IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Case No. 27,589

Plaintiff/Appellee,

vs.

RUDY B.,

Child/Appellant

APPEAL FROM THE SECOND JUDICIAL DISTRICT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE MONICA ZAMORA, DISTRICT JUDGE, PRESIDING

AMICUS CURIAE BRIEF OF JUVENILE LAW CENTER IN SUPPORT OF CHILD/APPELLANT

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TABLE OF AUTHORITIES

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SUMMARY OF PROCEEDINGS

On May 29, 2005, Rudy B., a minor, was involved in an altercation in which he used a gun. In December, 2005, he pled guilty to two counts of shooting from a motor vehicle causing great bodily harm, and two counts of aggravated battery with a deadly weapon with a firearm enhancement. (Plea Hearing Transcript at 2.)

In April, 2006, Rudy appeared at a hearing before a judge to determine whether he was amenable to treatment in the juvenile system. Rudy was not presented with the option of having his amenability hearing before a jury. At the hearing, the trial judge considered contested evidence on a number of points. Witnesses were in agreement that Rudy B. was doing well in the detention center, (April 2006 Amenability Hearing Transcript Vol II at 16) (hereinafter A.H.), but presented conflicting evidence on whether that compliance was a sign of rehabilitation or whether it indicated only that Rudy B. was conforming to the detention center's power structure. (A.H. at 16, 25-34, 38-40). Evidence was also presented about Rudy B.'s mental state during the commission of the crime, (A.H. at 34-6), and about the availability of resources in the juvenile justice system for his rehabilitation. (A.H. at 15, 19, 20). After two days of hearings, the trial judge concluded that Rudy B. was not amenable to treatment. (June 2006 Amenability Hearing Transcript at 28). At a subsequent hearing, Rudy B. was sentenced to 25 years in an adult facility. (August 2006 Sentencing Hearing Transcript at 13).

SUMMARY OF ARGUMENT

This case involves an issue of extraordinary importance to the lives of vulnerable youth – whether New Mexico's amenability hearing structure violates a juvenile's constitutional right to a jury trial.

New Mexico's sentencing structure provides that a child can face an adult criminal sentence after appearing and participating in juvenile proceedings only.[1] In order to impose an adult sentence, the judge must find that the child is "not amenable to treatment or rehabilitation as a child in available facilities" and that the child "is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." § 32A-2-20. The consequences to these children are profound. Rudy B.'s maximum sentence as a juvenile would have been confinement until age 21, or approximately three and a half years. § 32A-2-19(B)(1). As an adult, he was subject to, and received, a 25-year sentence.

The Supreme Court has long held that the judiciary must vigilantly guard against trial practices that reduce the jury's significance, and that the jury right is of "surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). *See also Jones v. United States*, 526 U.S. 227 (1999). In *Apprendi v. New Jersey*,

[1] New Mexico's Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2007). The section pertaining to disposition is § 32A-2-20.

the United States Supreme Court determined that this right could best be protected by a bright-line rule that a defendant is entitled to trial by jury beyond a reasonable doubt for *any* fact, other than the existence of a prior conviction, that increases a defendant's sentence beyond the statutory maximum. 530 U.S. 466.

In *New Mexico v. Gonzales*, 2001-NMCA-025, 130 N.M. 341, this Court held that section 32A-2-20 does not violate *Apprendi* because the amenability determination differs from findings related to elements of the crime in three ways: (1) it measures prospects for rehabilitation rather than culpability; (2) it rests on a different nature of findings, including predictions of a child's future behavior, and (3) it calls upon knowledge of the criminal and juvenile justice system which a court is in a better position to provide. *Gonzales* also set forth that *Apprendi* did not apply as all of the sentences were within the statutory range. *Id.* at ¶ 28. The United States Supreme Court rejected this reasoning in subsequent decisions.

The Supreme Court has clarified that the requirements of *Apprendi* apply to fact-finding in a variety of contexts, including sentencing factors like those at issue here. *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007). The Court has also specified that a statutory maximum is the maximum sentence a judge could impose based on the facts considered by the jury. *Ring*, 536 U.S. at 602. Like the other sentencing schemes to which this Court applied *Apprendi*, the

amenability hearing requires judicial fact-finding as a prerequisite to increasing the defendant's sentence above the statutory maximum. Refusing to apply *Apprendi* to amenability hearings would defy the Supreme Court's bright-line rule, and unconstitutionally erode the right to trial by jury.

Amicus therefore respectfully requests this Court hold section 32A-2-20 unconstitutional.

ARGUMENT

At issue here is the constitutionality under the Sixth Amendment of the New Mexico youthful offender sentencing statutes. This Court reviews the constitutionality of legislation *de novo*. *Pinnell v. Bd. of County Comm'rs*, 1999-NMCA-074, ¶ 17, 127 N.M. 452. Details regarding the preservation of issues for appeal are presented in Rudy B.'s case in chief.

I. The Sixth Amendment Protects the Right to a Jury Trial for Sentencing Procedures Resulting in Serious Adult Sentences.

Although *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not directly address the juvenile justice system, its Sixth and Fourteenth Amendment protections apply to this case because Rudy B.'s offense – and the ensuing punishment – was sufficiently serious. In *Duncan v. Louisiana*, the United States Supreme Court held that the Fourteenth Amendment extends the right to a trial by jury to defendants facing prosecutions under state law when they face punishment

for a "serious" offense. 391 U.S. 145, 154 (1968). The Court declared that fundamental fairness entitles the defendant to a jury trial to ensure a buffer against arbitrary government action, explaining:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . [finds] expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at *155-56*. The Court concluded that "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* at 157-58.

Supreme Court case law makes clear that Rudy B.'s offense falls well within the category of "serious" offenses that trigger the jury trial right. Rudy B. received an adult sentence of 25 years. According to the *Duncan* Court, "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not." *Id.* at 159. The Supreme Court has further held that an offense carrying a maximum prison term of more than six months is deemed serious such that the right to a jury trial attaches. *Blanton v. City of North Las Vegas,* 489 U.S. 538 (1989). Crimes with such penalties are "deemed by the community's social and ethical judgments to be serious. . . . Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." *Lewis v. United States,*

518 U.S. 322, 334 (1996) (Kennedy, J., concurring). *See also Duncan*, 391 U.S. at 160 ("The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.") (internal quotations omitted). As a result, when juveniles face serious adult punishment, they, like adults, are entitled to jury trials. Indeed, New Mexico recognizes this right, and provides for a jury trial when a juvenile may be subjected to an adult sentence. § 32A-2-16.[2]

The distinction between the adult and juvenile justice systems lies at the heart of Rudy B.'s claim that he was entitled to a jury trial for his amenability hearings. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which carves out an exception to the jury trial requirement for juveniles, underscores this point.

[2] The New Mexico statutes concerning youthful offenders can be found in New Mexico's Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2007). Many other states also grant youth facing adult consequences a jury right. *See, e.g.*, Ark. Code Ann. § 9-27-325 (West, Westlaw through end of 2007 Reg. Sess.) (jury trials for EJJ offenders); Colo. Rev. Stat. Ann. § 19-2-107 (West, Westlaw through laws effective Apr. 17, 2008) (aggravated juvenile offenders and juveniles who have committed a crime of violence have a right to a jury trial); Conn. Gen. Stat. Ann. §§ 46b-133c, 46b-133d (West, Westlaw through the 2008 Supplement and amendments and repeals by all Public Acts of the 2008 Jan. Special Sess.) (serious juvenile repeat offenders or serious sexual offenders get a jury trial in adult court); Idaho Code Ann. § 20-509 (Westlaw through Chs. 1-330 that are effective on or before Apr. 1, 2008) (juveniles aged 14 years and older accused of certain serious crimes get jury trials); Kan. Stat. Ann. §§ 38-2347, 38-2357 (Westlaw through end of 2007 Reg. Sess.) (EJJ juveniles have right to a jury trial); N.H. Rev. Stat. Ann. § 169-B:19 (Westlaw through laws currently effective through Ch. 4 of the 2008 Reg. Sess.) (right to jury trial if juvenile may be sentenced to an adult criminal facility or sentenced past the age of majority); R.I. Gen. Laws § 14-1-7.3 (Westlaw through all 2007 legislation) (certified juveniles have jury trial right).

McKeiver applies *only* to delinquency adjudications because the goal of such proceedings is rehabilitation, which would be undermined by imposing a fully adversarial system. As the McKeiver Court explained,

> We are particularly reluctant to say. . . that the [juvenile justice] system cannot accomplish its rehabilitative goals. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

403 U.S. at 547. To equate the juvenile and adult systems, the Court continued "chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. Justice White further explicated the difference between the adult and juvenile systems:

> Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system. For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control.).

Id. at 551-52 (White, J., concurring). To preserve the differences between these systems, the Court concluded that juvenile proceedings would be exempt from the jury trial right.

New Mexico's sentencing scheme, however, converts the juvenile proceeding into the functional equivalent of an adult criminal trial with the associated focus on blame and punishment rather than treatment. Although Rudy

B.'s hearings took place in a juvenile courtroom, he was exposed to the same maximum penalty as an adult offender charged with like crimes, sentenced to serve his term in the same adult facilities, and "treated as an adult offender." *See* § 32A-2-20(E). The focus was no longer rehabilitation; the threat – and reality – of adult criminal sentencing "put an effective end to what ha[d] been the idealistic prospect of an intimate, informal protective proceeding," *McKeiver*, 403 U.S. at 545. As a result, *McKeiver's* exception to the jury right does not apply to Rudy B.'s case.[3]

II. Rudy B.'s Sentence Exceeded the Statutory Maximum on the Basis of Judicial Fact-Finding in Violation of the Sixth Amendment.

As a preliminary matter, because the statute at issue here addresses a sentencing procedure, *Apprendi* applies to this case. The challenged disposition statute is concerned exclusively with what type of sentence a child will receive. § 32A-2-16. Indeed, the fact-finding takes place *after* the child's adjudicatory hearing, and although it transfers the child to an adult custodial agency, it does not transfer the case to a different court. § 32A-2-20(E). The statute thus falls

[3] As mentioned above, New Mexico also provides by statute that juveniles are entitled to a jury trial when the offense at issue would be triable by jury if committed by an adult. § 32A-2-16. Thus, to fail to grant the jury trial right in amenability hearings not only violates the U.S. Constitution, it also runs counter to state law.

squarely under the *Apprendi* rule. Case law on juvenile transfer and waiver schemes, in contrast, may raise jurisdictional matters not at issue here.[4]

A. Rudy B.'s Sentence was Based on Impermissible Judicial Fact-Finding.

The New Mexico youthful offender disposition statute requires the trial judge to consider a number of factors before imposing an adult sentence. Some factors more closely resemble *elements* of a crime, such as "whether a firearm was used" and "whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner." Others mirror traditional sentencing considerations, such as "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child…." § 32A-2-20(C). Case law is clear that *all* of these factors are required to be determined by a jury beyond a reasonable doubt.

1. *Apprendi* and its Progeny Establish a Bright-Line Rule that *Any* Fact Increasing a Penalty Beyond the Statutory Maximum Triggers the Right To a Jury Trial.

In *New Mexico v. Gonzales*, 2001-NMCA-025, 130 N.M. 341 (2001), this Court held that § 32A-2-20 does not violate the Constitution because of the

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[4] Some judges have characterized those schemes as jurisdictional in nature, and thus not subject to the *Apprendi* rule. *See, e.g. State v. Rodriguez*, 71 P.3d 919 (Ariz. 2003), *State v. Jones*, 47 P.3d 783 (Kan. 2002). Even in the more controversial context of transfer or waiver laws, however, some courts agree that *Apprendi* should apply. *See Commonwealth v. Quincy Q.*, 753 N.E.2d 781 (Mass. 2001).

differences between amenability sentencing factors and elements of the crime. The Court noted that, unlike elements, amenability factors measure prospects for rehabilitation rather than culpability; and depend on findings that are by nature different, focusing on a complicated and difficult question "requiring consideration of a child's environment, age, maturity, past behavior and predictions of future behavior, as well as specifics of the offense as they relate to the prospects of rehabilitation." *Id.* at ¶ 26. The Supreme Court has since clarified that these types of factors trigger the jury right articulated by *Apprendi*.

In *Apprendi,* the Supreme Court established a bright line rule underscoring that the type of fact at issue does not matter in the determination of whether the jury right attaches. "Other than the fact of a prior conviction, *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum" triggers the jury right. 530 U.S. at 490 (emphasis added). Since *Apprendi* (and after this Court's decision in *Gonzales*), the Supreme Court has clarified that the dispositive question is not whether the facts are labeled sentencing factors or elements of a crime, but whether the additional factors can be relied upon to support an increase in punishment beyond the statutory maximum. "[T]he characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question 'who decides,' judge or jury. *Ring v. Arizona,* 536 U.S. 584 (2002). The Court has further explained that

> [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would have received if punished according to the facts reflected in the jury verdict alone."

Id. at 602 (internal citations omitted). Thus, "[t]he dispositive question, we said, 'is one not of form, but of effect.'" *Id.* (quoting *Apprendi*, 530 U.S. at 494).

In *Blakely,* decided after this Court's decision in *Gonzales,* the United States Supreme Court further explained why allowing a judge to find facts like those at issue in this statute would violate *Apprendi*. According to the majority, there are only two alternatives to the *Apprendi* bright-line rule, and neither sufficiently protects the right to trial by jury. The first alternative would be that the jury "need only find whatever facts the legislature chooses to label elements of the crime, and those that it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge." The Court rejected this approach, explaining that it could result in the "absurd result" that "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it-or of making an illegal lane change while fleeing the death scene." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

The second alternative, according to the Court, and the one that most closely mirrors the logic set forth in *Gonzales,* would be that "legislatures may establish legally essential sentencing factors *within limits* – limits crossed when, perhaps, the

sentencing factor is a 'tail which wags the dog of the substantive offense.'" *Id.* at 307. The Court rejected this option as well, explaining that to rely on a judge's subjective interpretation of what constituted a sentencing factor and what constitutes an element of the crime would too deeply erode the power of the jury, and thus that *only* a bright-line rule could suffice.

> Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is too far. We think that claim is "not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."

Id. at 308. Thus, in *Blakely,* the Court held that a judge could not increase the defendant's carjacking sentence upon his or her own finding "that a defendant acted with deliberate cruelty." *Id.* at 313-14 Similarly, the jury right attaches to the factual findings required by section 32A-2-20, whether they go to the circumstances of the crime, the defendant's mental state, or even the availability of resources, if the result is to take the sentence beyond the statutory maximum. Whether the findings constitute a "tail which wags the dog," or a more traditional sentencing factor, the defendant is entitled to trial by jury. [5]

[5] The Supreme Court has clarified that *Apprendi's* reasoning applies to aggravating and mitigating factors that support imposition of the death penalty, *Ring,* 536 U.S. at 609, sentencing factors under the Armed Career Criminal Act, *Shepard v. United States,* 544 U.S. 13 (2005), sentencing under the federal sentencing guidelines, *United States v. Booker,* 543 U.S. 220 (2005), and sentencing factors that determine a defendant's sentence under a California sexual abuse law,

In concluding that *Apprendi* would permit the New Mexico amenability sentencing structure, this Court in *Gonzales* also analogized the amenability hearing to death penalty sentencing. *Gonzales* quoted the Supreme Court's conclusion that "once a jury has found the defendant guilty of all the elements of an offense" with a maximum penalty of the sentence of death, a judge could decide which sentence to apply. *Apprendi,* 530 U.S. at 497. The United States Supreme Court has since explicitly rejected this reasoning. In *Ring*, the Court held that although a single statute might contemplate both a life sentence and a sentence of death, when the law also requires a finding of aggravating factors before the death penalty may be imposed, the jury right attaches. 536 U.S. at 609 As a result, *Gonzales* no longer controls, and New Mexico statute violates the Sixth Amendment.

Only one "narrow exception" exists to the *Apprendi* rule requiring a jury right for fact-finding: the finding that a defendant has a prior conviction. In *Apprendi*, the Supreme Court carved out the exception concerning prior

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Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007). The facts at issue in *Blakely* are particularly analogous to those considered here. In *Blakely*, the Court established that a jury, not a judge, must consider whether a crime had been committed with "deliberate cruelty." 542 U.S. at 313-314. Here, the judge considered, among other factors, a similar culpability issue - whether the offense was committed in an "aggressive, violent, premeditated or willful manner." § 32A-2-20(C)(2). More important, however, is the Supreme Court's prohibition on litigants and judges engaging in an analysis about the type of facts at issue, instead requiring adherence to a bright-line rule barring *any* judicial fact-finding.

convictions because it had previously decided in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that prior convictions need not be listed in a criminal indictment. *Apprendi*, 530 U.S. at 487. The Supreme Court allows the prior convictions exception because "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). *See also Apprendi*, 530 U.S. at 490, 488, 496 (emphasizing that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact"). These protections are manifestly absent from the amenability determination.

Moreover, Supreme Court case law suggests that even a finding of prior convictions may now warrant jury protections. *Almendarez-Torres* itself was a bare 5-4 majority opinion, with Justice Thomas as one of justices who signed the majority opinion. Since then, however, Justice Thomas admitted that he was wrong in *Almendarez-Torres*, having made "an error to which I succumbed . . . ." *Apprendi*, 530 U.S. at 520, (Thomas, J., concurring) Still more recently, Justice Thomas dissented from the denial of certiorari in *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006)**,** observing that "it has long been clear that a majority

of [the United States Supreme Court] now rejects [the *Almendarez-Torres*] exception." The constitutional doubt cast even on the exception regarding prior convictions – which as a practical matter are unlikely to be contested – emphasizes the importance of the jury right in more subtle cases such as the one at bar.

2. The Purpose of the Sixth Amendment Right to Trial by Jury Underscores the Importance of the Bright-Line Rule.

In *Gonzales*, this Court held that the *Apprendi* rule did not apply to section 32A-2-20 because a judge would be better-positioned to make the factual decisions at issue. The Supreme Court has since clarified in *Blakely* and *Ring* that even when the judge might be better-positioned to make the factual determination, the Sixth Amendment jury right applies. As the Court explained in *Blakely*, the right to trial by jury does not necessarily exist to identify the best or most knowledgeable fact-finder. Instead, it exists to prevent unchecked power in the judiciary. The jury trial is the "circuit breaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306, and must be vigilantly protected.

More specifically, that a judge may be better-positioned to understand the complexity of a factual finding at issue does not eliminate the right to a jury determination of that fact. In *Ring*, the Court explicitly rejected the State's argument that the elaborate sentencing procedures and detailed factual findings

needed in death penalty cases mandated judicial fact-finding. 536 U.S. at 606. The *Ring* Court asserted that the jury right would apply even in cases where the jury might be less capable than the judge.

> The Sixth Amendment jury trial right … does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. ... The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free."

Id. at 607 (citing *Apprendi,* 530 U.S. at 498 (Scalia, J., concurring)). The judge may sometimes be better positioned to make determinations about a child's capacity for rehabilitation, or the availability of resources in the juvenile justice system, but that possibility cannot justify depriving these juvenile defendants of a right to trial by jury.

Rudy B. certainly has the option of waiving his jury right. *Ring*, 536 U.S. at 609 (quoting *Duncan*, 391 U.S. at 155-156 (1968)) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.'"). Yet when disputed facts were raised in the amenability hearing, when witnesses gave differing accounts of the nature of the crime, Rudy's culpability, his capacity for rehabilitation in light of the available resources - he had a right to have a jury hear those conflicting accounts and reach their own conclusion. The judge's capacity as

an effective fact-finder may not outweigh Rudy B.'s constitutional right to a jury determination.

3. The Jury Right Applies Here Because the Judge is Mandated to Find Amenability Factors Before Imposing an Adult Sentence.

If a sentencing recommendation is merely advisory, it does not trigger the jury right. If, as is the case here, the judge's discretion is limited because he or she *must* find certain facts to be true before imposing a sentence, *Apprendi* applies and the defendant has a right to a jury trial.

In *Booker*, the Supreme Court considered the constitutionality under the Sixth Amendment of federal sentencing guidelines. At issue were sentencing provisions that elevated the defendant's sentence based on a judicial finding regarding the quantity of illegal drugs at issue. 543 U.S. at 227. The Court concluded that the sentencing provisions violated the Sixth Amendment because they were mandatory. The Court explained that its holding "rests on the premise" that "the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." The Court continued:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.

Booker, 543 U.S. at 233. Although the sentencing scheme at issue here allows the judge the discretion to impose the adult sentence, and allows the judge a degree of leeway in determining which facts are relevant, it is still "mandatory" as that term has been defined by the *Apprendi* line of cases. As the Court explained in *Cunningham*, what makes a sentencing scheme mandatory is the requirement that a judge find certain facts before imposing the heightened sentence.

> We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Cunningham, 127 S. Ct. at 869. Because the judge was *required* to find additional factors in order to impose an adult sentence, § 32A-2-20(B), the sentence was mandatory and triggered the Sixth Amendment jury right.

B. Rudy B.'s Sentence Exceeded the Statutory Maximum.

1. The Statutory Maximum is the Maximum Allowed on the Basis of Facts Found by the Jury.

Rudy B.'s sentence violated the Sixth Amendment because the judge could not have imposed it without the findings of fact required by section 32A-2-20. The *Apprendi* rule applies to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. In *Blakely*, the Court clarified the meaning of "statutory maximum," explaining that "the 'statutory maximum'

for *Apprendi* purposes is the maximum a judge may impose based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303. The Court further underscored this point, noting that the statutory maximum is "the maximum [a judge] may impose *without* any additional findings." *Id.* at 304 (emphasis in the original).

The judge in Rudy B.'s case could not have imposed the adult sentence without making the additional factual findings required by the amenability hearing. The statute requires that to invoke an adult sentence "the court shall make" the findings that the child is not eligible for treatment or rehabilitation or for commitment to an institution for children with developmental disabilities or mental disorders. § 32A-2-20. Because New Mexico's sentencing scheme required the judge to find those facts before imposing the adult sentence, the scheme violates *Apprendi* and the Sixth Amendment.

2. A "Statutory Range" Does Not Apply to a Set of Distinct Sentencing Options.

It defies reason to label both the juvenile and the adult sentence as falling within one "statutory range." When a judge's sentencing consequences are segmented – and the judge is asked to either impose *either* "sentence A" *or* a very different "sentence B" upon a finding of additional facts – then the second sentence is outside of the statutory range. In *Cunningham,* for example, the United States Supreme Court addressed a sentencing scheme in which a person convicted of

sexual abuse of a child would be punished by a term of 6, 12, or 16 years. The law required the judge to impose the middle sentence unless he or she found aggravating or mitigating factors. 549 U.S. 270, 127 S. Ct. 856. The Court explained that under this system, "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.'" *Id.* at 859 (quoting *Booker*, 543 U.S. at 233).

Similarly here, Rudy B. faced a possible commitment to the youth services department until his twenty-first birthday if sentenced as a youthful offender in the juvenile system, In stark contrast, sentenced as an adult, Rudy B. was subject to – and received – a maximum sentence of twenty-five years in an adult correctional institution. Although the judge was not required to impose the sentence at the upper limit, the contrast in maximum sentences establishes two very different sentencing options, making this sentencing scheme substantially similar to the one at issue—and rejected—in *Cunningham.* Because the judge considered two distinct sentences, and because the adult sentence was dependent on the judge's findings at the amenability hearing, the adult sentence exceeded the statutory maximum.[6] As the United States Supreme Court has now firmly established, this sentencing scheme violated Rudy B.'s Sixth Amendment right to a jury trial.

[6] Moreover, the United States Supreme Court has explicitly rejected the argument that the statutory maximum encompasses all possible sentences contemplated in one statute, instead recognizing that a sentence requiring additional judicial fact-

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully request that this Court hold section 32A-2-20 unconstitutional.

finding of aggravating and mitigating factors exceeded the maximum. *Ring*, 536 U.S. 584.

CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of *Amicus Curiae* Juvenile Law Center uses a 14 point Times New Roman font and contains approximately 5,000 words, as calculated by Microsoft Word computer software, version 2003.

Dated: May 15, 2008

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, Jessica Feierman, Esq., do hereby certify this 15th day of May, 2008, pursuant to New Mexico Rule of Appellate Procedure 12-307, that the attached Motion for Leave to File an *Amicus Curiae* Brief in Support of the Appeal of Child/Appellant Rudy B. and the associated Brief of *Amicus Curiae* have been served, via first class mail on all counsel of record in this appeal as follows:

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