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**State v. Rudy B.: Denying Youthful Offenders the Benefit of
Apprendi's Bright-Line Rule before Adult Sentencing**

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STATE V. RUDY B.:
DENYING YOUTHFUL OFFENDERS THE
BENEFIT OF APPRENDI'S BRIGHT-LINE
RULE BEFORE ADULT SENTENCING

Amanda L. Thatcher*

I. INTRODUCTION

In *State v. Rudy B.*, the New Mexico Supreme Court determined that youthful offenders are not entitled to a jury finding for amenability determinations.¹ Amenability determinations are used in New Mexico to “gauge the possibility for meaningful rehabilitation”² of a child who has been adjudicated as a youthful offender³ and to determine whether that child will be sentenced as a juvenile or as an adult.⁴ The trial court is required to find that a child is not amenable to rehabilitative treatment or eligible for commitment to an institution for developmentally disabled children before invoking its discretion to sentence a child as an adult.⁵ There is a great disparity between the maximum sentences that a youthful offender can receive depending on whether he or she is sentenced as a juvenile or an adult. Sentenced as a juvenile, the maximum sentence a youthful offender can receive is commitment in a juvenile facility until the age of twenty-one.⁶ Sentenced as an adult, the maximum sentence a youthful offender can receive is imprisonment in an adult penitentiary for the maximum sentence that would be applicable to an adult convicted of the same offense or offenses.⁷ In effect, an adult sentence could potentially expose a child to life imprisonment.

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1. *State v. Rudy B. (Rudy II)*, 2010-NMSC-045, ¶ 2, 234 P.3d 726, 727, *cert. denied*, 131 S.Ct. 2098 (2011).

2. *State v. Gonzales (Gonzales I)*, 2001-NMCA-025, ¶ 19, 24 P.3d 776, 783.

3. NMSA 1978, § 32A-2-3(J) (2009). A youthful offender is a child adjudicated for any one or more of thirteen offenses that were committed when the child was between the ages of fourteen and eighteen.

4. NMSA 1978, § 32A-2-20 (2009).

5. NMSA 1978, § 32A-2-20(B).

6. NMSA 1978, § 32A-2-19(B) (2009).

7. NMSA 1978, § 32A-2-20(E).

Amenability determinations in New Mexico are similar to proceedings in other states that determine whether a delinquent child will be subject to a juvenile adjudication with status as a child, or whether the child will receive a criminal conviction with status as an adult.⁸ The proceedings for youthful offenders in New Mexico, however, are unique because they occur after trial,⁹ whereas the proceedings in other states occur as a preliminary matter before trial.¹⁰ The practical effect then, is that other states' proceedings merely determine whether the adult court or juvenile court will have jurisdiction over a child, while in New Mexico, the proceedings have a direct impact on the length of the sentence received by a youthful offender.

In 2000, the U.S. Supreme Court decided *Apprendi v. New Jersey*, a landmark case that limited a judge's ability to enhance a criminal sentence based on certain factors. *Apprendi* provided the bright-line rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹¹ Although the statutory maximum is the maximum sentence that the trial court could impose *without* any additional findings,¹² the New Mexico Supreme Court concluded that applying *Apprendi*'s bright-line rule to findings of non-amenability would be an improper extension of the rule.¹³ The New Mexico Supreme Court came to this conclusion after reviewing the U.S. Supreme Court's decision in *Oregon v. Ice*, in which the Supreme Court held that in light of historical practice and state sovereignty, *Apprendi* did not require a jury to make the factual findings necessary for a judge to impose consecutive sentences.¹⁴

The refusal to apply the *Apprendi* rule to amenability determinations is significant in New Mexico because it puts a youthful offender at risk of being imprisoned, conceivably for life, without affording the child basic constitutional protections. This note will examine the rationale behind the New Mexico Supreme Court's refusal to apply the *Apprendi* rule to amenability determinations and provide an analysis of the court's decision.

8. INST. OF PUB. LAW, UNIV. OF N.M. SCH. OF LAW, NEW MEXICO JUVENILE JUSTICE HANDBOOK 1-7 (2011).

9. *Id.*

10. 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 513-15 (2d ed. 1994).

11. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

12. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

13. *Rudy II*, 2010-NMSC-045, ¶ 59, 234 P.3d 726, 740, *cert. denied*, 131 S.Ct. 2098 (2011).

14. *Oregon v. Ice*, 555 U.S. 160, 164 (2009).

Part II examines the applicable law that served as the backdrop for the decision in *Rudy B.* It begins with a discussion of the juvenile justice system generally and then reviews the juvenile justice system and its history in New Mexico. Next, it reviews the *Apprendi* decision in detail and then reviews the decision in *Oregon v. Ice*.¹⁵ Part II concludes with an examination of *State v. Gonzales*,¹⁶ the first New Mexico case to determine whether the *Apprendi* rule applied to amenability determinations, and *Gonzales v. Tafoya*,¹⁷ the subsequent federal habeas case that addressed whether the *Apprendi* rule applied to amenability determinations.

Part III examines *Rudy B.* in detail, reviewing its procedural history at the trial court, the court of appeals, the supreme court, and on remand. In *Rudy B.*, the trial court found the child was not amenable to treatment and sentenced him to twenty-five years in an adult penitentiary. The court of appeals held that the *Apprendi* rule should be applied to amenability determinations, a decision that was reversed by the supreme court. On remand, the original adult sentence was affirmed. Part III focuses most heavily on the decision of the New Mexico Supreme Court, providing a detailed review of the court's holding and rationale, as well as the dissent's view of the case.

Part IV provides an analysis of *Rudy B.* Part IV first reviews historical practice and state sovereignty considerations of applying the *Apprendi* rule to amenability determinations. It then reviews the New Mexico Supreme Court's reliance on *Ice* in its application of the *Apprendi* rule to *Rudy B.* Part IV concludes with an analysis of the importance of the jury system and the jury's role in the juvenile justice system.

Part V concludes the note, offering suggestions as to how New Mexico should proceed following the New Mexico Supreme Court's decision in *Rudy B.*

II. BACKGROUND

A. *The Juvenile Justice System*

At common law, juvenile offenders were treated just like adults in the criminal justice system.¹⁸ The exception was if they were deemed incapable of forming the requisite criminal intent.¹⁹ The ability to form the

15. 555 U.S. 160.

16. *Gonzales I*, 2001-NMCA-025, 24 P.3d 776.

17. *Gonzales v. Tafoya (Gonzales II)*, 515 F.3d 1097 (2008).

18. 2 KRAMER, *supra* note 10, at 363.

19. *Id.*

requisite criminal intent largely depended on a child's age: children younger than seven were presumed incapable of forming the requisite mental intent; children between seven and fourteen were entitled to a rebuttable presumption that they lacked the requisite mental intent; children older than fourteen were presumed to have the requisite mental intent and were thus treated like adults under the law.²⁰ This approach continued until 1899, when Illinois created the first separate juvenile court.²¹ Today, all states have a separate juvenile justice system.²²

Social changes of the late nineteenth century brought with them the desire to prevent children from being imprisoned with hardened adult criminals.²³ Children were to be rehabilitated through procedures that were "'clinical' rather than punitive."²⁴ These procedures were not adversarial because the state was proceeding as *parens patriae*.²⁵ This term, originally taken from chancery practice, described the power of the state to act on behalf of a child to protect the property interests and person of the child.²⁶ Most states, including New Mexico, expressed the purpose of their juvenile justice systems to be the rehabilitation, rather than the punishment, of children.²⁷ The underlying policy of a separate juvenile justice system was to remove children from the adult system and provide them with "rehabilitation through individualized justice."²⁸

Juvenile courts did not exist at common law and were created by statutes.²⁹ The statutory definitions of a juvenile and the requirements for administration of the juvenile court systems vary by jurisdiction, but the general policy behind the juvenile system—to remove juveniles from the adult system—is shared by all jurisdictions.³⁰ By treating juveniles separately, the hope was that they would not be stigmatized as criminals at such a young age.³¹

20. *Id.*

21. *Id.* at 364.

22. *Id.* at 367.

23. *Id.* at 364.

24. *In re Gault*, 387 U.S. 1, 15–16 (1967).

25. *Id.* at 16. A state acting as *parens patriae* proceeds as a parent of a child. INST. OF PUB. LAW, *supra* note 8, at 1-4.

26. *In re Gault*, 387 U.S. at 16 (footnotes omitted).

27. 2 KRAMER, *supra* note 10, at 364; *see* NMSA 1978, § 32A-2-2 (2007).

28. Kelly K. Waterfall, Note, *State v. Muniz: Authorizing Adult Sentencing of Juveniles Absent a Conviction That Authorizes an Adult Sentence*, 35 N.M. L. REV. 229, 230 (2005) (quotation marks in original) (citation omitted).

29. 2 KRAMER, *supra* note 10, at 364.

30. *Id.* at 364–65.

31. *Id.* at 365; *see also* *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (stating that state legislatures have chosen not to label juvenile offenders as criminals).

Between 1899 and 1966, the juvenile justice system operated much like social welfare agencies with the goal to rehabilitate children.³² Juvenile proceedings were categorized as civil proceedings, rather than criminal proceedings, and therefore, a state was not subject to the same restrictions placed on it in other contexts where liberty interests were at stake.³³ Juvenile proceedings were informal, but because of this informality, children were not afforded general constitutional protections that were provided to adult offenders.³⁴ The discretion in the juvenile courts has resulted in arbitrary deprivation of fundamental rights, rather than compassionate, individualized treatment.³⁵

Beginning in 1966, case law began to expand the constitutional rights of children.³⁶ Not all constitutional rights have been incorporated to apply to children; notably, children have no federal constitutional right to a jury trial in adjudicative proceedings,³⁷ but children do have a right to a jury trial under the New Mexico Constitution.³⁸

Some children, depending on their characteristics as offenders or the characteristics of the offenses themselves, are tried in adult court.³⁹ Often called “waiver,”⁴⁰ because it is a waiver by the juvenile court of jurisdiction over a child, this procedure is used when a child is determined not to be amenable to rehabilitative treatment.⁴¹ Waiver decisions are

32. 2 KRAMER, *supra* note 10, at 375.

33. *In re Gault*, 387 U.S. 1, 17 (1967).

34. 2 KRAMER, *supra* note 10, at 375–76.

35. *In re Gault*, 387 U.S. at 18–19 (footnotes omitted).

36. 2 KRAMER, *supra* note 10, at 376; *see also In re Gault*, 387 U.S. at 30–31 (holding that children are entitled to specific due process requirements in delinquency proceedings: the right to receive notice of proceedings that would be constitutionally adequate in a civil or criminal proceeding, the right to counsel if confinement is a possibility, privilege against self-incrimination, and the right to confrontation and cross-examination of witnesses); *Kent v. United States*, 383 U.S. 541, 561–62 (1966) (holding that due process and fair treatment entitle a juvenile to a hearing before proceedings can be waived to an adult court); *In re Winship*, 397 U.S. 358, 369 (1970) (holding that juveniles are entitled to a standard of proof beyond a reasonable doubt in adjudicative proceedings).

37. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

38. NMSA 1978, § 32A-2-16 (2009); *see also Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968) (recognizing that a jury trial is required under N.M. CONST. art. II, § 14).

39. 2 KRAMER, *supra* note 10, at 511–13.

40. Jurisdictions vary in the use of the term “waiver,” “transfer,” or “certification” when a child is moved to the adult system. Wayne R. LaFave, et al., 6 *Crim. Proc.* § 26.4(i) (3d ed. 2011), *available at* Westlaw CRIMPROC.

41. 2 KRAMER, *supra* note 10, at 513–15.

made in the “best interests of the child and public.”⁴² When a child is waived into the adult system, he or she is then afforded all of the constitutional protections of an adult, including the right to a jury trial.⁴³ Juveniles that are waived into the adult system receive punishment similar to adults who are charged with the same offense, rather than the rehabilitation sought in the juvenile system.⁴⁴

*Kent v. United States*⁴⁵ initiated massive legislative reform for waiver proceedings.⁴⁶ Not only were the procedural requirements adopted in many state statutes, but the factors to be considered when making a waiver decision were also adopted.⁴⁷ The factors included whether the offense was against a person or property, whether it was committed in a vicious or premeditated manner, whether suitable programs were available for rehabilitation of the child, the maturity and the sophistication of the child, the child’s prior criminal history, and the child’s physical and mental condition.⁴⁸ Notably, *Kent* did not hand down the procedural requirement affording juveniles the right to a jury trial for waiver decisions⁴⁹ but held that waiver hearings must comply with “the essentials of due process and fair treatment.”⁵⁰ The due process standard for juvenile proceedings is “fundamental fairness.”⁵¹

In most jurisdictions, the decision to waive a child into the adult system is made by a trial court judge.⁵² Commonly termed “judicial waiver,” these proceedings usually require a hearing in which the amenability of the child to rehabilitative treatment is considered.⁵³ There are

42. Waterfall, *supra* note 28, at 230 (quotation marks in original) (citation omitted).

43. 2 KRAMER, *supra* note 10, at 516.

44. *Id.*

45. 383 U.S. 541 (1966).

46. 2 KRAMER, *supra* note 10, at 534.

47. *Id.* at 535.

48. *Id.* A modified version of these factors has been adopted in New Mexico for amenability determinations. *See infra* Part II.B.

49. 2 KRAMER, *supra* note 10, at 535.

50. *Kent*, 383 U.S. at 562.

51. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

52. 2 KRAMER, *supra* note 10, at 517.

53. Daniel M. Vannella, Note, *Let the Jury Do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings*, 48 WM. & MARY L. REV. 723, 738 (2006). Amenability determinations normally require a finding of whether the interests of the juvenile and society would be best served by transferring a child to the adult system.

some exceptions, however, by the use of automatic waiver provisions⁵⁴ or by allowing the prosecutor to make the decision.⁵⁵ These exceptions became more common beginning in the 1980s because there was an increase in violent crime committed by juveniles in the United States.⁵⁶ The juvenile system was reformed to focus more on public welfare, and many juvenile courts began to automatically waive jurisdiction over a child based on the offense of which he or she was accused without regard to the rehabilitative prospects of the child.⁵⁷ As a result, the child lost the greater procedural protections that he or she had in the juvenile system.⁵⁸

The waiver requirements of the juvenile court are usually articulated by statute.⁵⁹ Traditionally, age has been one of the most important requirements when determining whether or not the juvenile court will waive jurisdiction.⁶⁰ This is evidenced by many states' inability to waive jurisdiction over a child who is under a certain age⁶¹ and the use of automatic waiver provisions for a child who is above a certain age.⁶² The reasoning is that younger children are thought to be more amenable to rehabilitative treatment.⁶³ Next to age, circumstances surrounding the nature of the offense and a child's prior criminal or delinquency history are commonly considered when determining whether or not to waive jurisdiction over a child.⁶⁴ Some states require mandatory waiver if a child is charged with a very serious offense, such as murder,⁶⁵ because serious offenders are presumed not to be amenable to rehabilitative treatment and might undermine the rehabilitative efforts of other children if they

54. Commonly termed "legislative waiver" provisions, these provisions typically allow for children of a certain age or children that have committed certain acts to be automatically transferred to the adult system. *Id.* at 741.

55. 2 KRAMER, *supra* note 10, at 518. Prosecutorial waiver puts the decision in the hands of one individual, and the prosecutor is generally not required to base the decision on an amenability determination or due process consideration. They are also controversial because they are prone to political pressure and racial bias. Vannella, *supra* note 53, at 743.

56. INST. OF PUB. LAW, *supra* note 8, at 1-7.

57. INST. OF PUB. LAW, *supra* note 8, at 1-7.

58. 2 KRAMER, *supra* note 10, at 520.

59. *Id.* at 527.

60. *Id.*

61. *See, e.g.*, CAL. WELF. & INST. CODE § 707 (Deering 2011); COLO. REV. STAT. § 19-2-518 (2010); KAN. STAT. ANN. § 38-2347 (2006).

62. 2 KRAMER, *supra* note 10, at 527.

63. *Id.*

64. *Id.* at 528-29.

65. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1010 (2011); NMSA 1978, § 32A-2-3(H) (2009); 42 PA. CONS. STAT. § 6322 (1995).

are placed in the juvenile system.⁶⁶ The majority rule is that a hearing must be held before making the waiver decision because the decision is highly dependent on a particularized factual inquiry into a child at a given time and under given circumstances.⁶⁷

B. *The Juvenile Justice System in New Mexico*

The modern juvenile justice system in New Mexico is governed by the Delinquency Act,⁶⁸ which is contained in the Children's Code.⁶⁹ The Delinquency Act was designed to shield children from the adult consequences of criminal behavior but also to hold them accountable to the extent proper depending on their age, education, mental and physical factors, background, and all other factors deemed relevant; to provide a system of supervision, care, and rehabilitation for children; and to deter acts of juvenile delinquency.⁷⁰

In New Mexico, children are entitled to a jury trial for delinquency proceedings if an adult charged with the same offense would be entitled to a jury trial.⁷¹ Additionally, children are statutorily entitled to the same "basic rights" as adults, except as otherwise provided in the Children's Code.⁷² "Basic rights" has been interpreted to mean basic constitutional protections, including protections against unreasonable search and seizure and confrontation rights of the Sixth Amendment.⁷³

66. 2 KRAMER, *supra* note 10, at 529–30.

67. *Id.* at 531.

68. Delinquency Act, NMSA 1978, §§ 32A-2-1 to 32A-2-33 (1993, as amended through 2009).

69. Children's Code, NMSA 1978, §§ 32A-1-1 to 32A-24-5 (1993, as amended through 2009).

70. NMSA 1978, § 32A-2-2 (1993, prior to amendments through 2009). This section was later revised in 2003 and 2007 to include nine additional purposes of the act.

71. This right was first recognized as a constitutional right in *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968) (recognizing that a jury trial is required under N.M. CONST. art. II, § 14) and is also codified under NMSA 1978, § 32A-2-16 (2009). Even after the decision in *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), the New Mexico Supreme Court has ruled that juveniles have a constitutional right to a jury trial in New Mexico. INST. OF PUB. LAW, *supra* note 8, at 2-9; see *State v. Eric M.*, 1996-NMSC-056, ¶ 5, 925 P.2d 1198, 1199 (reaffirming that children charged with a violation of state law are entitled to a jury trial).

72. NMSA 1978, § 32A-2-14 (2009).

73. INST. OF PUB. LAW, *supra* note 8, at 2-1; see *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 33 P.3d 1, 15 (stating basic rights include the right to be free from unreasonable search and seizure and the right to confront witnesses).

There are three types of juvenile offenders defined in the Delinquency Act: delinquent offenders,⁷⁴ youthful offenders,⁷⁵ and serious youthful offenders.⁷⁶ Whether a child is sentenced as an adult or juvenile depends on the statutory classification of the child.⁷⁷ The procedural rules that are applicable to a child's proceeding also depend on his or her statutory classification.⁷⁸ A child who has been charged as a youthful offender will be tried under the Rules of Criminal Procedure that govern adult proceedings.⁷⁹ If a child is convicted of a youthful offender offense, he or she will be sentenced as an adult or juvenile at the trial court's discretion.⁸⁰

New Mexico created its separate juvenile court system in 1917 when it enacted its first juvenile code.⁸¹ Prior to 1917, a juvenile was treated "no differently than an adult."⁸² The first juvenile code did not allow delinquent adjudications to be deemed criminal convictions, and there was no provision in the code that allowed a juvenile to be prosecuted in the adult system.⁸³ The juvenile code was amended in 1943 to allow a juvenile to be

74. NMSA 1978, § 32A-2-3(C) (2009). A delinquent offender is a delinquent child who is neither a youthful offender nor a serious youthful offender.

75. NMSA 1978, § 32A-2-3(J). A youthful offender is a child adjudicated for any one or more of thirteen offenses that were committed when the child was between the ages of fourteen and eighteen.

76. NMSA 1978, § 32A-2-3(H). A serious youthful offender is a child between the ages of fifteen and eighteen charged with and indicted or bound over for first degree murder.

77. NMSA 1978, § 32A-2-3. A delinquent offender is only subject to juvenile sanctions. NMSA 1978, § 32A-2-3(C). A youthful offender is subject to either adult or juvenile sanctions. NMSA 1978, § 32A-2-3(J). A serious youthful offender is subject to only an adult sentence because he or she is not a delinquent child as defined by the Delinquency Act. NMSA 1978, § 32A-2-3(H). If a child originally charged as a serious youthful offender is adjudicated for an offense other than first degree murder, he or she will be sentenced "as either a youthful offender or a delinquent offender, depending on the nature of the adjudicated act." *State v. Jones*, 2010-NMSC-012, ¶ 19, 229 P.3d 474, 478-79.

78. Rule 10-101 NMRA. The Children's Court Rules govern procedures for delinquent offenders. Rule 10-101(A)(1)(a). The Rules of Criminal Procedure govern procedures for both youthful offenders and serious youthful offenders. Rule 10-101(A)(2).

79. Rule 10-101(A)(2)(b).

80. NMSA 1978, § 32A-2-20(A) (2009).

81. INST. OF PUB. LAW, *supra* note 8, at 1-3; *see also Jones*, 2010-NMSC-012, ¶ 25, 229 P.3d at 480.

82. *Jones*, 2010-NMSC-012, ¶ 25, 229 P.3d at 480 (quoting *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968)).

83. *Id.* ¶ 25, 229 P.3d at 480.

prosecuted in the adult system for the commission of a felony.⁸⁴ In 1955, the juvenile code was amended again to limit the class of juveniles who could be prosecuted in the adult system, requiring that a child be older than fourteen and not suitable for reformation or rehabilitation to be treated as an adult.⁸⁵ The code was changed again in 1972 to require that a child be at least sixteen years old and charged with a felony to be prosecuted in the adult system.⁸⁶ Before waiving its jurisdiction over a case to the adult court, the juvenile court was required to find, among other things,⁸⁷ that a child was not amenable to rehabilitative treatment in available facilities.⁸⁸ The code was amended again three years later to lower the threshold for waiving a case to adult court, allowing for discretionary waiver of a child at least fifteen years old accused of murder or sixteen years old accused of an enumerated felony considered to be a serious offense.⁸⁹ Additionally, the juvenile court was no longer required to make the finding that a child was not amenable to rehabilitative treatment; it only had to *consider* amenability when making the waiver decision.⁹⁰ Finally, in 1993, the state adopted its modern statutory requirements, which mandate that only serious youthful offenders can be prosecuted in adult court and “[a]ll others remain in the juvenile system until after adjudication and may be sentenced as adults only after an amenability hearing.”⁹¹ Although the code now requires waiver of a child over the age of fourteen charged with first-degree murder, it eliminates the juvenile court’s ability to waive jurisdiction over other offenders.⁹²

New Mexico follows a unique approach with regard to waiver proceedings in that all children, except for serious youthful offenders,⁹³ are adjudicated in the juvenile court system.⁹⁴ Only after adjudication as a youthful offender is it decided whether a child will then be sentenced as

84. *Id.* ¶ 26, 229 P.3d at 480.

85. *Id.* ¶ 27, 229 P.3d at 481.

86. *Id.* ¶ 29, 229 P.3d at 481.

87. The court was also required to find that there were reasonable grounds to believe that the child committed the act alleged, that the child was not committable to an institution for the mentally ill, and that the interests of the community were best served by restraining or disciplining the child. *Id.*

88. *Id.* This waiver procedure was much like the waiver procedures modernly used in most states. *See supra* Part II.A.

89. *Jones*, 2010-NMSC-012, ¶ 30, 229 P.3d at 481.

90. *Id.* ¶ 30, 229 P.3d at 482.

91. *Id.* ¶ 31, 229 P.3d at 482.

92. *Id.* ¶ 32, 229 P.3d at 482.

93. NMSA 1978, § 32A-2-3(H) (2009).

94. INST. OF PUB. LAW, *supra* note 8, at 1-7.

an adult if the proper findings are made after an amenability hearing.⁹⁵ To impose an adult sentence, the trial court is required to make two findings, one of which is that a child is not amenable to rehabilitative treatment in available facilities.⁹⁶ The statute empowers the trial *court* with the discretion to sentence a child as an adult or juvenile after making the required findings but then directs the trial court *judge* as to the specific factors that he or she must consider when making the findings required to invoke an adult sentence.⁹⁷ The trial court judge is required to consider the following eight factors when determining whether a child is amenable to rehabilitative treatment:

- (1) the seriousness of the alleged offense;
- (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- (3) whether a firearm was used to commit the alleged offense;
- (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
- (5) 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;
- (6) the record and previous history of the child;
- (7) 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; and
- (8) any other relevant factor, provided that factor is stated on the record.⁹⁸

The Children, Youth, and Families Department is required to submit a predisposition report to the trial court concerning a youthful offender's amenability to rehabilitative treatment.⁹⁹ The amenability determination concerns both the rights of the child and protection of public interest.¹⁰⁰ It is an important right for the child, and a child is unable to

95. See NMSA 1978, § 32A-2-20 (2009).

96. NMSA 1978, § 32A-2-20(B). The second finding the trial court must make before invoking an adult sentence is that "the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders." This note will only focus on the amenability determination as that was the issue of contention in *State v. Rudy B. (Rudy II)*, 2010-NMSC-045, 234 P.3d 726, *cert. denied*, 131 S.Ct. 2098 (2011).

97. NMSA 1978, § 32A-2-20.

98. NMSA 1978, § 32A-2-20(C).

99. NMSA 1978, § 32A-2-17(A)(3) (2009).

100. *State v. Jones*, 2010-NMSC-012, ¶ 46, 229 P.3d 474, 485–86.

waive the amenability determination.¹⁰¹ After the amenability determination, the trial court is required to obtain an additional predisposition report prior to sentencing a youthful offender, regardless of whether the child is to be sentenced in the juvenile system or adult system.¹⁰² It was this modern statutory scheme that was applied to the child in *Rudy B.*

C. *Apprendi v. New Jersey*

Rudy B. dealt with whether the U.S. Supreme Court decision in *Apprendi v. New Jersey*¹⁰³ changed the procedures applicable to amenability determinations in New Mexico, which ultimately would have changed the way youthful offenders are sentenced. In *Apprendi*, the U.S. Supreme Court held, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁰⁴ This is an interpretation of the constitutional rights provided by the Due Process Clause of the Fifth Amendment¹⁰⁵ and the Sixth Amendment,¹⁰⁶ which apply to state prosecutions through the Fourteenth Amendment.¹⁰⁷

1. Facts of *Apprendi*

The defendant in *Apprendi* was indicted for twenty-three offenses alleging his involvement in four separate shootings and for various weapons charges.¹⁰⁸ He pleaded guilty to two counts of firearm possession for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb; the remaining charges were dismissed.¹⁰⁹ New Jersey had a “hate crime” law that served as a sentencing enhancement if the trial court judge found by a preponderance of the evidence that the offense was committed “with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual ori-

101. *Id.*

102. NMSA 1978, § 32A-2-17(A)(3); *see also* State v. Jose S., 2007-NMCA-146, ¶ 17, 171 P.3d 768, 772 (holding that a separate sentencing hearing distinct from the amenability hearing is required before sentencing a youthful offender as an adult).

103. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

104. *Id.* at 490.

105. “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

106. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI.

107. *Apprendi*, 530 U.S. at 476.

108. *Id.* at 469.

109. *Id.* at 469–70.

entation or ethnicity.”¹¹⁰ The defendant allegedly targeted an African-American family that had recently moved into an all-white neighborhood.¹¹¹ Without the sentencing enhancement, the defendant faced a maximum penalty of twenty years imprisonment,¹¹² but with the sentencing enhancement, he faced a maximum sentence of thirty years imprisonment.¹¹³ The trial court held an evidentiary hearing to determine the purpose of the shooting, and it found, by a preponderance of the evidence, that the defendant had acted with the purpose to intimidate as contemplated by the hate crime statute;¹¹⁴ accordingly, it ordered an enhanced sentence on one of the counts.¹¹⁵ Both the appeals court and the New Jersey Supreme Court affirmed the sentence.¹¹⁶

2. Rationale of *Apprendi*

A judge has considerable discretion in imposing a sentence within the range prescribed by statute, and he or she is well within judicial authority to consider factors relating to both the offense and the offender in exercising that discretion.¹¹⁷ A judge’s discretion is limited only by the statutory limits imposed by the legislature.¹¹⁸ A legislative scheme that imposes a sentence exceeding a defendant’s liability as determined by the guilty verdict alone is inconsistent with the limits on a judge’s discretion to adhere to statutory legal penalties.¹¹⁹ Submitting all facts to the jury with the requirement that it find those facts beyond a reasonable doubt is necessary for a variety of reasons, including the risk involved with erroneous deprivation of liberty and the stigma that accompanies a criminal conviction.¹²⁰ The deprivation of liberty and stigma associated with a criminal conviction are heightened when a defendant faces a sentence beyond what is provided for in the statute.¹²¹ This deprivation and stigma

110. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000) (deleted by amendment 2001).

111. *Apprendi*, 530 U.S. at 469.

112. The plea agreement provided for a concurrent sentence for the unlawful possession of the antipersonnel bomb and consecutive sentences for the two counts of firearm possession for an unlawful purpose. *Id.* at 470.

113. *Id.*

114. *Id.* at 470–71.

115. *Id.* at 471.

116. *Id.* at 471–72.

117. *Id.* at 481.

118. *Id.*

119. *Id.* at 482–83.

120. *Id.* at 484–85.

121. *Id.* at 484.

have constitutional significance.¹²² The U.S. Supreme Court was clear in its adoption of the rule, stating: “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”¹²³

The U.S. Supreme Court concluded that the defendant’s purpose for committing the crime required an evaluation of his state of mind or intent, for all practical purposes, an “element” of the crime.¹²⁴ “Whereas recidivism ‘does not relate to the commission of the offense’ itself, New Jersey’s [hate crime] purpose inquiry goes precisely to what happened in the ‘commission of the offense.’”¹²⁵ The Supreme Court explained, however, that the rule reaches beyond elements of the crime, and the relevant inquiry is whether the required finding exposes the defendant to greater punishment than that authorized by a finding of guilt alone.¹²⁶

D. Oregon v. Ice

Rudy B. relied heavily on *Oregon v. Ice*,¹²⁷ in which the U.S. Supreme Court applied its decision from *Apprendi* to determine whether a judge had the discretion to impose consecutive or concurrent sentences. The specific issue decided in *Ice* was whether the *Apprendi* rule required a jury finding to impose consecutive sentences for multiple offenses.¹²⁸ Under common law in most states, the trial court judge had discretion to impose either consecutive or concurrent sentences.¹²⁹ The prevailing statute at issue in *Ice* required a judge to make specific factual findings before he or she could exercise such discretion.¹³⁰ The U.S. Supreme Court held, “in light of historical practice and the authority of States over

122. *Id.* at 495.

123. *Id.* at 490 (alteration in original) (citation omitted) (internal quotation marks omitted).

124. *Id.* at 493.

125. *Id.* at 496 (internal citation omitted) (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 244 (1998)).

126. *Id.* at 494.

127. *Oregon v. Ice*, 555 U.S. 160 (2009).

128. *Id.* at 163.

129. *Id.*

130. *Id.* at 165. A judge may impose consecutive sentences for simultaneously-sentenced offenses that do not arise from the same continuous and uninterrupted conduct or for offenses that do arise from the same continuous and uninterrupted conduct if the judge finds the offense indicated a willingness of the defendant to commit more than one offense or the offense caused or created a greater risk to the victim or to a different victim. OR. REV. STAT. § 137.123(1) (2007).

administration of their criminal justice systems,” a jury is not required to make the factual findings necessary for a judge to impose consecutive sentences.¹³¹

1. Facts of *Ice*

The defendant in *Ice* entered into an apartment and sexually assaulted an eleven-year-old girl on two different occasions during a span of eight months.¹³² At sentencing, the judge made the factual findings required by statute for consecutive sentences and sentenced the defendant consecutively for two burglary offenses and two sexual assault offenses.¹³³ The defendant was sentenced concurrently for other offenses stemming from the two incidents.¹³⁴

2. Rationale of *Ice*

The U.S. Supreme Court distinguished *Ice* from the previous line of *Apprendi* cases because *Ice* involved multiple offenses and the previous cases involved sentencing for a discrete offense.¹³⁵ After reviewing the purposes behind the *Apprendi* decision,¹³⁶ the Supreme Court concluded that two elements must be considered before extending the *Apprendi* rule to such a case: historical practice and state sovereignty.¹³⁷ The Supreme Court explained that the decision to impose consecutive or concurrent sentences had not traditionally been within the domain of the jury, but rather had traditionally been within the realm of the states to administer their criminal justice systems.¹³⁸ Historically, the prevailing practice was for judges to impose consecutive sentences automatically, and the modern statutes actually provided greater protections than the historical practice.¹³⁹ The Supreme Court concluded that there was “no encroachment . . . by the judge upon facts historically found by the jury, nor any threat to the jury’s domain as a bulwark at trial between the State and the accused.”¹⁴⁰

131. *Ice*, 555 U.S. at 164.

132. *Id.* at 165.

133. *Id.* at 165–66.

134. *Id.*

135. *Id.* at 167.

136. The *Ice* Court explained that the *Apprendi* rule is intended to preserve the jury’s historic role to protect the defendant from a state during the trial process and to prevent legislative encroachment on the jury’s domain with both of these inquiries made against the backdrop of state sovereignty. *Id.* at 168.

137. *Id.*

138. *Id.*

139. *Id.* at 168–69.

140. *Id.* at 169.

3. Dissent in *Ice*

Justice Scalia, joined by Chief Justice Roberts, Justice Souter, and Justice Thomas dissented in *Ice*, concluding that the decision directly conflicted with *Apprendi* and subsequent case law because the statute exposed defendants to sentencing enhancements based on facts found by judges, rather than juries.¹⁴¹ The dissent argued that the distinction applied by the majority—that the *Apprendi* rule applied only to the length of a sentence for a single crime and not for the total sentence for the defendant—was not supported by *Apprendi* and its progeny, by the history of fact finding required to impose consecutive sentences, or by logic.¹⁴² The dissent argued that the Sixth Amendment’s requirement, as explained by *Apprendi*, is simply not satisfied when a judge finds additional facts to enhance a defendant’s sentence by imposing consecutive sentences.¹⁴³

E. *State v. Gonzales*

New Mexico’s appellate courts first addressed whether the *Apprendi* rule applied to amenability determinations in *State v. Gonzales*.¹⁴⁴ *Gonzales* was decided by the New Mexico Court of Appeals in 2001. The court of appeals held that the *Apprendi* rule was not applicable to amenability determinations¹⁴⁵ and that such determinations did not require proof beyond a reasonable doubt.¹⁴⁶

1. Facts of *Gonzales*

The defendant child was fourteen at the time that he participated in a string of burglaries that resulted in the homicide of one homeowner and injury to a neighbor. The child pleaded guilty to second-degree murder, aggravated burglary, aggravated battery, and two counts of aggravated assault.¹⁴⁷ The trial court found that the child was not amenable to rehabilitative treatment and sentenced him to twenty-two years in an adult penitentiary.¹⁴⁸

141. *Id.* at 173 (Scalia, J., dissenting).

142. *Id.*

143. *Id.* at 178.

144. *Gonzales I*, 2001-NMCA-025, 24 P.3d 776.

145. *See* NMSA 1978, § 32A-2-20(B) (2009).

146. *Gonzales I*, 2001-NMCA-025, ¶ 1, 24 P.3d at 779. The court also applied this ruling to eligibility commitments, but such determinations are outside the scope of this note. *See supra* note 96.

147. *Gonzales I*, 2001-NMCA-025, ¶¶ 2–5, 24 P.3d at 779.

148. *Id.* ¶ 5, 24 P.3d at 779.

2. Rationale of *Gonzales*

The New Mexico Court of Appeals reasoned that *Apprendi* supported its decision because the trial court has discretion to consider facts about the underlying offense as well as the offender in making sentencing determinations within the range allowable by the statute.¹⁴⁹ The court of appeals concluded that the child was sentenced within the range allowable by statute because the Delinquency Act authorized the mandatory adult sentence if the court made the findings necessary to invoke an adult sentence.¹⁵⁰ Since the range of possible sentences was fixed depending on whether the child was sentenced as an adult or juvenile, the court of appeals held that the findings made by the trial court did not result in the child being sentenced for a greater offense.¹⁵¹

The conclusions originally reached by the New Mexico Court of Appeals have since been foreclosed by the U.S. Supreme Court's decision in *Blakely v. Washington*.¹⁵² *Blakely* defined the statutory maximum:

[T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings*.¹⁵³

3. Habeas Relief Sought and Denied

In 2008, the Tenth Circuit Court of Appeals affirmed the denial of habeas relief for the child in *Gonzales v. Tafoya*.¹⁵⁴ The child alleged that his due process rights were violated by finding that he was not amenable to treatment or eligible for commitment without submitting those findings to a jury pursuant to *Apprendi*.¹⁵⁵ As to the *Apprendi* claim, the Tenth Circuit held that the child was not entitled to a jury trial for the amenability determination and that the district court did not unreasonably apply federal law in rejecting his claim.¹⁵⁶ The Tenth Circuit applied

149. *Id.* ¶ 29, 24 P.3d at 785.

150. *Id.* ¶ 31, 24 P.3d at 785; *see also* NMSA 1978, § 32A-2-20(E).

151. *Gonzales I*, 2001-NMCA-025, ¶ 31, 24 P.3d at 785.

152. *Blakely v. Washington*, 542 U.S. 296 (2004).

153. *Id.* at 303–04 (emphasis in original).

154. *Gonzales II*, 515 F.3d 1097 (2008).

155. The child also alleged that his guilty plea was not knowing and voluntary, that he received ineffective assistance of counsel, and that the evidence was insufficient to find him non-amenable to treatment or eligible for commitment. *Id.* at 1101.

156. *Id.* at 1101–02.

state and federal law as of 2000, the date *Apprendi* was decided, because the post-*Apprendi* decisions could not be retroactively applied on habeas review,¹⁵⁷ and it ultimately concluded that *Kent v. United States* was the controlling case for the constitutionality of waiver proceedings.¹⁵⁸

The Tenth Circuit considered applying the *Apprendi* rule to juvenile waiver proceedings and noted that most courts have determined that the *Apprendi* rule should not be applied to such proceedings.¹⁵⁹ Courts generally distinguished waiver proceedings from *Apprendi* based on three reasons: waiver proceedings establish the court's jurisdiction; juveniles do not enjoy the same rights as criminal defendants, such as the right to jury trials; and waiver proceedings required findings that were unrelated to culpability, were not findings of historical facts, and required expertise that juries lacked.¹⁶⁰ The court then acknowledged that some of the distinguishing characteristics were inapplicable in New Mexico because waiver proceedings are not pretrial proceedings that establish jurisdiction and juveniles do have state law rights to jury trials.¹⁶¹ The Tenth Circuit, however, was satisfied that the distinction between the types of findings made in amenability determinations were sufficiently distinguishable from the types of findings made in *Apprendi* that required submission to a jury because some of the findings required expertise and reasoned judgment to make a predictive, rather than historical, assessment.¹⁶²

The New Mexico Supreme Court, in deciding *Rudy B.*, also relied on the predictive nature of the findings, among other reasons, to hold that juveniles are not entitled to a jury trial for amenability determinations.¹⁶³

III. STATE V. RUDY B.

*State v. Rudy B.*¹⁶⁴ addressed two issues: (1) whether the New Mexico Court of Appeals had jurisdiction to hear the constitutional challenge to judge-made amenability determinations after *Child Rudy B.* (hereafter

157. *Id.* at 1110.

158. *Id.* at 1115. In *Kent v. United States*, the U.S. Supreme Court held that waiver proceedings must comply with “the essentials of due process and fair treatment[.]” but it did not set forth the requirement for a jury trial for such proceedings. 383 U.S. 541, 561 (1966).

159. *Gonzales II*, 515 F.3d at 1111.

160. *Id.* at 1111–12.

161. *Id.* at 1112–13.

162. *Id.* at 1113.

163. *Rudy II*, 2010-NMSC-045, ¶ 37, 234 P.3d 726, 735, *cert. denied*, 131 S.Ct. 2098 (2011); *see also infra* Part III.D.

164. *Rudy II*, 2010-NMSC-045, 234 P.3d 726.

“Rudy”) waived his right to appeal in his plea agreement; and (2) whether the court of appeals erred when it declared that judge-made amenability determinations were unconstitutional.¹⁶⁵ Rudy challenged the constitutionality of New Mexico’s approach to amenability determinations under NMSA 1978, Section 32A-2-20 under the Sixth Amendment’s right to a jury trial. Specifically, Rudy argued that a jury, rather than a judge, must make the amenability determination.¹⁶⁶ The New Mexico Supreme Court held that the jurisdictional issue was not integral to the resolution of the constitutional issue before it, and therefore, it declined to decide whether Rudy’s waiver of his right to appeal extended to the constitutional challenge.¹⁶⁷ The decision in *Rudy B.* rested on the New Mexico Supreme Court’s analysis of whether a jury was required to make the amenability determination; accordingly, this note is limited to that issue.

A. *Facts of Rudy B.*

Rudy was seventeen when he participated in a gang fight in a parking lot.¹⁶⁸ Believing that one of the opposing gang members had a gun, Rudy pulled out his gun and shot three people.¹⁶⁹ All three people survived, but one was rendered a quadriplegic.¹⁷⁰ Rudy was indicted on three counts of shooting from a motor vehicle resulting in great bodily harm, three counts of aggravated battery with an deadly weapon, one count of unlawful possession of a handgun by a minor, and one count of tampering with evidence.¹⁷¹ Rudy pleaded guilty to two counts of shooting from a motor vehicle resulting in great bodily injury and to two counts of aggravated battery with a deadly weapon; the remaining charges were dismissed.¹⁷² The offenses to which he pleaded guilty qualified as youthful offender offenses.¹⁷³ The plea agreement provided that sentencing would occur as provided by law and that Rudy would be sentenced after an amenability hearing pursuant to NMSA 1978, Section 32A-2-20 (2009).¹⁷⁴ The plea agreement specified that the maximum sentence possible for a juvenile disposition was commitment in a juvenile facility until Rudy reached the age of twenty-one and the maximum sentence possible for an

165. *Id.* ¶ 10, 234 P.3d at 728–29.

166. *Id.* ¶ 1, 234 P.3d at 727.

167. *Id.* ¶ 16, 234 P.3d at 729–30.

168. *Id.* ¶ 3, 234 P.3d at 727.

169. *Id.*

170. *Id.*

171. *Id.* ¶ 4, 234 P.3d at 727.

172. *Id.*

173. NMSA 1978, § 32A-2-3(J) (2009).

174. State’s Brief in Chief at 1, *Rudy II*, 2010-NMSC-045, 234 P.3d 726 (No. 31,909); see also *Rudy II*, 2010-NMSC-045, ¶ 5, 234 P.3d at 727.

adult sentence was twenty-six years imprisonment in an adult penitentiary.¹⁷⁵

At the amenability hearing, the parties presented conflicting evidence to the trial court regarding Rudy's amenability to rehabilitative treatment, and the trial court found that the evidence presented was inadequate for it to determine if there were sufficient programs and facilities available to rehabilitate Rudy.¹⁷⁶ Because the trial court was unable to make its amenability determination without this information, it deferred its ruling until the parties submitted additional evidence regarding the services and facilities available to rehabilitate Rudy.¹⁷⁷ At the subsequent amenability hearing, the trial court found that Rudy was not amenable to rehabilitative treatment because there were no services and facilities available that could rehabilitate him to the level that would adequately protect the public.¹⁷⁸

B. Summary of Procedural History in Rudy B.

The trial court found that Rudy was not amenable to rehabilitative treatment and sentenced him as an adult to twenty-five years in an adult penitentiary.¹⁷⁹ The New Mexico Court of Appeals reversed the trial court's amenability determination and remanded the case for resentencing.¹⁸⁰ The New Mexico Supreme Court granted certiorari upon the state's appeal and reversed the court of appeals, remanding the case back to the court of appeals for consideration of two issues unrelated to the constitutionality of judge-made amenability determinations.¹⁸¹ On remand, the court of appeals affirmed on both issues, ultimately affirming Rudy's original sentence of twenty-five years imprisonment.¹⁸²

C. The Decision of the New Mexico Court of Appeals in Rudy B.

The New Mexico Court of Appeals held that the *Apprendi* rule applied to amenability determinations, overruling its previous decision in *Gonzales*.¹⁸³ It concluded that the judge-made amenability determinations

175. State's Brief in Chief, *supra* note 174, at 1–2.

176. *Rudy II*, 2010-NMSC-045, ¶ 7, 234 P.3d at 728.

177. *Id.*

178. *Id.* ¶ 8, 234 P.3d at 728. Adequate protection of the public is one of the eight factors to be considered by the trial court judge before making an amenability determination. See NMSA 1978, § 32A-2-20(C)(7) (2009).

179. *Rudy II*, 2010-NMSC-045, ¶ 8, 234 P.3d at 728.

180. *State v. Rudy B. (Rudy I)*, 2009-NMCA-104, ¶ 61, 216 P.3d 810, 826.

181. *Rudy II*, 2010-NMSC-045, ¶ 60, 234 P.3d at 740.

182. *State v. Rudy B. (Rudy III)*, No. 27,589, 2011 WL 2041497, at *1 (N.M. Ct. App. Apr. 26, 2011).

183. *Rudy I*, 2009-NMCA-104, ¶ 53, 216 P.3d at 824; see generally *supra* Part II.E.

that were required to invoke adult sentences were unconstitutional because amenability determinations have the effect of increasing a child's sentence based on facts other than those necessary for the verdict and, as such, must be made by a jury.¹⁸⁴ It explained that an amenability determination “operate[s] as the functional equivalent of an element of a greater offense”¹⁸⁵ and is therefore within the jury's exclusive province.¹⁸⁶

The New Mexico Court of Appeals analyzed the progression of cases that had been decided by the U.S. Supreme Court since *Apprendi*,¹⁸⁷ ultimately resting the majority of its analysis on *Ice* and *Ring v. Arizona*.¹⁸⁸ *Ice* established the principle that the *Apprendi* rule should be extended only to cases in which the jury had historically played a role in the issues to be decided.¹⁸⁹ The U.S. Supreme Court in *Ice* concluded that the jury did not historically play a role in determining whether consecutive or concurrent sentences were imposed, and therefore, the *Apprendi* rule did not apply.¹⁹⁰ The U.S. Supreme Court in *Ring*, in comparison, applied the *Apprendi* line of reasoning and concluded that aggravating factors, which increased a defendant's statutory sentence, must be found by a jury.¹⁹¹

The New Mexico Court of Appeals reasoned that *Rudy B.* was distinguishable from *Ice* because an amenability determination cannot “reasonably be compared” to the determination of whether to impose consecutive or concurrent sentences.¹⁹² The court of appeals explained that in *Ice*, the jury had already determined the facts required to impose the sentence for each offense, and the judge's role was only to determine the manner in which the sentences would be served.¹⁹³ In *Rudy*'s case, the facts required to impose an adult sentence were not determined by the verdict, but solely by the judge at a post-trial amenability hearing.¹⁹⁴ The court of appeals relied on *Cunningham v. California*¹⁹⁵ for the proposition that “[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term,

184. *Rudy I*, 2009-NMCA-104, ¶ 53, 216 P.3d at 824.

185. *Id.* ¶ 32, 216 P.3d at 820 (citation omitted) (internal quotation marks omitted).

186. *Id.* ¶ 33, 216 P.3d at 820.

187. *Id.* ¶¶ 20–22, 216 P.3d at 816–19.

188. *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (invalidating judge-made findings of aggravating factors that allowed the imposition of the death penalty following a conviction of guilt by a jury).

189. *Rudy I*, 2009-NMCA-104, ¶ 22, 216 P.3d at 817; *see also supra* Part II.D.

190. *Rudy I*, 2009-NMCA-104, ¶ 22, 216 P.3d at 817–18.

191. *Id.* ¶ 30, 216 P.3d at 819 (citation omitted) (internal quotation marks omitted).

192. *Id.* ¶ 31, 216 P.3d at 820.

193. *Id.* ¶ 31, 216 P.3d at 819–20.

194. *Id.* ¶ 31, 216 P.3d at 820.

195. 549 U.S. 270 (2007).

the Sixth Amendment requirement is not satisfied.”¹⁹⁶ The court of appeals concluded that *Ice* did not foreclose the application of the *Apprendi* rule to amenability determinations and that such determinations are exclusively within the jury’s province because they are similar to aggravating factors.¹⁹⁷ The court of appeals thus decided that *Rudy B.* was more like *Ring* than *Ice* because the amenability determination increased Rudy’s criminal liability from a juvenile sentence to an adult sentence, operating as the “functional equivalent of an element of a greater offense.”¹⁹⁸ The court of appeals then reviewed its decision in *Gonzales* and provided support for its departure from that previous holding.¹⁹⁹

D. *The Decision of the New Mexico Supreme Court in Rudy B.*

1. The Holding of the New Mexico Supreme Court in *Rudy B.*

The New Mexico Supreme Court reversed the New Mexico Court of Appeals and held that the Sixth Amendment does not require a jury to make the evidentiary findings for amenability determinations, thereby upholding the statutory preference for judge-made amenability determinations.²⁰⁰ The New Mexico Supreme Court based its holding largely on the U.S. Supreme Court’s decision in *Ice*.²⁰¹ The New Mexico Supreme Court concluded that applying the *Apprendi* rule to amenability determinations would be an extension of the rule because amenability determinations are not offense-specific,²⁰² they are predictive rather than retrospective,²⁰³ and they are made in the juvenile justice context.²⁰⁴ The supreme court ultimately held such an extension improper because amenability determinations have not traditionally been made by a jury, and applying the *Apprendi* rule to such determinations would impose on the state’s traditional role of administering its juvenile criminal justice system.²⁰⁵

196. *Rudy I*, 2009-NMCA-104, ¶ 31, 216 P.3d at 820 (quoting *Cunningham*, 549 U.S. at 290).

197. *Id.* ¶ 33, 216 P.3d at 820.

198. *Id.* ¶ 32, 216 P.3d at 820.

199. *Id.* ¶¶ 34–54, 216 P.3d at 820–25.

200. *Rudy II*, 2010-NMSC-045, ¶ 2, 234 P.3d 726, 727, *cert. denied*, 131 S.Ct. 2098 (2011).

201. *Id.*; see *Oregon v. Ice*, 555 U.S. 160 (2009).

202. *Rudy II*, 2010-NMSC-045, ¶ 36, 234 P.3d at 735.

203. *Id.* ¶ 37, 234 P.3d at 735.

204. *Id.* ¶ 39, 234 P.3d at 735.

205. *Id.* ¶ 59, 234 P.3d at 740.

2. The Rationale of the New Mexico Supreme Court in *Rudy B.*

The New Mexico Supreme Court acknowledged that NMSA 1978, Sections 32A-2-20(B) (2009) and 32A-2-20(C) (2009) allow a trial court judge to increase a juvenile's criminal penalty potentially "far beyond" the statutory maximum provided for in the Delinquency Act, by making factual determinations as to a child's amenability to rehabilitative treatment.²⁰⁶ The amenability determination that is made by a trial court judge includes findings beyond those contained in the verdict or admitted by a child, and it serves to increase the maximum sentence as contemplated in *Blakely*.²⁰⁷ Based on the jurisprudence up until *Cunningham v. California*²⁰⁸ in 2007, the supreme court in *Rudy B.* admitted that judge-made amenability determinations would violate the *Apprendi* rule.²⁰⁹ However, the supreme court concluded that in light of the U.S. Supreme Court decision in *Ice*, the *Apprendi* rule did not apply to amenability determinations.²¹⁰ The New Mexico Supreme Court reasoned that amenability determinations are collateral decisions that are not tied to the offenses charged and that the *Apprendi* rule was never meant to extend to collateral decisions.²¹¹

The New Mexico Supreme Court first reviewed whether applying the *Apprendi* rule to amenability determinations would be an extension of that rule and then determined whether an extension would be proper in light of *Ice*. Under *Ice*, the historical role of the jury and the state sovereignty were to be considered when applying the *Apprendi* rule beyond the context of sentencing statutes.²¹² The supreme court determined that the amenability determination was not properly subject to the *Apprendi* rule because it is not offense specific or within the traditional domain of the jury.²¹³ Applying the *Apprendi* rule to amenability determinations would extend the rule beyond its jurisprudential limits because the findings for amenability determinations are not offense specific, like the findings required for consecutive or concurrent sentencing were not offense specific in *Ice*.²¹⁴ The supreme court explained that the ame-

206. *Id.* ¶ 24, 234 P.3d at 732.

207. *Id.* "The relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

208. 549 U.S. 270 (2007).

209. *Rudy II*, 2010-NMSC-045, ¶ 24, 234 P.3d at 732.

210. *Id.*

211. *Id.*

212. *Id.* ¶ 33, 234 P.3d at 734.

213. *Id.* ¶ 36, 234 P.3d at 735.

214. *Id.* ¶ 34, 234 P.3d at 734.

nability determination is focused on the child, rather than the offense committed, but it then acknowledged that offense-specific factors must be considered by the trial court judge in making an amenability determination.²¹⁵ It reconciled this discrepancy by noting that other factors, which are not offense specific, must also be considered by the trial court judge when making an amenability determination.²¹⁶ Even though the supreme court concluded that amenability determinations, as a whole, are not offense specific, it directed that three of the offense-specific factors²¹⁷ must indeed be submitted to the jury.²¹⁸

The New Mexico Supreme Court also concluded that applying the *Apprendi* rule to amenability determinations would extend the rule because amenability determinations are predictive and uncertain.²¹⁹ Because of the level of uncertainty and the need for informed judgment, such inquiries are not conducive to a jury decision beyond a reasonable doubt.²²⁰ The supreme court noted that the *Apprendi* rule had traditionally been applied to issues that involved historical fact finding and not to forward-looking determinations, such as amenability determinations.²²¹ After outlining this distinction, the supreme court acknowledged that the difference between predictive and retrospective findings were not relevant to the U.S. Supreme Court's decision in *Ice*.²²²

Finally, the New Mexico Supreme Court concluded that applying the *Apprendi* rule to amenability decisions would extend the rule because the case before it dealt with the juvenile justice system, rather than the adult justice system.²²³ States generally have more discretion to create and

215. *Id.* ¶¶ 34–35, 234 P.3d at 734.

216. *Id.* ¶ 35, 234 P.3d at 734; *see* NMSA 1978, § 32A-2-20(5)–(7) (2009); *see also supra* Part II.B.

217. NMSA 1978, § 32A-2-20(2)–(4) provides that the trial court judge must consider, among other factors, whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; whether a firearm was used to commit the alleged offense; and whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if personal injury resulted; *see also supra* Part II.B.

218. *Rudy II*, 2010-NMSC-045, ¶ 36, 234 P.3d at 735.

219. *Id.* ¶ 37, 234 P.3d at 735.

220. *Id.*

221. *Id.* *But see* *Cunningham v. California*, 549 U.S. 270, 277–79 (2007) (applying the *Apprendi* rule to California's determinate sentencing law, which required consideration of facts relating to the offense and the offender).

222. *Rudy II*, 2010-NMSC-045, ¶ 38, 234 P.3d at 735.

223. *Id.* ¶ 39, 234 P.3d at 735.

administer their own juvenile justice systems, which the supreme court determined was especially important in light of the reasoning in *Ice*.²²⁴

Once the New Mexico Supreme Court decided that applying the *Apprendi* rule to amenability determinations would extend the rule beyond its existing jurisprudential limits, it then reviewed whether such an extension was proper in light of historical practice and state sovereignty as discussed in *Ice*.²²⁵ The New Mexico Supreme Court explained that New Mexico's procedure for post-trial amenability determinations is different, but analogous to, pretrial waiver or transfer proceedings in other states.²²⁶ In both instances, the inquiry is whether a child should be subjected to adult consequences, which is only determined after deciding whether a child is amenable to rehabilitative treatment in the juvenile system.²²⁷ Although most cases deciding whether the *Apprendi* rule applied to waiver proceedings have held that it did not apply, the New Mexico Supreme Court placed little emphasis on the existing case law because the cases were decided prior to *Ice*.²²⁸ The supreme court noted that all of the forty-five states that have waiver proceedings allow the trial court judge to make the waiver decision after making specific findings.²²⁹ In New Mexico, the trial court judge has had the authority to make amenability determinations since the inception of the juvenile code, regardless of whether the proceedings occurred before trial or after trial.²³⁰ Historically then, since amenability determinations have been incorporated into criminal proceedings in New Mexico, the decision has always been left to the trial court judge's discretion.²³¹ The supreme court concluded that extending the *Apprendi* rule to amenability determinations was not proper in light of historical practice because such determinations have "never been based upon facts historically found by the jury, and so it cannot be a threat to the jury's domain as preserved in the U.S. Constitution."²³²

The New Mexico Supreme Court then turned to the second factor discussed in *Ice*: state sovereignty as it relates to the ability of states to

224. *Id.* The supreme court relied on *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which held there is no right to a jury trial in the juvenile court system.

225. *Rudy II*, 2010-NMSC-045, ¶ 40, 234 P.3d at 735.

226. *Id.* ¶ 43, 234 P.3d at 736. Recall that waiver proceedings in New Mexico happen at the post-trial sentencing phase for all children except serious youthful offenders, rather than the pretrial phase.

227. *Id.* ¶ 44, 234 P.3d at 737.

228. *Id.* ¶ 45, 234 P.3d at 737.

229. *Id.* ¶ 46, 234 P.3d at 737.

230. *Id.* ¶ 47, 234 P.3d at 737.

231. *Id.* ¶ 48, 234 P.3d at 738.

232. *Id.* ¶ 53, 234 P.3d at 739.

administer their own criminal justice systems.²³³ The New Mexico Supreme Court concluded that states typically have had independence to administer the adjudication and disposition of juvenile offenders and that, thus, deference to the state in the administration of its juvenile justice system is proper.²³⁴ Requiring juries to make amenability determinations would be inconsistent with state sovereignty in this area, especially since the legislature has the power to remove a child from the protections of the juvenile system altogether in certain circumstances.²³⁵ The supreme court reasoned that if the legislature had the ability to deny children “the right to juvenile procedures and dispositions . . . then [it] ought to be able to extend greater protection to children.”²³⁶

The New Mexico Supreme Court concluded that applying the *Apprendi* rule to amenability determinations would create significant administrative burdens.²³⁷ First, it would result in a slippery slope in which a trial court judge’s discretion to apply other sentencing determinations would be removed.²³⁸ Second, it would result in bifurcated proceedings requiring a jury finding for the verdict and a separate jury finding for amenability.²³⁹

3. The Dissent of Justice Chavez in *Rudy B.*

Justice Chavez dissented in *Rudy B.* and asserted that the majority ruled incorrectly because a child is entitled to the same constitutional protections as an adult under New Mexico law.²⁴⁰ The dissent reasoned that the majority incorrectly applied *Ice* because historical practice and state sovereignty supported the opposite conclusion.²⁴¹ The dissent noted that “[t]he essential inquiry [from *Ice*] is whether the findings involve a sentence for a discrete offense.”²⁴² Rudy’s case is distinguishable from *Ice* because Rudy was sentenced for a discrete offense.²⁴³

233. *Id.* ¶ 54, 234 P.3d at 739.

234. *Id.* ¶ 56, 234 P.3d at 739–40.

235. *Id.* ¶ 57, 234 P.3d at 740; *see also* NMSA 1978, § 32A-2-3(H) (2009) (providing that children who are defined as serious youthful offenders are not delinquent children subject to the Delinquency Act).

236. *Rudy II*, 2010-NMSC-045, ¶ 57, 234 P.3d at 740.

237. *Id.* ¶ 58, 234 P.3d at 740.

238. *Id.*

239. *Id.*

240. *Id.* ¶ 62, 234 P.3d at 741 (Chavez, J., dissenting); *see* NMSA 1978, § 32A-2-14(A) (2009) (stating that “a child is entitled to the same basic rights as an adult, except as otherwise provided in the Children’s Code”).

241. *Rudy II*, 2010-NMSC-045, ¶ 67, 234 P.3d at 742.

242. *Id.* ¶ 75, 234 P.3d at 744.

243. *Id.* ¶ 67, 234 P.3d at 742.

The dissent determined that the majority erred by looking only to the historical practice since the separate juvenile justice system was enacted because this approach “ignore[d] 125 years of historical common law practice.”²⁴⁴ The common law practice was for a jury to decide whether a juvenile between fourteen and eighteen years old would be sentenced as an adult,²⁴⁵ which was distinguishable from *Ice* because the common law practice of deciding whether to impose consecutive or concurrent sentences was left to the judge.²⁴⁶

The dissent explained that when the state seeks to impose an adult sentence on a child, the goal becomes punishment, rather than rehabilitation, in the same way the state would seek to punish an adult.²⁴⁷ As such, it is fundamentally unfair and unconstitutional to impose an adult sentence on a child by proving only the essential elements of the crime beyond a reasonable doubt.²⁴⁸ The majority’s decision is inconsistent with the legislature’s intent to protect children from adult consequences because it does not make sense to protect children from adult consequences yet deprive them of the constitutional protections afforded to adults.²⁴⁹ Notwithstanding *McKeiver v. Pennsylvania*,²⁵⁰ the dissent expressed that juveniles in New Mexico likely have a federal constitutional right to a jury trial, so the jury should serve the same functions as it does in the adult system.²⁵¹ The dissent concluded that *Apprendi* and *Ice* support a requirement for a jury finding of the facts required to sentence a child as an adult unless those facts are waived or admitted by the child; otherwise, the judge is only authorized to impose a juvenile disposition.²⁵²

The dissent explained that the majority’s assertion that the predictive factors²⁵³ required for an amenability determination removed Rudy’s case from the realm of *Apprendi* is not supported by case law because

244. *Id.* ¶ 68, 234 P.3d at 742.

245. *Id.*; see also *supra* Part II.A.

246. *Rudy II*, 2010-NMSC-045, ¶ 69, 234 P.3d at 742–43 (Chavez, J., dissenting).

247. *Id.* ¶ 70, 234 P.3d at 743.

248. *Id.* ¶ 71, 234 P.3d at 743.

249. *Id.* ¶ 77, 234 P.3d at 744.

250. 403 U.S. 528 (1971) (holding children have no federal constitutional right to a jury trial in adjudicative proceedings).

251. *Rudy II*, 2010-NMSC-045, ¶ 78, 234 P.3d at 744 (Chavez, J., dissenting). The dissent opines that if the *McKeiver* issue had been decided regarding the New Mexico juvenile justice system, it would have likely warranted a different result because New Mexico criminally prosecutes some juvenile offenders as adults, and the system is not like the informal protective proceeding that was at issue in *McKeiver*. *Id.*

252. *Id.* ¶ 72, 234 P.3d at 743.

253. See *id.* ¶ 35, 234 P.3d at 734 (majority opinion).

Cunningham addressed such a situation.²⁵⁴ In *Cunningham*, the U.S. Supreme Court invalidated a system imposing a sentencing enhancement “based on facts relating to the crime, *the accused*, or other facts considered to be circumstances in aggravation.”²⁵⁵ Similarly, in *State v. Frawley*,²⁵⁶ the New Mexico Supreme Court invalidated a system imposing a sentencing enhancement based on facts relating to the offense *and the offender*.²⁵⁷ Rudy could not be sentenced as an adult until the trial court judge made additional findings related to the offense and the offender.²⁵⁸ An amenability hearing is essentially the same as a hearing on the aggravated circumstances of the offense and the offender. At common law, a child fourteen to eighteen years old was entitled to the same constitutional protections as an adult; therefore, youthful offenders should be afforded the same constitutional protections afforded to adults today.²⁵⁹ The dissent argued that if the statute automatically sentenced youthful offenders as adults, but allowed the judge to find mitigating factors to reduce the sentence, it would be constitutional.²⁶⁰ However, the legislation as written improperly allows a trial court judge to make the factual findings required before an adult sentence can be imposed.²⁶¹

IV. ANALYSIS

Rudy B. foreclosed the opportunity for youthful offenders to have amenability determinations made by a jury and proved beyond a reasonable doubt. The New Mexico Supreme Court largely based its decision whether to apply the *Apprendi* rule to amenability determinations on the analysis used in *Ice*.²⁶² *Ice* provided the requirement of reviewing historical practice and considering state sovereignty when deciding whether the *Apprendi* rule should be extended in a given situation.²⁶³ The following analysis of *Rudy B.* discusses the twin considerations provided in *Ice*, whether the *Ice* analysis should even be applied to amenability determinations, and the importance of the jury system and how it extends to juvenile proceedings.

254. *Id.* ¶ 74, 234 P.3d at 743–44 (Chavez, J., dissenting).

255. *Id.* (emphasis in original).

256. 2007-NMSC-057, 172 P.3d 144.

257. *Rudy II*, 2010-NMSC-045, ¶ 74, 234 P.3d at 744 (Chavez, J., dissenting) (emphasis added).

258. *Id.* ¶ 75, 234 P.3d at 744.

259. *Id.* ¶ 81, 234 P.3d at 745.

260. *Id.* ¶ 83, 234 P.3d at 745.

261. *Id.*

262. *See supra* Part III.D.

263. *See supra* Part II.D.

A. Historical Practice

The first consideration provided in *Ice* was historical practice. The decision in *Rudy B.* hinged on historical practice and the traditional role of the jury.²⁶⁴ Although “historical pedigree can give a procedural practice a presumption of constitutionality . . . the presumption must surely be rebuttable.”²⁶⁵ Included in historical practice is how longstanding a procedure is and how uniformly it has been applied.²⁶⁶ Historical practice can be gauged from different points in history, and the outcome in *Rudy B.* depended largely on the scope of historical practice that was considered by the court. This query, however, presents an additional question: what is the applicable historical practice? Is the applicable historical practice that which relates specifically to jury involvement with amenability determinations, to jury involvement with children in the criminal justice system generally, or to something broader, such as jury involvement in sentencing in criminal cases?

There is little guidance in the application of the historical practice analysis as it relates to *Apprendi* because this nuance in the *Apprendi* line of cases is not well-developed. There are, however, other areas of law where historical practice has been applied, such as determining the scope of fundamental rights. Indeed, historical practice is the primary guide in determining whether a principle is fundamental.²⁶⁷

For example, in *Bowers v. Hardwick*,²⁶⁸ the U.S. Supreme Court looked at historical practice when determining if homosexual sodomy was a fundamental right and thus constitutionally protected. It discussed that such activity was a criminal offense at common law prohibited by all of the original thirteen states that ratified the Bill of Rights.²⁶⁹ It then looked at the laws in 1961, when all states prohibited sodomy, and the laws at the time of the decision in 1986, when twenty-four states and the District of Columbia prohibited sodomy.²⁷⁰ In light of this history, the Supreme Court determined that the practice could not be deemed to be “deeply rooted in this Nation’s history and tradition.”²⁷¹ However, in a concurring opinion, Justice Burger reviewed historical practice starting further back in history than was considered by the majority. Justice Burger looked to

264. *Rudy II*, 2010-NMSC-045, ¶ 59, 234 P.3d at 740.

265. *Medina v. California*, 505 U.S. 437, 454 (1992) (O’Connor, J., concurring in the judgment).

266. *Montana v. Egelhoff*, 518 U.S. 37, 51 (1996).

267. *Id.* at 43.

268. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

269. *Id.* at 192.

270. *Id.* at 192–93.

271. *Id.* at 193.

the history of Western civilization, Roman law, and the English common law.²⁷²

In *Lawrence v. Texas*,²⁷³ the case that overruled *Bowers*, the U.S. Supreme Court determined that a different point in time was the proper gauge of historical practice. The Supreme Court stated “[t]he Nation’s laws and traditions in the past half century are most relevant here.”²⁷⁴ The Supreme Court focused the most attention on historical practice since the decision in *Bowers*,²⁷⁵ which only included the preceding seventeen years. These cases demonstrate that “historical practice” is not neatly defined and is indeed a flexible determination open to interpretation.

Bowers and *Lawrence* demonstrate another relevant consideration to *Rudy B.*: the framing of the matter at issue. In *Bowers*, the right was framed as the right to engage in homosexual sodomy,²⁷⁶ whereas in *Lawrence*, the right was framed more broadly as the right to live with dignity as free persons.²⁷⁷ Just as this framing determined the outcome in these two cases regarding the same issue, so the framing determines the appropriate outcome in the matter of *Rudy B.* If the issue is framed narrowly to inquire whether the historical practice was to have amenability determinations decided by a jury, then the appropriate response would be to answer in the negative. If, however, the issue is framed more broadly to inquire if the historical practice was to have the jury originally involved with children in the criminal justice system or whether sentencing decisions have historically been in the hands of the jury, then the appropriate response would be to answer in the affirmative.

The relevant historical practice could be gauged from various points in history: from the time post-trial amenability decisions were added to the Children’s Code in 1993, from the time when pretrial amenability decisions were employed, from the time when New Mexico began to treat children differently in 1917, from the time at the framing of the Bill of Rights, or at common law. Juries have not historically been involved with waiver decisions because such decisions did not exist at common law.²⁷⁸ But because the type of amenability determination in New Mexico is unique to the state,²⁷⁹ another possible option to gauge the historical practice is at the time of statehood. This would support requiring jury findings

272. *Id.* at 196–97.

273. *Lawrence v. Texas*, 539 U.S. 558 (2003).

274. *Id.* at 559.

275. *Id.*

276. *Bowers*, 478 U.S. at 190.

277. *Lawrence*, 539 U.S. at 567.

278. *Gonzales II*, 515 F.3d 1097, 1115 (2008).

279. *See* INST. OF PUB. LAW, *supra* note 8, at 1-7.

in juvenile proceedings because at the time of statehood, juveniles were treated just like adults. However, instead of determining whether the jury has traditionally played a role in amenability determinations, the appropriate inquiry could be phrased as whether the jury has traditionally played a role in sentencing decisions because the length of imprisonment is the underlying issue in *Apprendi*.

It is obvious that “[n]o historical foundation extending down the centuries into the common law required submission of the amenability . . . questions” to a jury,²⁸⁰ but there is a historical foundation that requires the submission of sentencing factors to a jury. In the United States, juries participated in sentencing until the twentieth century.²⁸¹ At that time, jury sentencing began to be replaced by discretionary judicial sentencing.²⁸² By sentencing a child as an adult, the court is essentially removing the child from the juvenile system and placing the child in the adult system with no further protections. When this happens, the issue becomes more like the U.S. Supreme Court cases that require fact finding to be done by the jury.

The New Mexico Supreme Court in *Rudy B.* chose to review historical practice as it relates to amenability determinations, specifically whether to try and sentence a child as an adult, and set the historical benchmark as 1917 when New Mexico implemented separate proceedings for juveniles.²⁸³ The supreme court determined that judges have made amenability determinations for as long as they have been a part of the New Mexico juvenile criminal justice system.²⁸⁴

The decision of the New Mexico Supreme Court ignored the factors that go into the amenability decision. Indeed, the first four statutory factors have historically been made by a jury, and the next three factors are properly within the province of the jury after *Cunningham*.²⁸⁵ Additionally, *Ice* provided that the relevant inquiry for *Apprendi* application is “whether the finding of a particular fact was understood as within ‘the domain of the jury . . . by those who framed the Bill of Rights.’”²⁸⁶ If the understanding of the Framers is important in the analysis, then it would

280. *Gonzales II*, 515 F.3d at 1116.

281. *Vannella*, *supra* note 53, at 745.

282. *Id.*

283. *Rudy II*, 2010-NMSC-045, ¶ 48, 234 P.3d 726, 738, *cert. denied*, 131 S.Ct. 2098 (2011).

284. *Id.*

285. *Cunningham v. California*, 549 U.S. 270 (2007) (invalidating California’s determinate sentencing law that imposed a sentencing enhancement based on the facts of the crime, the accused, or other aggravating circumstances).

286. *Oregon v. Ice*, 555 U.S. 160, 168 (2009).

appear that the appropriate time to gauge historical practice would be from the founding of the country. In that case, the dissent in *Rudy B.* made a compelling argument that it was the Framers' understanding that children between the ages of fourteen and eighteen were treated the same as adults, including being afforded the same constitutional protections as adults.²⁸⁷ Therefore, at the time of the founding of the country, the historical practice was for a jury to find the facts necessary for the imposition of punishment on a child.²⁸⁸ The dissent in *Rudy B.* asserted that the majority had not accurately analyzed the historical practice,²⁸⁹ and as *Bowers* and *Lawrence* indicate, the analysis of historical practice can occur at different times depending on the circumstances.

B. State Sovereignty

The second consideration provided in *Ice* was state sovereignty and the ability of states to administer their own criminal justice systems. Criminal justice systems and especially juvenile justice systems are particularly within the states' areas of exclusive control.²⁹⁰ Even though the U.S. Supreme Court has held that some constitutional protections must be afforded to juveniles,²⁹¹ it has been more deferential to states in the administration of their juvenile justice systems.²⁹² This deference, however, is likely based on the different approach for juveniles where the focus is on rehabilitation, rather than punishment. When a juvenile enters the adult system, that same deference should not be present and the juvenile criminal process must then be administered using the same procedures as its adult counterparts.²⁹³

State sovereignty is intended to work as a constraint on federal power,²⁹⁴ but here it is being used as a constraint on a federal right. Sovereignty generally is used in the context of states providing *more* rights to their citizens than the federal government does, not taking away rights that otherwise would be enjoyed. Indeed, the approach taken by the New Mexico Supreme Court marked the first time it has taken away rights under the guise of state sovereignty.²⁹⁵ The supreme court correctly noted

287. *Rudy II*, 2010-NMSC-045, ¶ 69, 234 P.3d at 742 (Chavez, J., dissenting).

288. *Id.* ¶ 67, 234 P.3d at 742.

289. *Id.* ¶ 68, 234 P.3d at 742.

290. *Id.* ¶ 54, 234 P.3d at 739 (majority opinion).

291. *Id.* ¶ 55, 234 P.3d at 739.

292. *Id.* ¶ 56, 234 P.3d at 740.

293. *See infra* Part IV.D.

294. *See* U.S. CONST. amend. X (“powers not delegated to the United States . . . are reserved to the States respectively, or to the people”).

295. *Rudy II*, 2010-NMSC-045, ¶ 67, 234 P.3d at 742 (Chavez, J., dissenting).

that states are within their authority to completely remove amenability determinations and automatically try and sentence juveniles as adults,²⁹⁶ and this would actually provide juveniles in New Mexico, or at least youthful offenders, greater rights because then they would be afforded the benefit of the *Apprendi* rule before sentencing.

The New Mexico Supreme Court viewed amenability determinations as providing greater protections to children,²⁹⁷ but this assertion is true only if amenability determinations are subject to the *Apprendi* rule. Allowing a judge to increase a juvenile's sentence far beyond the statutory maximum based on one person's findings does not provide children greater protections. In the dissent's opinion, honoring state sovereignty in New Mexico supported submitting amenability determinations to the jury because juveniles have the constitutional right to jury trials in New Mexico.²⁹⁸

C. Should the Ice Analysis Even Be Applied to Amenability Determinations?

The New Mexico Supreme Court concluded that applying the *Apprendi* rule to amenability determinations would be an extension of the rule.²⁹⁹ It would appear, however, that the historical practice analysis and the role of the jury was always part of the *Apprendi* rule and not necessarily a component added by the later ruling in *Ice*.³⁰⁰ As the U.S. Supreme Court stated in *Ice*, “[t]he [*Apprendi*] rule’s animating principle is the preservation of the jury’s historic role as a bulwark between the State and

296. *Id.* ¶ 57, 234 P.3d at 740 (majority opinion).

297. *Id.*

298. *Id.* ¶ 67, 234 P.3d at 742 (Chavez, J., dissenting).

299. *Id.* ¶ 40, 234 P.3d at 735 (majority opinion).

300. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (recognizing that “the historical foundation for our recognition of [the government’s requirement to prove every element beyond a reasonable doubt] extends down centuries into the common law”); *Id.* at 478 (stating that any distinction between an element and a sentencing factor was unknown “as it existed during the years surrounding our Nation’s founding . . .”); *Id.* at 482–83 (stating “[t]he historic link between verdict and judgment . . . highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone”) (emphasis removed); *Id.* at 495 (explaining “[t]his concern flows . . . from the historical pedigree of the jury . . .”); *Id.* at 497 (stating “[t]he procedure . . . challenged in this case is an unacceptable departure from the jury tradition . . .”); *see also Gonzales II*, 515 F.3d 1097, 1115 (2008) (stating “*Apprendi*’s holding is based upon ‘historical foundation,’ centuries of common law tradition regarding the role of the jury . . .”) (citation omitted).

the accused at the trial for an alleged offense.”³⁰¹ Indeed, as early as 2002, the U.S. Supreme Court explicitly acknowledged that the application of the *Apprendi* rule required the consideration of “whether the finding of a particular fact was understood as within ‘the domain of the jury . . . by those who framed the Bill of Rights.’”³⁰² Because the historical practice and role of the jury components were part of the *Apprendi* analysis from its inception, the New Mexico Supreme Court may have misconstrued the state of the *Apprendi* rule after *Ice*.

Assuming that *Ice* was intended to change the state of the *Apprendi* rule, *Rudy B.* may still be distinguishable from *Ice* in two respects. First, *Ice* dealt with multiple offenses, and *Rudy B.* dealt with a discrete offense. Second, the verdict alone subjected the defendant in *Ice* to the maximum sentence for each of his multiple sentences. The trial court judge in *Ice* merely decided the manner in which each individual sentence would be served, not the length of the sentence. In *Rudy B.*, the trial court judge had to make additional findings to sentence Rudy as an adult—findings that directly affected the length of his sentence.

The U.S. Supreme Court in *Ice* began its analysis by distinguishing the case from the previous line of *Apprendi* cases because *Ice* involved sentencing for multiple offenses, rather than a discrete offense.³⁰³ The dissent in *Rudy B.* pointed out that whether the sentence was for a discrete offense was the threshold inquiry.³⁰⁴ *Ice* dealt with “multiple offenses different in character or committed at different times,”³⁰⁵ and the U.S. Supreme Court was thus unable to apply the previous line of *Apprendi* cases.³⁰⁶ *Rudy B.* dealt with a discrete offense, and if the holding in *Ice* was meant to apply only to multiple offenses, then the decision in *Rudy B.* would likely have been decided differently because the *Apprendi* rule would have been applied to amenability determinations based on the jurisprudence until *Cunningham*. The New Mexico Supreme Court even acknowledged that the cases before *Ice*, specifically until *Cunningham*, supported applying the *Apprendi* rule to amenability determinations.³⁰⁷

Ice explained that the core concerns that prompted the decision in *Apprendi*—encroachment by the judge upon facts traditionally found by the jury and interference with the jury’s domain as bulwark between the

301. *Oregon v. Ice*, 555 U.S. 160, 168 (2009) (emphasis added).

302. *Id.* (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002)).

303. *Id.* at 167.

304. *Rudy II*, 2010-NMSC-045, ¶ 75, 234 P.3d at 744 (Chavez, J., dissenting).

305. *Ice*, 555 U.S. at 167.

306. *See id.* (summarizing *Apprendi* and its progeny and concluding that *Ice* was distinguishable because the *Apprendi* line of cases dealt with discrete crimes).

307. *Rudy II*, 2010-NMSC-045, ¶ 24, 234 P.3d at 732 (majority opinion).

state and the accused—were not present regarding the imposition of multiple sentences.³⁰⁸ There was no “legislative attempt to remove from the province of the jury the determination of facts that warrant punishment for a *specific* statutory offense[.]” and therefore, the restriction on judge-found facts was inapplicable in *Ice*.³⁰⁹

The concerns that prompted the decision in *Apprendi* are present with amenability determinations in New Mexico. Rudy was adjudicated as a youthful offender for the statutory offenses of shooting from a motor vehicle resulting in great bodily injury and aggravated battery with a deadly weapon.³¹⁰ Based only upon the facts of the verdict, the statutory maximum sentence he could have received was commitment in a juvenile facility until he reached the age of twenty-one.³¹¹ He was eligible for an adult sentence only after the finding of additional facts by the trial court judge. This is distinguishable from the defendant in *Ice*. There, the defendant was convicted of six different offenses stemming from two separate incidents.³¹² Because there were two separate incidents, the trial court had to decide whether to impose consecutive or concurrent sentences—the manner of sentencing—but the facts required for the imposition of each individual sentence were found based on the guilty verdict.

The U.S. Supreme Court in *Ice* explained that the state would be within its authority to make consecutive sentences the rule and concurrent sentences the exception without the need to address the constitutional issue.³¹³ As mentioned by the New Mexico Supreme Court, this same reasoning could apply to the decision to sentence a child as a juvenile or as an adult.³¹⁴ But if New Mexico made it the rule that all youthful offenders would be sentenced as adults and only in exceptional cases would youthful offenders be sentenced as juveniles, then youthful offenders would be entitled to all of the constitutional protections provided to adults—including the *Apprendi* rule.

Despite the dissimilar facts in *Ice* and *Rudy B.*, the New Mexico Supreme Court used the *Ice* analysis after concluding that *Rudy B.* would be an extension of the *Apprendi* rule for three reasons: amenability determinations are not offense specific, the findings are predictive in nature,

308. *Ice*, 555 U.S. at 169.

309. *Id.* at 170 (citation omitted) (internal quotation marks omitted) (emphasis added).

310. *Rudy II*, 2010-NMSC-045, ¶ 4, 234 P.3d at 727.

311. NMSA 1978, § 32A-2-19(B) (2009).

312. *Ice*, 555 U.S. at 165.

313. *Id.* at 171.

314. *Rudy II*, 2010-NMSC-045, ¶ 57, 234 P.3d at 740.

and the findings are made in the juvenile justice context.³¹⁵ *Ice* was distinguishable from the previous line of *Apprendi* cases because it was outside the scope of the offense-specific context,³¹⁶ and the New Mexico Supreme Court concluded that amenability determinations were collateral decisions outside the scope of the offense-specific context and unrelated to the charged offenses.³¹⁷ The New Mexico Supreme Court in *Rudy B.* further stated that the amenability determination is not offense specific,³¹⁸ even though the details of the offense “may have some bearing on th[e] decision.”³¹⁹

While an amenability determination on its face has little to do with the offense because of its focus on the child, this notion is not very compelling because the trial court judge is *required* to consider offense-specific characteristics when making an amenability determination.³²⁰ Specifically, the first four factors that the judge must consider when making the amenability determination are offense specific:

- (1) the seriousness of the alleged offense;
- (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- (3) whether a firearm was used to commit the alleged offense; [and]
- (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.³²¹

The New Mexico Supreme Court stated that the *Apprendi* rule “continues to apply with full force to judicial findings enlarging criminal sentences that conflict with the traditional domain of the jury[.]”³²² but it declined to hold that amenability determinations are under the scope of *Apprendi* even though the first four factors required for amenability determinations are indeed within the traditional domain of the jury. After concluding that amenability determinations are not offense specific, but at the same time recognizing that offense-specific factors are part of amenability determinations, the New Mexico Supreme Court directed that

315. *Id.* ¶ 40, 234 P.3d at 735.

316. *Ice*, 555 U.S. at 163.

317. *Rudy II*, 2010-NMSC-045, ¶ 24, 234 P.3d at 732.

318. *Id.* ¶ 34, 234 P.3d at 734.

319. *Id.* ¶ 35, 234 P.3d at 734.

320. *See* NMSA 1978, § 32A-2-20(C) (2009).

321. NMSA 1978, § 32A-2-20(C)(1)–(4).

322. *Rudy II*, 2010-NMSC-045, ¶ 33, 234 P.3d at 734.

three of the four offense-specific factors must indeed be submitted to the jury.³²³

The second reason that the New Mexico Supreme Court provided for its conclusion that applying the *Apprendi* rule to amenability determinations would be an extension of the rule was that the findings are predictive in nature. The New Mexico Supreme Court agreed with the analysis of the Tenth Circuit in *Gonzales* when it reasoned that the findings required by NMSA 1978, Section 32A-2-20 (2009) are different from the findings considered in the *Apprendi* line of cases because the *Apprendi* rule had generally been applied to historical findings, rather than forward-looking determinations.³²⁴ The supreme court made this distinction but acknowledged that the predictive versus historical analysis was not relevant in *Ice*.³²⁵ Such a distinction was not relevant in *Ice*, nor was it set forth in *Apprendi*.³²⁶ *Apprendi* is clear that “[l]abels do not afford an acceptable answer . . . the relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”³²⁷ The U.S. Supreme Court has also stated that “all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”³²⁸ The New Mexico Supreme Court ignored the principle 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

323. *Id.* ¶ 36, 234 P.3d at 735. The supreme court recommended that factors two through four of Section 32A-2-20(C) should be submitted to the jury using special interrogatories. It is unclear why the first factor, the seriousness of the alleged offense, was excluded from this recommendation because it is also offense-specific.

324. *Id.* ¶ 37, 234 P.3d at 735. The supreme court relied on *Gonzales v. Tafuya* (*Gonzales II*), 515 F.3d 1097 (2008), for these assertions; however, the Tenth Circuit in *Gonzales II* acknowledged that it was applying the law as it existed before *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Ring v. Arizona*, 536 U.S. 584 (2002), because the rules of those cases were not to be applied retrospectively. *Gonzales II*, 515 F.3d at 1113.

325. *Rudy II*, 2010-NMSC-045, ¶ 38, 234 P.3d at 735.

326. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (adopting the rule that with the exception of a prior conviction, “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”

327. *Id.* at 494 (alteration in original).

328. *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

jury beyond a reasonable doubt.”³²⁹ The predictive versus historical analysis of the findings then is misplaced.

*Cunningham*³³⁰ is perhaps the most analogous case that provides guidance in this area. The Tenth Circuit on habeas review in *Gonzales* did not review *Cunningham* and stated that it was applying the law as of the date *Apprendi* was decided.³³¹ The New Mexico Supreme Court, on the other hand, acknowledged that “[i]f the Supreme Court had stopped at *Cunningham*, we would be hard-pressed to disagree with our Court of Appeals that judge-made amenability determinations under 32A-2-20 violate the *Apprendi* rule.”³³² In *Cunningham*, the U.S. Supreme Court held that California’s determinate sentencing law (DSL) violated a defendant’s right to a jury trial because it placed sentence-elevating fact finding within the province of the judge.³³³ The DSL provided a lower, middle, and upper level of sentencing.³³⁴ The trial court was required to impose the middle level term unless the judge found aggravating or mitigating factors.³³⁵ The trial court was required to consider “the trial record[,] the probation officer’s report[,]”³³⁶ statements in aggravation or mitigation submitted by the parties, the victim, or the victim’s family[,] and any further evidence introduced at the sentencing hearing.”³³⁷ The judicial council then adopted sentencing rules that provided a non-exhaustive list of aggravating circumstances: facts relating to the crime, *to the defendant*, statutorily declared aggravating or mitigating circumstances, and any other criteria reasonably related to the decision being made.”³³⁸ The judge was required to impose the middle-term sentence unless he found facts either relating to the offense or the offender that were beyond the elements of the crime.³³⁹ This is akin to the amenability determination

329. *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482–83).

330. *Cunningham v. California*, 549 U.S. 270 (2007).

331. *Gonzales II*, 515 F.3d 1097, 1110 (2008). The decision on habeas review therefore lacked the clarification provided by the U.S. Supreme Court in subsequent jurisprudence, perhaps most notably, the decisions in *Blakely v. Washington*, 542 U.S. 296 (2004) (defining the statutory maximum), and *Cunningham*, 549 U.S. 270 (applying *Apprendi* to so-called predictive findings relating to the offender).

332. *Rudy II*, 2010-NMSC-045, ¶ 24, 234 P.3d 726, 732, *cert. denied*, 131 S.Ct. 2098 (2011).

333. *Cunningham*, 549 U.S. at 274.

334. *Id.* at 277.

335. *Id.*

336. Under NMSA 1978, § 32A-2-17 (2009), a comparable predisposition report that concerns a youthful offender’s amenability to rehabilitative treatment must be prepared at least five days before disposition or sentencing.

337. *Cunningham*, 549 U.S. at 277 (internal quotation marks omitted).

338. *Id.* at 278–79 (emphasis added).

339. *Id.* at 279.

where the judge is required to impose a juvenile disposition unless he or she finds facts either relating to the offense³⁴⁰ or the offender³⁴¹ that are beyond the elements of the crime. Either the U.S. Supreme Court was mistaken when it declared in *Ice* that it had never extended the *Apprendi* rule beyond an offense-specific context, or the Court considered the factors outlined in *Cunningham*, which are strikingly similar to those required for amenability determinations, to be offense specific. In either event, the similarities between California's DSL and the findings required for amenability determinations tend to support that applying the *Apprendi* rule to amenability determinations would be an application, but not an extension, of the rule.

The dissent in *Rudy B.* identified this distinction: “[w]hen a judge, and not a jury, finds additional facts ‘related to the offense or the offender-beyond the elements of the charged offense’ as a prerequisite for exercising discretion to increase a sentence beyond the statutory maximum, such a scheme is unconstitutional.”³⁴² “[A]n amenability hearing is nothing more than a hearing on aggravating circumstances relating to either the offense or the offender.”³⁴³ The circumstances required to increase the penalty in *Rudy B.* were related to both the offense and the offender. It is clear that a child is entitled to a jury finding beyond a reasonable doubt for the circumstances relating to the offense, but it would appear from *Cunningham* that a child is also entitled to a jury finding beyond a reasonable doubt for the circumstances relating to the offender.

Finally, the New Mexico Supreme Court concluded that applying the *Apprendi* rule to amenability determinations would be an extension of the rule because the findings are made in the juvenile justice context, and the *Apprendi* rule had only been applied in the adult criminal context. Although states traditionally have greater latitude in establishing their juvenile justice systems,³⁴⁴ New Mexico has chosen to provide juveniles with a right to a jury trial.³⁴⁵ Therefore, the distinction between the adult and juvenile contexts is perhaps immaterial. The New Mexico Supreme Court even accepted the threshold inquiry that the *Apprendi* rule could potentially apply in the juvenile context because youthful offenders in New Mexico are entitled to a jury trial when an adult charged

340. NMSA 1978, § 32A-2-20(1)–(4) (2009); *see also supra* Part II.B.

341. NMSA 1978, § 32A-2-20(5)–(7); *see also supra* Part II.B.

342. *Rudy II*, 2010-NMSC-045, ¶ 65, 234 P.3d 726, 741 (Chavez, J., dissenting) (citing *Cunningham*, 549 U.S. at 279).

343. *Id.* ¶ 81, 234 P.3d at 745.

344. *Id.* ¶ 39, 234 P.3d at 735 (majority opinion).

345. NMSA 1978, § 32A-2-16 (2009).

with the same offense would be entitled to one.³⁴⁶ Additionally, the *Apprendi* rule may apply because a juvenile is at risk of receiving an adult sentence.³⁴⁷

In conclusion, it is debatable whether the historical practice consideration examined in *Ice* even adds anything new to the *Apprendi* rule because the historical role of the jury has always been a consideration when applying the rule. Second, the facts in *Ice* might be too distinguishable from the facts in *Rudy B.* to appropriately apply it to amenability determinations. Indeed, it would appear that *Cunningham* is a closer fit to amenability determinations. Finally, applying the *Apprendi* rule to amenability decisions might not be an extension of the rule at all, in which case the *Ice* analysis may be inapplicable.

D. The Importance of the Jury System and How it Extends to Juvenile Proceedings

English colonists brought the jury trial right to America, and the Founders acknowledged how important the right was by recognizing it in the Bill of Rights.³⁴⁸ The right to a jury trial in a criminal case has long been deemed a fundamental right, but the U.S. Supreme Court in *McKeiver* held that juveniles are not entitled to a jury trial for *adjudicative* proceedings,³⁴⁹ a decision that was largely based on the fact that juvenile proceedings focus on rehabilitation, rather than criminal prosecution.³⁵⁰ However, if *McKeiver* were decided regarding youthful offender proceedings in New Mexico, the result would likely have been different. The juveniles in *McKeiver* were exposed only to commitment until the age of twenty-one,³⁵¹ unlike youthful offenders in New Mexico, who can potentially be imprisoned for life in an adult penitentiary.³⁵²

The New Mexico Supreme Court relied on the distinction of adjudications used in *McKeiver* when it explained that the amenability determination is “an essential step in the *adjudication* and disposition of children,”³⁵³ but the term adjudication in this context should be reserved

346. *Rudy II*, 2010-NMSC-045, ¶ 41, 234 P.3d at 736.

347. *Rudy I*, 2009-NMCA-104, ¶ 65, 216 P.3d 810, 826 (Sutin, J., specially concurring); see also N.M. CONST. art. II, §§ 12, 18; *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968).

348. Tina Chen, *The Sixth Amendment Right to a Jury Trial: Why is it a Fundamental Right For Adults and Not Juveniles?*, 28 J. JUV. L. 1, 5 (2007).

349. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

350. *Rudy II*, 2010-NMSC-045, ¶ 78, 234 P.3d 726, 744 (Chavez, J., dissenting); see also *supra* Part II.A.

351. *Rudy II*, 2010-NMSC-045, ¶ 78, 234 P.3d at 744 (Chavez, J., dissenting).

352. *Id.* ¶ 62, 234 P.3d at 740.

353. *Id.* ¶ 56, 234 P.3d at 739 (majority opinion).

for juvenile sentences. In New Mexico, the amenability decision removes the sentence from the realm of adjudications, and it then becomes a conviction that carries the stigma meant to be avoided by the enactment of a separate juvenile system. Juvenile court proceedings are intended to be informal, protective proceedings³⁵⁴ that are focused on rehabilitation.³⁵⁵ Such proceedings are not deemed to be criminal prosecutions under the Sixth Amendment.³⁵⁶ Juvenile proceedings are fundamentally different from adult criminal trials because of states' interests in preserving and promoting the welfare of children.³⁵⁷ But when a child in New Mexico is subject to life imprisonment without the findings of a jury, the system is no longer informal and protective, and it fails to promote the welfare of the child.

Most jurisdictions have held that the *Apprendi* rule does not apply to waiver proceedings.³⁵⁸ "In general, these courts have held that the rule does not apply to a juvenile waiver proceeding because it is not a sentencing proceeding, but rather a determination of the court's jurisdiction."³⁵⁹ Other reasons employed by the courts in refusing to apply the *Apprendi* rule to waiver proceedings typically also included that the juvenile criminal justice system and the adult criminal justice system are different, focusing mainly on the lack of a jury trial guarantee in the juvenile system and that the findings required during a waiver proceeding are different from the findings traditionally made by juries.³⁶⁰

The reasons for not applying the *Apprendi* rule to waiver proceedings, which focus largely on a finding of amenability, however, are likely inapplicable to comparable proceedings in New Mexico. In other jurisdictions, if the juvenile court waives jurisdiction over a child, he or she is then afforded jury protections when sent into the adult system. But in New Mexico, the amenability determination, which places a child in the adult system, is accompanied by an automatic adult sentence without jury protections. New Mexico does not have pretrial waiver proceedings that establish jurisdiction, and at the time the decision is made to move a child

354. *McKeiver*, 403 U.S. at 545.

355. *Id.* at 547.

356. *Id.* at 541.

357. Chen, *supra* note 348, at 3.

358. *Gonzales II*, 515 F.3d 1097, 1111 (2008); *see also* Vannella, *supra* note 53, at 751. *But see* Commonwealth v. Quincy Q., 753 N.E.2d 781, 789 (Mass. 2001), *overruled on other grounds by* Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005) (holding "any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt").

359. State v. Kalmakoff, 122 P.3d 224, 227 (Alaska Ct. App. 2005).

360. *Gonzales II*, 515 F.3d at 1111–12.

into the adult system by sentencing him or her as an adult, the juvenile court already has adjudicated the child as guilty of the charged offenses.³⁶¹ Additionally, juveniles are both constitutionally and statutorily entitled to a jury trial in New Mexico.³⁶² However, even if juveniles did not have the right to a jury trial in New Mexico, that fact “does not seem sufficient to distinguish *Apprendi* when the findings at issue authorize an *adult* sentence.”³⁶³ Finally, the argument that the findings required in waiver proceedings are different from those found by juries is not applicable in New Mexico because an amenability determination acts as a sentencing enhancement, which must be found by a jury,³⁶⁴ and *Cunningham* foreclosed the idea that circumstances relating to the offender are outside of the jury’s province.³⁶⁵

The statutory system that has been enacted to provide juveniles with greater protections is actually providing juveniles with fewer protections in New Mexico. If Rudy had been tried and sentenced in the adult system, he would have been entitled to a jury finding of any fact, other than a prior conviction, that increased his penalty beyond the prescribed statutory maximum. The *Apprendi* rule has not been required in waiver proceedings because a juvenile is typically being moved *into* a system with the protections of a jury where the maximum sentence received will be subject to the rule,³⁶⁶ but in New Mexico, when a child is moved into the adult system, a judge has discretion and often does sentence a child far beyond the statutory maximum.³⁶⁷ The New Mexico Supreme Court acknowledged that the amenability determination is a statutory *protection* that is meant to “temper the harshness of historical practice” and to pre-

361. *Id.* at 1112–13; *see also* NMSA 1978, § 32A-2-20(B) (2009) (stating that the child must be adjudicated as a youthful offender before making the findings required to sentence him or her as an adult).

362. *Peyton v. Nord*, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968) (recognizing that a jury trial is required under N.M. CONST. art. II, § 14); NMSA 1978, § 32A-2-16 (2009).

363. *Gonzales II*, 515 F.3d at 1113 (emphasis in original).

364. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (stating that a sentencing enhancement describes an increase beyond the statutory maximum and is the functional equivalent of an element of a greater offense and must be covered by the jury’s guilty verdict).

365. *See Cunningham v. California*, 549 U.S. 270, 277–79 (2007) (applying *Apprendi* to California’s determinate sentencing law, which required consideration of facts relating to the offense and the offender); *see also supra* Part IV.C.

366. “Once transferred, the juvenile will be subjected to the statutory maximum sentence under the applicable criminal statute only after a jury has determined his or her guilt beyond a reasonable doubt.” Vannella, *supra* note 53, at 752 (internal quotation marks omitted).

367. *Rudy II*, 2010-NMSC-045, ¶ 24, 234 P.3d 726, 732, *cert. denied*, 131 S.Ct. 2098 (2011); *see also supra* Part III.D.

vent children from being imprisoned with hardened criminals.³⁶⁸ But by removing from the province of the jury the fact finding necessary to increase a child's sentence beyond the statutory maximum, children in New Mexico are being provided fewer protections than those to which their adult counterparts are entitled.

As the dissent noted in *Rudy B.*, it is alarming that a child could be sent to adult prison for life without the same protections that adults have.³⁶⁹ Indeed, once the state has exercised its discretion to seek adult punishment, the state's focus is no longer on rehabilitation of the child, but it then seeks to punish the child like it would an adult.³⁷⁰ Because juveniles have a right to a jury trial in New Mexico, they should benefit from *all* of the traditional functions of the jury.³⁷¹

The New Mexico Supreme Court concluded that amenability determinations are not proper for a jury finding because of the specialized knowledge required³⁷² and because it would require bifurcated proceedings adding delay and cost to the current system.³⁷³ "The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders."³⁷⁴ Additionally, just as in *Ring v. Arizona* where the "superiority of judicial factfinding in capital cases [was] far from evident,"³⁷⁵ there is no support for the conclusion that judicial fact finding in amenability determinations is superior. Judge-made amenability determinations require that "[t]he facts that determine the length of the sentence to which [a youthful offender] is exposed will be determined to exist . . . by a single employee of the State."³⁷⁶ Faith in a trial court judge is irrelevant because the child may believe that a jury is more reliable and less idiosyncratic than a single judge.³⁷⁷ Furthermore, the argument that entrusting fact finding to a judge in the interests of fairness and efficiency has already been foreclosed:

The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one

368. *Id.* ¶ 52, 234 P.3d at 739.

369. *Id.* ¶ 62, 234 P.3d at 740 (Chavez, J., dissenting).

370. *Id.* ¶ 70, 234 P.3d at 743.

371. *Id.* ¶ 78, 234 P.3d at 744 (emphasis added).

372. *Id.* ¶ 38, 234 P.3d at 735 (majority opinion).

373. *Id.* ¶ 58, 234 P.3d at 740.

374. *Ring v. Arizona*, 536 U.S. 584, 607 (2002).

375. *Id.*

376. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

377. *Rudy II*, 2010-NMSC-045, ¶ 85, 234 P.3d at 746 (Chavez, J., dissenting).

of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.³⁷⁸

Other states too have had to adopt new procedures after *Apprendi*. New Mexico could take an approach similar to the states that have chosen to retain determinate sentencing after *Apprendi* by submitting the facts necessary for imposition of an elevated sentence either immediately after trial or at a separate hearing.³⁷⁹

Although the amenability hearing must be separate from the trial,³⁸⁰ the amenability hearing could be held immediately after a finding of guilt while the jury is still convened. The predisposition report concerning amenability required by NMSA 1978, Section 32A-2-17 (2009) could be prepared and submitted to the parties five days before trial. If the jury renders a guilty verdict, a separate amenability hearing could be held immediately after the trial in order for that same jury to make its amenability determination. Following that decision, the subsequent predisposition report required by statute could be ordered and the matter set for a separate sentencing hearing.³⁸¹ Any additional burden imposed by this process would be minimal, and indeed the protection of constitutional rights outweighs efficiency and reduction of costs in the judicial process.

An alternative way to resolve the tension between protecting the constitutional rights as explained in *Apprendi* and the logistical hurdles of applying the *Apprendi* rule to amenability determinations is to make the amenability determination at a pretrial waiver proceeding. Indeed, New Mexico previously followed the approach used by most other states by making the amenability determination before trial until the modern version of the Children's Code was enacted in 1993.³⁸² The California legislature amended its determinate sentencing law following *Cunningham*³⁸³ in order to save the constitutionality of the statute, and the New Mexico legislature could amend the Delinquency Act to achieve the same result.

378. *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

379. *See* *Cunningham v. California*, 549 U.S. 270, 294 (2007) (explaining how several states have modified their systems after *Apprendi* and *Blakely*).

380. *See* NMSA 1978, § 32A-2-16(A) (2009) (requiring hearings on petitions to be conducted separate from other proceedings); *see also* *State v. Jones*, 2010-NMSC-012, ¶ 13, 229 P.3d 474, 477 (stating that amenability hearings are special proceedings held after adjudication).

381. *See* NMSA 1978, § 32A-2-17 (2009) (requiring that the adult probation and parole division of the corrections department or the Children, Youth, and Families Department prepare a subsequent predisposition report on a child after the amenability determination).

382. *See supra* Part II.B.

383. CAL. PENAL CODE § 1170 (Deering 2011).

By amending the Delinquency Act to once again provide for pretrial amenability determinations, the original goals envisioned by creating a separate juvenile system would be preserved for children who are not prosecuted in the adult system. Children in the juvenile system would avoid being imprisoned with hardened adult criminals, they would avoid the stigma of criminal convictions, and the system could focus on the underlying goal of rehabilitation. The informal system that allows for greater privacy and confidentiality, thereby reducing stigma and increasing the opportunity for rehabilitation, would be available for children found to be amenable to rehabilitative treatment.

Pretrial amenability determinations would be outside the realm of *Apprendi* because they would have no direct effect on sentencing. The concern of the New Mexico Supreme Court that submitting amenability determinations to a jury would cause undue cost and delay would be abated. Additionally, the preference for judge-made amenability determinations because of the required specialized knowledge and the required balancing of the factors provided in Section 32A-2-20 would be constitutionally sound if the amenability determinations happened in pretrial waiver proceedings.

The jury trial right has been a fundamental right since the founding of this country. *Apprendi* has added an additional element to this right intended to be a bright-line rule: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³⁸⁴ A child found to be not amenable to rehabilitative treatment can be, and often is, automatically imprisoned in an adult penitentiary for a term far beyond the statutory maximum. Accordingly, amenability determinations in New Mexico should be within the province of the jury or amenability determinations should be made before trial like they are in most other jurisdictions.

V. CONCLUSION

The *Apprendi* rule should be applied to amenability determinations in New Mexico as the Delinquency Act is currently written because the determination is made after a finding of guilt and the determination increases a youthful offender’s sentence far beyond the statutory maximum. In New Mexico, juveniles have a constitutional and statutory right to a jury trial, and the application of the *Apprendi* rule logically follows. Amenability determinations in New Mexico act like sentencing enhance-

384. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

ments and are not like their waiver counterparts in most other jurisdictions. The factors of NMSA 1978, Section 32A-2-20 (2009) are strikingly similar to the determinate sentencing law factors that have been held within the realm of *Apprendi*. Finally, the importance of the jury's role in the criminal justice system demands applying the *Apprendi* rule before taking away a child's personal liberty.

Unfortunately, because New Mexico's approach to post-trial amenability determinations is unique, the matter will likely never be accepted by the U.S. Supreme Court. Indeed, the U.S. Supreme Court has denied certification of *Rudy B*. Additionally, although the matter has been addressed on habeas review, the state of the law was reviewed as it existed in 2000, without the benefit of later U.S. Supreme Court interpretations of the application of the *Apprendi* rule. Accordingly, the best option to resolve this error is to seek an internal resolution from the New Mexico Legislature or the New Mexico Supreme Court. The New Mexico Legislature should be urged to change the law regarding amenability determinations to provide for pretrial determinations, or the New Mexico Supreme Court should be urged to reconsider its position and provide jury protections for amenability determinations that subject children to the risk of adult imprisonment, thereby providing children with at least the same protections that are provided to adults in the criminal justice system.