of imprisonment, and therefore the Court declines to suspend the incarceration.)

The other crimes herein carry the following basic sentences: Aggravated Battery with Great Bodily Harm is a third degree felony with a basic sentence of three years; Aggravated Battery against a Household Member, in the manner charged herein, is also a third degree felony with a basic sentence of three years; and Intimidation of a Witness is a fourth degree felony with a basic sentence of 18 months.

The range of possible sentences in this matter, therefore, is from a minimum of eighteen years imprisonment, which would result if all of the charges were to run concurrently, to a maximum of one hundred eighty-seven and one-half years, which would result if all of the sentences were run consecutively.

Ordinarily, the young age of the defendant would tend to influence a judge toward leniency, based upon the inference that the crimes were motivated in part by youthful impulsiveness and immaturity, and that converting a large amount of incarceration to probation will allow the youth to show that the lesson has been learned and he can now benefit rather than attack society. That analysis does not apply here, first because of the inability to convert first degree felony incarceration to probation (*see the additional note regarding juvenile sentencing added after the hearing, supra.*) and, second, because Joel Ira is not the typical young defendant. The evidence shows that he is almost certain to be the same threat to society upon his release as he is today because humanity has not developed a way to implant a conscience once the period for its natural growth has passed.

Most compelling in this case is the expectation of the victims, particularly the eight-to-ten year old girl who was brutally and repeatedly raped and humiliated over a period of two years, that our system of justice will react in a way that recognizes the enormity of the terror and pain caused to her. Without years of effective counseling and therapy, it seems unimaginable that this little girl will grow up to be an emotionally healthy adult, with the opportunity for happiness in her adult relationships. What is the penalty that society should require for the near destruction of a life's potential?

Moreover, the child has a legitimate fear, expressed in her testimony to this Court, that Joel Ira at large would seek her out to carry out his threat to kill her for telling about the rapes. How long should society wait until it feels comfortable communicating to this child: "He's out now; you're on your own." Nothing presented to this Court prepares me to tell this child, at any point in the future, that she shouldn't fear Joel Ira if he is released.

This Court would like to fashion a sentence that will guarantee, or even offer hope, that Joel Ira can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.

This Court would like to fashion a sentence that will assure Joel Ira's victims that he will not be a serious threat to them if released before he reaches an advanced age. There is no such sentence.

This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likeli that he would attempt it. To assure that result, in consideration of the crowded conditions of o prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

Therefore, it will be the sentence of this Court that Joel Ira will be committed to the custody of the New Mexico Department of Corrections to serve six consecutive terms for Criminal Sexual Penetration in the First Degree, each term lasting eighteen years, for a term of incarceration of one hundred and eight years. Four more terms of eighteen years for Criminal Sexual Penetration in the First Degree will be served concurrently with the other six. Terms of three years each for Aggravated Battery with Great Bodily Harm and Aggravated Battery Against a Household Member, and a term of eighteen months for Intimidation of a Witness, will be served concurrently with the other terms herein, for a total term of incarceration of one hundred and eight years.

During incarceration, this Court will recommend to the Department of Corrections that

Joel Ira be provided any available treatment that is appropriate for his future benefit.

JERRY H. RITTER, JR.
DISTRICT JUDGE

IN THE DISTRICT COURT OF OTERO COUNTY
TWELFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO

CAUSE NO. CH-95-142
DIVISION I

IN THE MATTER OF

JOEL IRA, a child.

STIPULATED ORDER FOR
PSYCHOLOGICAL EVALUATION AND
FOR TRANSPORT

THIS MATTER having come before the court upon stipulation of the parties, for the court to order a psychological evaluation of the respondent and to transport the respondent, Joel Ira, to Albuquerque, New Mexico for said evaluation.

IT IS THEREFORE ORDERED that the child undergo a psychological evaluation, for the purpose of disposition or sentencing, and that the evaluation be performed by Dr. Sam Roll, who will disclose his results to the children's court attorney and the child's attorney.

IT IS FURTHER ORDERED that the Otero County Sheriff, or his duly authorized agent, from the Otero County Detention Center, Alamogordo, New Mexico, transport the respondent to the appropriate juvenile detention facility in Albuquerque, New Mexico, for the purpose of attending a forensic evaluation, scheduled in this cause on July 17 and 18, 1997.

IT IS THE FURTHER ORDER OF THE COURT that the Otero County Sheriff, or his duly authorized agent, will return the respondent from the offices of Dr. Sam Roll, 202 Tulane SE, or from the juvenile detention facility in Albuquerque, New Mexico, upon completion of the forensic

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[redacted]

evaluation, to return him to the Otero County Detention Facility, Alamogordo, New Mexico, where he is to remain in detention pending sentencing or disposition.

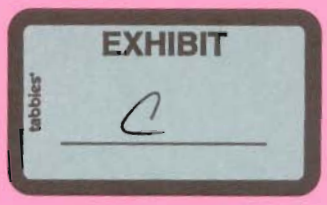
JERRY H. RITTER, JR.
DISTRICT JUDGE

NOTED:

SANDRA A. GRISHAM
CHILDREN'S COURT ATTORNEY

Telephonic Approval 7/8/97 @ 9:50 a.m.
SAM DAMON
CHILD'S ATTORNEY

165B



EXHIBIT
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STATE OF NEW MEXICO
COUNTY OF OTERO
TWELFTH JUDICIAL DISTRICT

FILED
DISTRICT COURT OF
OTERO COUNTY, NM
2015 DEC -9 PM 1:39

JOEL IRA,

Petitioner

COPY

vs.

JAMES JANECKA, WARDEN
Lea County Correctional Facility
Homes, New Mexico

Respondent.

Cause No. D-1215-JR-199500142
Judge Jerry H. Ritter, Jr. Div. I

ORDER DENYING
PETITION FOR HABEAS CORPUS

THIS MATTER having come before the Court on Petitioner's Petition for Habeas Corpus filed on or about July 30, 2014, the State was represented by its Deputy District Attorney, James A. Dickens, and Petitioner by his counsel, Gary C. Mitchell. Evidentiary hearings were held; testimony taken and arguments heard on June 30, 2015, and November 20, 2015. The Court being sufficiently advised in the premises FINDS that:

The Petitioner presented evidence of his own behavior since his incarceration in 1997. This evidence does not form a basis for modifying or altering the previously imposed sentence nor was it directly raised or argued in the Petition for Habeas Corpus. Even considering this evidence, the court finds the testimony of Dr. Samuel Roll, Ph.D. persuasive: that a person with a severe level conduct disorder can function appropriately in a controlled and structured

environment such as prison. The Petitioner's behavior while in custody does not provide sufficient proof as to how he would conduct himself if released. Thus, the evidence did not contradict the Court's original finding that the Petitioner presented an extreme and unacceptable risk of re-offending if released.

The Petitioner's sentencing is not cruel and unusual as defined by either the Constitutions of the Untied States of America or the State of New Mexico. The case law relied upon by the Petitioner prohibits states from imposing mandatary life sentences on juveniles. The statutory scheme under which the Petitioner was sentenced did not mandate a life sentence. Rather, New Mexico's juvenile sentencing statutes provided, and still provide, wide latitude to the sentencing judge to craft an appropriate sentence for an individual child after considering the child's age, maturity, environment, mental health, possible rehabilitation, risk to the community and the nature of the offenses. The Court exercised its discretion in this case after holding numerous hearings and taking testimony from lay and expert witnesses. Only after reviewing this evidence did the Court come to the conclusion that the appropriate sentence was 91 1/2 years. The sentence in this particular case was meant to isolate the Petitioner from society because of the significant and continuing danger the Petitioner presented and because of the complete lack of any program that presented an acceptable likelihood of successfully treating the Petitioner.

The sentence was appropriate and proportional to the significance and number of offenses committed by the Petitioner. The Petitioner was convicted of five 1st Degree felonies among all of his other charges. The Petitioner's crimes were not a single isolated incident or group of events, rather they were systematically and regularly repeated over years. The sentence was

appropriate and proportional considering the trauma experienced by the victim and the lasting impact the Petitioner's crimes had on the victim. The penological reason for the sentence was to isolate the Petitioner from society because of the overwhelming evidence that he presented a significant and continuing threat to society if released.

The record is clear and has been tested on appeal that the Court held amenability hearings as required. Additionally, the Petitioner was evaluated for his amenability to treatment as required. The Petitioner had the ability and exercised his right to waive a probable cause determination whether that was conducted by a preliminary hearing or grand jury presentation. The Petitioner's arguments regarding ineffective assistance of counsel and the legality of the written plea agreement were decided upon direct appeal. Both arguments were found to be without merit.

IT IS THEREFORE ORDERED that the Petition for Habeas Corpus is denied.

/s/ JERRY H. RITTER, JR.

Jerry H. Ritter, Jr.
District Judge, Division I

Submitted by

JADS

James A. Dickens
Deputy District Attorney

Approved as to form:

Approved by email on 2-Dec-2015 at 1:18 PM
Gary C. Mitchell
Attorney for Petitioner