ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

PLAINTIFF-APPELLANT,

v. No. 35,528

NEHEMIAH G.,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE JOHN ROMERO

STATE OF NEW MEXICO'S BRIEF IN CHIEF

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October 6, 2016

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STATEMENT REGARDING CITATIONS TO THE RECORD

The record in this case includes three compact discs ("CDs") containing digital audio recordings of district court proceedings that may be played using the "For The Record" ("FTR") software program. The CDs include the amenability hearing held between January 11, 2016 and February 11, 2016. Citations to these recordings are in the form of "1/11/16 CD" followed by the start and end times for the cited testimony, as displayed at the top of the FTR window.

The record also includes a digital video disc ("DVD") marked as State's Exhibit 5, which may be played using Windows Media Player. Citations to this recording are in the form of "Ex. 5, at" followed by the start and end times for the cited statement, as displayed in the time stamp at the bottom of the video.

In all other respects, this brief follows the conventions of Rule 23-112 NMRA and its appendix.

STATEMENT OF COMPLIANCE WITH RULE 12-213(F)

This brief in chief complies with the length limitations of Rule 12-213(F) NMRA. It was prepared in 14-point Times New Roman font. Although it exceeds 35 pages, the body of the brief, including headings and footnotes, contains 10,759 words, according to Microsoft Word 2010's "word count" function.

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INTRODUCTION

Nehemiah G. killed his mother while she slept and then his younger siblings, and then killed his father when he came home five hours later. After an evidentiary hearing, the trial court concluded that he had "not been found to be not amenable to treatment in available juvenile facilities." It then sentenced him as a juvenile, committing him to the custody of the Children, Youth, and Families Department ("CYFD") for just over two years.

The State is appealing the trial court's amenability determination under Article VI, Section 2 of the New Mexico Constitution, and NMSA 1978, Section 32A-1-17 (1999), which together give an aggrieved party in a juvenile case the right to appeal from a judgment that is contrary to law.

The amenability determination in this case was contrary to law for two reasons. First, the court failed to make findings showing it had considered the aggressive, violent, and premeditated nature of the murders in this case, as required by NMSA 1978, 32A-2-20(C) (2009) and Rule 10-247(F) NMRA. Second, the court's determination was clearly against the uncontradicted evidence that Nehemiah G. could not be treated successfully before he reached the age of 21. Indeed, when this evidence is considered along with the aggressive, violent, and

premeditated nature of the murders—as the trial court was required to do—the court's error is inescapable.

STATEMENT OF FACTS

1. Procedural History.

On February 4, 2014, appellee Nehemiah G. was charged by indictment with five open counts of murder, with each count specifically charging first degree murder, *see* NMSA 1978, § 30-2-1(A)(1) (1994); second degree murder while armed, *see* NMSA 1978, §§ 30-2-1(B) (1994), 31-18-16 (1993); and manslaughter while armed, *see* NMSA 1978, §§ 30-2-3 (1994), 31-18-16 (1993). **[RP 3]** Additionally, the indictment charged three counts of armed, intentional child abuse resulting in death, *see* NMSA 1978, §§ 30-6-1(H) (2009), 31-18-16 (1993). **[RP 3]**

On October 16, 2015, Nehemiah G. entered a guilty plea to two counts of second degree murder and three counts of intentional child abuse resulting in death. **[RP 130]** An amenability hearing was held. *See* NMSA 1978, § 32A-2-20(B) (2009). On February 11, 2016, Judge Romero concluded that Nehemiah G. had "not been found to be not amenable to treatment in available juvenile facilities" **[2/11/16 CD 05:51:31-05:52:20]**, and on February 26, 2016, the court issued an "Order Declining To Find Neh[e]miah [G.] Not Amenable To Treatment Or Rehabilitation As A Child In Available Facilities." **[RP 217 (all caps omitted)]**

On March 2, 2016, Nehemiah G. was committed to the custody of CYFD until his twenty-first birthday on May 20, 2018. **[RP 219]**

2. The Amenability Hearing.

The evidence at Nehemiah G.'s amenability hearing was presented over the course of seven days. It included testimony from civilian witnesses, deputies from the Bernalillo County Sheriff's Department ("BCSD"), a forensic pathologist, a number of mental health professionals, two radiologists, and a video recorded statement given to detectives by Nehemiah G. on January 20, 2013.

Three expert witnesses testified. Dr. Stephen Manlove was retained by the defense. **[1/14/16 CD 1:57:05-1:57:30]** He evaluated Nehemiah G. on May 15 and 16, 2013, and September 29, 2014. **[1/14/16 CD 1:58:54-1:59:54]** He testified on January 14, 2016, and his evaluation report was admitted into evidence as Defense Exhibit G. **[1/14/16 CD 1:58:24-1:58:54]** Dr. Kris Mohandie was retained by the State. **[*See* Ex. 2, at 1]** He evaluated Nehemiah G. on July 29, 2015. **[1/11/16 CD 2:24:53-2:26:46]** He testified on January 11, 2106, and again on February 11, 2016, and his report was admitted as State's Exhibit 2. **[1/11/16 CD 2:24:01-2:24:53]** Dr. Barry Fields conducted a court-ordered evaluation of Nehemiah G. in December 2015. **[Ex. I, at 1]** He testified on January 15, 2016, and again on February 10, 2016, and his report was admitted as Defense Exhibit I. **[1/15/16 CD 2:54:26-2:54:41]**

a. The evidence as to the murders.

Nehemiah G. was born on March 20, 1997. **[Ex. G, at 1; Ex. I, at 1]** At the time of the murders, he lived in a house in Bernalillo County with his parents Greg and Sarah G., his 9 year-old brother Z.G., and two younger sisters: 5 year-old J.G., and 2 year-old A.G. **[Ex. G, at 1, 3]** An older sister named Vanessa had married and moved out of the house in May 2011. **[Ex. G, at 23-24]** Greg G. had been a pastor at Calvary Albuquerque Church ("Calvary"), and Nehemiah G. could frequently be found at the Calvary campus. **[1/13/16 CD 9:45:25-9:46:27, 9:48:58-9:49:36, 10:30:23-10:31:31, 10:32:02-10:32:48]**

1. Discovery of the victims.

Ms. Joan W. testified that she first met Nehemiah G. on Saturday, January 19, 2013, when she drove her 12 year-old granddaughter, A.W., to Calvary because she wanted to watch Nehemiah G. practicing with the band. **[1/12/16 CD 1:03:53-1:07:37]** That day, Nehemiah G. told Ms. W. that his parents had been killed in a car accident a month earlier, and that he had been living alone in his home since then. **[1/12/16 CD 1:17:32-1:17:47]** That evening, Ms. W. repeated what she had been told to Jonathan Kottenstette, a worship leader at Calvary. **[1/12/16 CD 1:22:00-1:22:40; 1/13/16 CD 9:52:35-9:53:49]** He then spoke with two pastors, who called Vince Harrison, the security director at Calvary. **[1/13/16 CD 9:54:29-9:55:57]**

When Nehemiah G. told the pastors and Harrison that that his family had been killed in a car accident, but somehow their bodies were in the house, Harrison decided to drive Nehemiah G. to his house to investigate. **[1/13/16 CD 9:55:57-9:57:09, 10:37:49-10:41:22]** When Nehemiah G. then said something like his "father's past came back to haunt him," and that there were guns in the house, Harrison stopped the car and called the police. **[1/13/16 CD 10:41:22-10:43:31]**

BCSD deputies met Harrison down the street. **[1/12/16 CD 1:48:15-1:48:31, 1:53:13-1:57:26, 2:09:31-2:11:04; 1/13/16 CD 10:43:35-10:43:40]** Nehemiah G. told one of the deputies that he had slept over at a friend's house, and that he found his family dead when he came home. **[1/12/16 CD 1:51:46-1:52:49]** The deputies entered the home and found Nehemiah G.'s father lying dead at the foot of a staircase, and found the dead bodies of Nehemiah G.'s mother, brother, and two sisters in two upstairs bedrooms. **[1/12/16 CD 1:54:41-1:57:26, 2:13:38-2:15:41]** Photographs of the scene were admitted as State's Exhibits 6 through 45, and autopsy photographs of each victim were admitted as State's Exhibits 46 through 61. **[1/12/16 CD 2:28:43-2:31:03; 1/13/16 CD 9:40:06]**

2. Nehemiah G.'s confessions.

Afterwards, Nehemiah G. was driven to BCSD headquarters, where he was questioned by detectives. **[1/12/16 CD 2:17:26-2:17:56]** A video recording of the

interview was admitted as State's Exhibit 5.[1] **[1/12/16 CD 10:46:56-10:47:28]** Nehemiah G. initially told the detectives that he had slept over a friend's house, discovered his family's bodies when he came home, and then drove to Calvary in his family's van. **[Ex. 5, at 02:02:45-02:15:40]** When asked how the guns got in the back of the van, he first said that his father must have put them there, but later said he put the guns there because he feared whoever killed his family would look for him next. **[Ex. 5, at 02:38:26-02:42:32]** When detectives then mentioned gunshot residue testing, Nehemiah G. added that he fired the guns in the air before putting them in the trunk. **[Ex. 5, at 02:58:44-03:01:46]** Ultimately, however, Nehemiah G. admitted that he killed his family. **[1/12/16 CD 10:35:39-10:35:53]**

Nehemiah G. recounted the killings to the detectives, to Dr. Manlove in May 2013, and to Dr. Mohandie in July 2015. He said that on the day leading up to the murders, his mother had "yelled at him a lot" and had nagged and criticized him. **[Ex. G, at 10]** He tried to cool off by playing a video game, but still felt "a lot of hate," and was "shaking to keep myself controlled." **[Ex. 5, at 03:16:25-03:16:47]** When he went upstairs to watch television in his parents' bedroom, his mother "started complaining again, about nothing this time." **[Ex. 5, at 03:16:47-**

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[1] In order to expedite the hearing, Judge Romero said he would watch the video in chambers during a break.

03:16:51] By 11:50 p.m. he "could not keep his anger in anymore," and "decided to proceed with the plan to kill his mother." **[Ex. G, at 10]**

After his mother fell asleep with his brother Z.G. asleep beside her, Nehemiah G. got the rifle out of the closet and shot her twice in the head. **[Ex. G, at 10; Ex. 5, at 03:16:58-03:17:45]** He then turned on the light. **[Ex. 2, at 8]** Z.G. was still asleep, so Nehemiah G. woke him and told him, "Your mom's dead," and "turned her face over" to show him. **[Ex. 2, at 8; Ex. 5, at 3:17:46-3:17:53]** Z.G. went to get some tissues to clean up the blood. **[Ex. 2, at 8; Ex. G, at 10]** When he came back, Nehemiah G. told him, "You're next," and shot him once in the head. **[Ex. 2, at 8; Ex. 5, at 03:18:15-03:18:20; Ex. G, at 10]** He recalled: "[H]e didn't really stare at me, he kind of looked up and he dropped real quick." **[Ex. 2, at 8]** Nehemiah G. told Dr. Manlove, "I never liked him," and said that his 9 year-old brother had been "fighting him for 'superior authority' in the family for some time."[2] **[Ex. G, at 10]**

After shooting Z.G., Nehemiah G. went down the hall, turned on the lights so he could see, and shot his sisters. **[Ex. 2, at 8]** He told the detectives, "They were crying, but, you know." **[Ex. 5, at 03:18:27-03:18:34]** He said, "I

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[2] By contrast, Nehemiah G. told the detectives that he shot Z.G. because Z.G. got "really mad" and "real aggressive" after seeing that his mother was dead, and when detectives later asked whether he felt anyone he killed "deserved it," he answered, "My little brother." **[Ex. 5, at 03:17:53-03:18:15, 03:29:21-03:29:26]**

completely turned off my conscience," and "[M]y conscience wasn't there. I wasn't in control."[3] **[Ex. 5, at 03:19:00-03:19:04; Ex. G, at 10]** He then turned off the lights, went back to his parents' room, reloaded the rifle, and got his father's AR-15 rifle, because his "dad was a big guy," so he "needed more firepower." **[Ex. 2, at 8]** After firing a shot into his sister's room to see how loud the AR-15 would sound in the house, he went downstairs to wait. **[Ex. 2, at 8-9]** When his father got home at 6:00 or 6:30 a.m., he went into the bathroom, waited for him to walk by, stepped out and shot him four or five times in the back, and then walked up to him and shot him again in the head.[4] **[Ex. 2, at 9; Ex. 5, at 03:19:49-03:20:30; Ex. G, at 11]**

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[3] Dr. Fields testified that when Nehemiah G. was asked why he killed his siblings, he answered, "'Well it had to be a thorough job,' or something like that." **[2/10/16 CD 10:59:42-11:00:13]**

[4] The autopsy results were consistent with Nehemiah G.'s account of the murders. Dr. Clarissa Krinsky of the Office of Medical Investigator testified that Sarah G. was shot twice in the head, in the right nose and left upper lip. **[1/13/16 CD 9:04:04-9:04:29]** Z.G. was shot once in the right side of his head. **[1/13/16 CD 9:12:56-9:13:05]** J.G. was shot once in her right forehead. **[1/13/16 CD 9:18:42-9:19:12]** A.G. was shot three times—once in her right back, once in her right front chest, and once in the head, near her left eye. **[1/13/16 CD 9:24:39-9:25:50]** Greg G. was shot four times—in the left back and right side, and twice in the head. **[1/13/16 CD 9:31:12-9:31:45, 9:33:11-9:33:21]** Dr. Krinsky opined that Greg's wounds were caused by a high-powered rifle, while the wounds suffered by Sarah, Z.G., J.G., and A.G. were consistent with a fairly low caliber weapon. **[1/13/16 CD 9:09:23-9:09:26, 9:13:33-9:13:53, 9:19:39-9:20:03, 9:25:50-9:26:11, 9:31:45-9:31:49, 9:33:21-9:33:58]**

When asked if he knew killing was wrong at the time he killed his family, Nehemiah G. replied, "Not at the time. I was a little different. . . . I had[,] I guess, not a fondness, not a good word. I was a little intrigued by it, wondered what it would be like to kill a person." **[Ex. 2, at 13]** When asked if he fantasized about it, he replied, "Not really. . . . Wondered what it would be like to shoot somebody or stab somebody." **[Ex. 2, at 13]** When pressed if it was his "curiosity to experience taking a life" that made him kill his family, Nehemiah G. replied, "Not really. I could have waited for the military for that," but agreed that he was curious. **[Ex. 2, at 22]**

3. The text message evidence.

During his police interview, Nehemiah G. admitted texting a photograph of his dead mother to A.W. **[1/12/16 CD 10:07:47-10:08:10]** BCSD later recovered a series of texts sent between Nehemiah G. and A.W. between 11:20 p.m. on January 18 and 9:22 p.m. on January 19, 2013. **[1/12/16 CD 10:08:10-10:10:03; *see* Ex. 3, at 1, 29]** Photographs of the texts were admitted as State's Exhibits 3 and 4. **[1/12/16 CD 10:13:21-10:14:32, 10:16:50-10:17:15]** They showed that, between texting each other about who loved the other more, and sending sideways hearts and cat smiles, the two discussed the murders both before and after they occurred. **[*See* Ex. 3, at 1-23]**

Starting at 11:21 p.m., Nehemiah G. texted: "let me go see if my mom is asleep," and then, "damnit she's sill [sic] awake." **[Ex. 3, at 1]** When A.W. replied, "Fuck she gotta go to sleep," Nehemiah G. texted, "I know I'll kill her in her sleep soon." **[Ex. 3, at 1]** After texting, "she's go to sleep in.a hr or so" at 11:39 a.m., Nehemiah G. added that he "just thought of something weird," and went on to text, "I want to fuck you right now," "I really want to fuck you so hard right now," and "I'll fuck you as hard as I can." **[Ex. 3, at 4-6]** Two minutes later he asked, "umm where do you want to meat [sic] when I kill my family?" and then suggested, "how about the church?" **[Ex. 3, at 6]** When A.W. asked when, he replied, "when my family died." **[Ex. 3, at 7]** He later added, "once I kill my dad I can get the car." A.W. replied, "Ok that nice hope he dies fast," and Nehemiah G. responded, "oh he will." **[Ex. 3, at 11]**

Minutes later, Nehemiah G. texted, "damn my mom won't go to sleep," and then "and even if my mom go to sleep my lil brother is sill up," but added, "I know as I can kill my mom my lil brother won't be that much if a prob." **[Ex. 3, at 12]** When A.W. told him to "knock him out i[f] u want," Nehemiah G. responded, "I'll just shoot him." **[Ex. 3, at 13]** When A.W. then texted, "Ok what u gonna do wit ur sis," Nehemiah G. replied, "shoot them to[o]." **[Ex. 3, at 13]** When A.W. later texted, "Wht u doing," Nehemiah G. responded, "waiting to kill them you?" **[Ex. 3, at 13]** A.W. replied, "Watching tv and being bored." Nehemiah G. answered,

"lol you won't be bored for long." **[Ex. 3, at 13-14]** At 1:01 a.m., Nehemiah G. texted, "I just killed my mom and brother and my sisters," adding, "now I just need to wait for my dad." **[Ex. 3, at 16-17]** He then asked, "do you want to see the bodys?" When A.W. replied "sure," he sent a photo showing his mother and brother. **[Ex. 3, at 18; Ex. 4; 1/12/16 CD 10:14:32-10:15:04]** He also texted, "their died," and "fuck I really have gone insane." **[Ex. 3, at 18]** At 6:13 a.m., Nehemiah G. texted, "I just killed my dad." **[Ex. 3, at 23]** Nehemiah G. and A.W. then arranged to meet at Calvary, where the two "made out."[5] **[Ex. 3, at 23-25; Ex. G, at 11]**

b. Reports of hallucinations.

Following his arrest, Nehemiah G. was detained at the Bernalillo County Youth Services Center ("YSC"). **[Ex. 2, at 28]** He denied hallucinations during an assessment on January 23, 2013, but the next day described the following hallucinations during a psychiatric assessment: "age 11[,] shadow in his room[;]

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[5] Nehemiah G. and A.W. also discussed killing A.W.'s mother. At 11:57 p.m., A.W. texted, "My mom is gonna go to sleep in a few hours and [I don't know] if I could got that far when she is asleep," adding "I dont got a gun or the guts to." **[Ex. 3, at 7]** Nehemiah G. replied "well fin[d] the guts," and told her "well uses a blade," and when A.W. asked "Wht if she screams"? he replied, "then cover her lips." **[Ex. 3, at 8]** When A.W. responded, "Could you kill her :\ i dont got guts or anything," Nehemiah G. texted, "k fine I'll kill her," adding "but I have to kill my family 1[st]" **[Ex. 3, at 8]** But they abandoned the plan when the two realized Nehemiah G. did not know how to get to A.W.'s house. **[Ex. 3, at 9]**

age 12[,] heard someone call his name in church and saw a tall shadow, [and] he would see a person with a helmet[;] this stopped in 2012." **[Ex. 2, at 29]**

In February or March 2013, Nehemiah G. was prescribed the antipsychotic Seroquel after he disclosed suicidal thoughts and threatened to hurt or kill other patients. **[Ex. I, at 19; *see* Ex. G, at 8, 20; Ex. 2, at 30]** He was switched to Risperdal in April 2013, after hearing a voice commanding him to kill others. **[Ex. I, at 19]** He also reported voices telling him to "Take care of others . . . use violence to get your way," and he said the voice "spoke of [a second] self."[6] **[Ex. 2, at 31]** His Risperdal dosage was later increased in August 2013, after he heard voices "telling him to take people out." **[Ex. I, at 20; Ex. 2, at 31]** He was "punching walls to vent his anger at other residents in late October and early November" 2013, but he had stopped by later November, and was "no longer endorsing having auditory hallucinations." **[Ex. I, at 20]**

Nehemiah G. reported that he began hearing voices when he was age 8 or 9. **[Ex. G, at 11, 17; Ex. 2, at 17]** At first, the voice would answer hard questions, but it became darker over time, and would tell him to do physically aggressive things. **[Ex. G, at 11, 12, 17; Ex. 2, at 17]** When he was age 10, the voice told him "to punch someone because the person did something." **[Ex. G, at 12, 17]**

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[6] YSC staff considered his report "contradictory," and "possible manipulation." **[Ex. 2, at 31]**

When he was in fights, "the voice would say to beat everyone up," or to "kick someone or hurt somebody who had already stopped fighting."[7] **[Ex. G, at 12, 17]** At the time, the hallucinations happened every day. **[Ex. G, at 12, 17]** The voice "began to dim" when he was age 12 or 13, but then increased a few weeks before the killings, and became louder and "more intrusive and compelling." **[Ex. G, at 12, 17]**

Nehemiah G. said that he "wouldn't have done it if the voices weren't there." **[Ex. G, at 13]** He either did not think about killing his family until the voice brought up the idea, or he thought about killing his family in the past but chose not to do it until the voice encouraged him. **[Ex. G, at 12, 17]** He said the voice "kind of got me to get up, motivated me. I have a lot of hate, motivated my hatred towards things." **[Ex. 2, at 18]**

The voice said his father and the rest of his family "deserve[d] to die," and "If you kill him I will give you the power to do it. The weaker ones in the household have to be cut off from the family chain. They don't deserve to live," and "[They] trespass against you and themselves." **[Ex. G, at 12]** Before he shot

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[7] Nehemiah G. did not mention visual hallucinations to Dr. Manlove, but he described five to Dr. Mohandie. He twice saw the figure of a woman in his home, he once saw "some demon looking thing" with "[b]rown fur, black arms and legs, like red eyes, and tan horns" at church, and he twice saw children's handprints in his room at Sequoyah Adolescent Treatment Center. **[Ex. 2, at 18]**

his mother, the voice said, "I know you can do it. Don't be the weak link. You're almost there. You just have to take a few more steps and then you are done." **[Ex. G, at 12, 18]** After he killed her, it said: "One threat is down but you have to take out the others. If you don't kill the others they will rise against you and kill you." **[Ex. G, at 12, 18]** After he killed his siblings, the voice said: "[Y]our work is almost done," and 'You just have one more to go." **[Ex. G, at 13, 18]** After he killed his father, it said: "[Y]our work is complete and you rise to power has begun." **[Ex. G, at 13, 18]**

c. Reports of fights, gang involvement, and parental abuse.

Nehemiah G. told Dr. Manlove that he was in fights almost every week between the second and sixth grades, generally at church.[8] **[Ex. G, at 23]** He said he once thought about killing two boys at Calvary when he was 12, and that he brought a sharpened screwdriver to the Calvary skate park to kill one of them but the boy did not show up. **[Ex. G, at 16]** He also said he had been in an Albuquerque gang called Los Padillas, had been involved in three or four drive-by

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[8] Nehemiah G. told the detectives that his "entire second, third, fourth, fifth, sixth grades were all fights," and that sometimes when he looked at people he would "automatically think of . . . 'taking them out.'" **[Ex. 5, at 03:11:32-03:13:18, 03:11:32-03:12:00, 03:15:58-03:16:10]** He told Dr. Mohandie he was in fifteen or sixteen fights, explaining: "a lot of kids mess with me, I mess with others." **[Ex. 2, at 20]** Vanessa did not remember "ever seeing or hearing about Nehemiah having a fight in church." **[Ex. I, at 14]** Vince Harrison likewise testified that he could not recall ever hearing about Nehemiah G. being in any fights at Calvary. **[1/13/16 CD 10:08:52-10:09:02]**

shootings, had shot five or six people in gang battles using an AK-47 rifle, and had helped hunt down a member of the Bloods and shot him in the back.[9] **[Ex. G, at 4, 23; 1/14/16 CD 2:10:21-2:10:57]**

Nehemiah claimed his father told him to patrol their property with a rifle at night when his father worked nightshifts, and to shoot any intruders. **[Ex. G, at 6]** He said he would "[w]atch my perimeter" or "[w]atch the frontier," and would sometimes carry a gun on his "patrols." **[Ex. I, at 14]** When asked if his father was paranoid, he said: "We all were. . . . I shared my parents' paranoia," and that he was "still somewhat" paranoid "to an extent." **[Ex. I, at 14]** He also said that his father "thought the government was going to turn on people and start a second civil war," that he himself believed that "[f]or a while," and when asked if he still believed it, he replied: "Not really, but you never know." **[Ex. I, at 14]**

Nehemiah G. also claimed parental abuse.[10] He told Dr. Manlove that his mother was always upset, and "verbally aggressive" toward him almost every day;

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[9] In his September 2014 interview with Dr. Manlove, Nehemiah G. admitted that he was not a gang member and that he had been trying to "glorify my acts by making them part of being a gangster." **[Ex. G, at 4, 23; 1/14 CD 2:12:01-2:12:28]** Dr. Manlove concluded that Nehemiah G.'s claimed gang involvement was a "delusion" or "fantasy," in which he was "faking bad" in order to give a "context" for his acts, or to make "some sense of what he had done" by giving "sort of a reason for the event." **[1/14 CD 2:13:01-2:14:46, 4:05:20-4:05:36]**

[10] By contrast, in his police interview, Nehemiah G. described his father as "fair" and "easy," and his mother as "fair" and a "great mother." **[Ex. 5, at**

that she hit him with a belt about once a month or so; and that she would tell him, "I wish you were never born," "I wish you would get shot," and "I wish we were in a biblical age so I could stone you to death." **[Ex. G, at 5, 9; 1/14/16 CD 2:19:32-2:20:27]** He also told Dr. Mohandie that his mother made him beat his dog with a bat when he was age 15.[11] **[Ex. 2, at 21]**

As for his father, Nehemiah G. told Dr. Manlove that he had "anger issues," and that he "shoved, punched, and kicked him." **[Ex. G, at 6]** He claimed that when he was 12, his father once beat him into unconsciousness, and that when he was 12 or 13, he punished him for passing notes during a "homeschool" class at Calvary by locking him in the crawl space under the house, making him write out the Book of Proverbs, and punching and kicking him. **[Ex. G, at 21-22; 1/14/16**

02:19:22-02:19:31] When asked how they disciplined him, he said that they would spank him over his clothes when he was younger, either with their hands or with a belt, but that when he got older they talked to him "like I was a normal adult." **[Ex. 5, at 02:24:57-02:26:31]** Likewise, he denied past emotional or physical abuse during an assessment at YSC on January 23, 2013. **[Ex. 2, at 28]**

[11] Nonetheless, Nehemiah G. told Dr. Manlove he would have done "anything for her," and as an example he said that he once "pricked [a] boy in the stomach with a knife" because he was "talking crap" about his mother, and then told him "that if he told anyone he pricked him he would 'take him out.'" **[Ex. G, at 5; 1/14/16 CD 2:20:57-2:20:55]**

CD 2:35:52-2:36:18, 3:09:35-3:10:34] He also alleged other beatings when he was 14 or 15 years old.[12] **[Ex. G, at 22]**

d. Expert testimony regarding amenability.

1. Dr. Stephen Manlove.

Dr. Manlove opined that Nehemiah G. was amenable to treatment, because hallucinations and depression were treatable, because his brain was still developing, and because he had already responded well to rehabilitative efforts. **[1/14/16 CD 3:35:54-3:36:19; Ex. G, at 37-38]** Even so, he could not say how Nehemiah G. would be doing in two years. **[1/14/16 CD 3:35:36-3:35:40]** He believed that the "trajectory is moving in the right direction," but that it "should be extended as long as possible." **[1/14/16 CD 3:35:40-3:35:54]** He said it was "hard to say" how long, but "a rule of thumb is that we would . . . have a good feel

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[12] Vanessa disputed Nehemiah's specific allegations of beatings when he was 12 or 13. **[*See* Ex. G, at 21-22; 1/14/16 CD 3:09:35-3:10:46]** She said that her father "disciplined by lecturing" and by spanking, mostly with the hand," rarely with a belt. **[Ex. G, at 24; Ex. I, at 8]** Her mother "mostly yelled or said she would wait until their father got home," but she also sometimes spanked with a belt. **[Ex. G, at 23; Ex. I, at 8]** Vanessa married and left the house in May 2011, when Nehemiah G. was 14. **[Ex. G, at 23-24]** She stated that Nehemiah G. was still being spanked at the time, and that he would get "some form of physical discipline a couple of times a week." **[Ex. I, at 8; *see* Ex. G, at 23-24]** She explained that he was a "rebellious teenager" who "got in trouble more than the other children" and "did not seem to care about the consequences." **[Ex. G, at 24]** Of course, Vanessa's absence from the home meant there was no way to confirm or deny Nehemiah G.'s allegations of beatings when he was age 14 or 15, given that he killed the only witnesses to what went on in the home during this time.

for how he was doing by the time he was . . . somewhere in his mid-20's range," at which point he should be reassessed. **[1/15/16 CD 9:05:24-9:06:10]**

Dr. Manlove also testified that Nehemiah G.'s "maturity at the time of the alleged crime appeared to be delayed," because he was "socially isolated and lived in a rigid environment," and had untreated psychotic symptoms, a poor education, "marginal" social skills, "no friends," and a "primitive" relationship with his girlfriend. **[Ex. G, at 37; 1/14 CD 3:11:56-3:14:24]**

2. Dr. Barry Fields.

Dr. Fields concluded that Nehemiah G. was "amenable for treatment" because he thought he ultimately could be rehabilitated, but added: "I do not think it would be appropriate to only have it go up until he is 21 years old." **[1/15/16 CD 3:05:32-3:06:21]** He recommended a minimum of five years of additional treatment, "partly based upon what he did," partly because the brain is not fully developed until age 22 or 23, and partly because of the "work that I think he needs to do. . . . I don't think it can be finished by the time he's twenty-one." **[1/15/16 CD 3:06:21-3:07:49; *see* Ex. I, at 39]** He added, "I would prefer to see him in an ongoing structured environment, at least for a while." **[2/10/16 CD 11:09:03-11:10:00]**

Regarding brain development, Dr. Fields noted that the brain could mature earlier or later than age 23, and that "there's no magic about a particular age." **[2/10/16 CD 9:08:25-9:09:43]** But he later emphasized:

> I would seriously doubt that anything under five years would suffice to produce the kinds of changes that I think he needs to undergo before being deemed appropriate to release from . . . court supervision, or probation supervision. Regardless, I'm not talking about frontal lobes now. I'm just talking about, you know, . . . if we just look at what he did and . . . the . . . psychological makeup he has and problems he has, . . . I just don't see that sooner than that is going to suffice to produce . . . the kinds of changes that I think need to happen.

[2/10/16 CD 9:11:35-9:12:47]

Dr. Fields believed three things had not yet been addressed in psychotherapy: Nehemiah G. still needed to come to terms with what he had done, and they needed to address his "lingering paranoid ideations" and the idea that "violence is okay." **[1/15/16 CD 4:27:27-4:31:48; 2/10/16 CD 11:30:47-11:34:50]** He explained that Nehemiah G. had "developed a fascination with the military" and a "propensity to use guns," and had been "inculcated with the idea it was okay to kill others." **[Ex. I, at 38; *see* 1/15/16 CD 10:26:34-10:29:21]** And while psychotherapy had addressed how he interacted and socialized with others, it had not yet addressed the "internal factors" that gave rise to his "fascination with . . . violence." **[2/10/16 CD 10:32:42-10:34:00]**

When asked specifically about the risk Nehemiah G. posed to public safety, Dr. Fields testified:

> I think that if he . . . remains in a structured treatment program, [it] will be very low. And I think if he remains under the thumb of the court, if he transitions into . . . the community, but stays under the thumb of . . . the court, . . . that he will not pose a threat . . . to the community. . . . I don't think . . . he should just be sentenced as a juvenile, do something for two and a half years, and cut him loose the day he turns twenty-one. . . . That doesn't seem appropriate to me . . . at all. . . . And that's . . . just on the basis of what he did that night.

[1/15/16 CD 4:34:28-4:36:23] He opined that Nehemiah G. eventually would be safe to return to the community if he kept making the same progress with his treatment. **[2/10/16 CD 12:03:24-12:05:53]** But he also acknowledged the possibility that Nehemiah G. could never safely return to the community. **[2/10/16 CD 11:11:11-11:11:53]**

Dr. Fields also testified that he believed Nehemiah G. "lacked some maturity" at the time of the killings, given that he liked to hang out with younger boys and had a 12 year-old girlfriend. **[1/15/16 CD 3:27:21-3:29:12]** He also opined that his immaturity was due to a "issues related to the lack of social and educational growth, and . . . the [] abusive and confining treatment of his parents." **[1/15/16 CD 3:29:12-3:29:49]**

3. Dr. Kris Mohandie.

Dr. Mohandie opined that Nehemiah G. could not be successfully treated in two years. **[1/11/16 CD 3:21:41-3:23:41]** He observed that Nehemiah G.

"continues to have an interest in violence" and "to engage in threats and aggression" because, while detained, he had repeatedly expressed the desire to hit or kill or other residents, had punched a wall, and had gotten into fights with other residents. **[Ex. 2, at 58-60]** He opined:

> The fact that he is not only alleged to have committed a homicide, but upon his own family, reflects just how detached, callous, and brutal he is capable of being. It reflects how severely damaged his attachments and bonding is to others and raises significant concerns about his potential violence to anyone. Whether the source of his impaired attachment and bonding is past abuse or not, his condition is difficult, at best to treat. Rather, it is only likely to be suppressed in a safe, controlled setting.

[Ex. 2, at 57]

e. Other testimony.

1. Cheryl Aiken.

Nehemiah G. was transferred from YSC to Sequoyah Adolescent Treatment Center in May 2014. **[Ex. 62, at 1-8]** Cheryl Aiken was his therapist there. **[1/14/16 CD 9:14:23-9:14:40]** She described him as polite and respectful, but acknowledged that he had approached and yelled at another staff member, saying that he was "tired of being disrespected." **[1/14/16 CD 9:18:13-9:18:52, 10:00:19-10:01:08]** She testified that they were working on "tolerance and acceptance"; coping skills like deep-breathing, listening to music, playing the guitar, talking to others, or "tak[ing] space"; and "managing emotions" and "self-sooth[ing]." **[1/14/16 CD 9:21:15-9:23:28, 9:28:36-9:29:40]** She said he was

willing to "engage" in therapy, and "consider different ideas," and was less "judgmental," "anxious," and "hypervigilant," but that he still needed work in these areas. **[1/14/16 CD 9:34:24-9:35:32]** She also testified that he usually would talk with staff when irritated with other kids, rather than confronting the kids, although he had been in one or two fights. **[1/14/16 CD 9:32:43-9:33:22; 9:39:40-9:40:25]**

When asked if Nehemiah G. was "treatable," she answered that he had "done the treatment" and "made progress," that he had "not had many altercations," and was able to "manage his emotions without fighting," all of which showed he was treatable." **[1/14/16 CD 9:39:40-9:40:25]** When asked about his diagnosis, she answered that she did not handle diagnoses, but rather a psychiatrist at Sequoyah had done so. **[1/14/16 CD 9:52:47-9:53:27]**

2. Dr. George Davis.

Dr. George Davis is the director of psychiatry for CYFD. **[2/10/16 CD 1:44:25-1:44:53]** He met with Nehemiah G. for about an hour in December 2015. **[2/10/16 CD 2:13:55-2:14:12]** He testified: "From what I've read and, and from meeting him that one time, I assume he's in most respects pretty much like the rest of our population. . . . [A]nd so, I think we have capacity to address those needs." **[2/10/16 CD 2:02:09-2:02:35]** But he also testified that the CYFD could hold and treat Nehemiah G. only until the age of 21, and that the most they could do after

that would be to "make referrals, . . . make plans, . . . do independent living, [and] . . . help . . . get jobs." **[2/10/16 CD 2:02:59-2:03:16, 2:07:06-2:07:36, 2:22:11-2:22:55]** When asked if it would benefit Nehemiah G. and his treatment providers to send him to CYFD for treatment and then bring him back for adult sentencing when he turned 21, Dr. Davis answered that he thought it would, because "people's behavior is always better when it's watched," and because "it would add some kind of weight to and expectations to the need to perform and get engaged." **[2/10/16 CD 2:36:17-2:37:29]**

Dr. Davis also testified that, based on three studies from the 1980's and 1990's, and based on his own limited experience with child shooters, children who commit family murder tend to be "easier to treat" because they often do not have long criminal histories like other committed juveniles. **[2/10/16 CD 2:22:22-2:25:01, 2:32:20-2:35:08]**

f. The trial court's ruling.

The trial court issued its ruling on February 11, 2016. Before doing so, the court reviewed the testimony of Jonathan Kottonstette and Vince Harrison, Nehemiah's Aunt Regina, Cheryl Aiken and three other staff members at Sequoyah, Drs. Mohandie, Manlove, Fields, and Davis, and two radiologists who reviewed Nehemiah G.'s brain MRI. **[2/11/16 CD 3:11:36-3:27:42, 3:29:13-5:41:59]**.

The court observed that Ms. Aiken had testified that, in her opinion, Nehemiah G. was "treatable." **[2/11/16 CD 4:02:37-4:03:19]** It also observed that Dr. Manlove testified that Nehemiah G. was amenable to treatment, but with "as long a trajectory as possible," and that it was a "good idea" that treatment "continue in the mid-20's range." **[2/11/16 CD 4:37:59-4:38:17, 4:43:18-4:43:32]** It also observed that Dr. Fields testified Nehemiah G. was amenable to treatment, but he needed a minimum of another five years of treatment in a structured setting, to age 23. **[2/11/16 CD 5:00:05-5:00:58; 5:17:23-5:18:06; 5:23:05-5:23:38]** But the court asserted that Dr. Fields "departed a bit from his hard line of 23 by saying some cases take longer for rehabilitation, and some cases take less time, that there is no magic age" for concluding that the brain is fully formed. **[2/11/16 CD 5:01:07-5:02:07]** The court also observed that both Dr. Manlove and Dr. Fields opined that Nehemiah G. lacked maturity. **[2/11/16 CD 4:25:00-4:26:27, 5:08:51-5:09:39]**

Additionally, the court stated that Dr. Fields believed the risk to public safety posed by Nehemiah G. was "very low," based on an article that said "there isn't really any . . . increased risk to public safety from kids who kill their families" **[2/11/16 CD 5:15:25-5:16:20]**, and that Dr. Davis testified kids who have killed family are "easier to treat, and they have greater success with them." **[2/11/16 CD 5:41:00-5:41:47]**

Regarding testimony from BCSD deputies, the court first noted that this evidence "focused, quite frankly, on the crime," adding, "And I'll talk about that a little bit more later why I'm not going over that testimony." **[2/11/16 CD 3:27:42-3:28:16]** Similarly, the court observed that Dr. Krinsky's testimony, and the autopsy photos showing the family and the various states of death, "again focus[ed] on the crime." **[2/11/16 CD 3:28:30-3:29:13]** But the court never returned to the testimony of the detectives, nor did it address the facts of the case, although it did observe that areas in which the court was to make findings "include the seriousness of the alleged offense." **[2/11/16 CD 5:43:15-5:43:49]** The court added:

> I'm supposed to consider the following factors: Number 1, the serious of the alleged offense. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner. Whether a firearm was used to commit the alleged offense. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, . . . especially if personal injury, and as . . . indicated, not only was personal injury a factor, but death of five individuals.

[2/11/16 CD 5:43:49-5:45:00]

The court acknowledged that you "can't really focus on the child without talking about the offenses committed," but nonetheless did not make findings regarding the nature of the offense, reasoning that under *State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, "the focus of the findings, set out in 32A-2-20 must be

on the child, not on the particular offense committed." **[2/11/16 CD 5:47:41-5:48:23]**

The court concluded:

> The overriding question is can Nehemiah [G.] be rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of 21. . . . Based on the evidence that I've summarized, the testimony specifically from Dr. Manlove, to a lesser degree, to a greater degree the testimony from Dr. Fields, and from Dr. Davis, along with the testimony of those who have worked very closely with Nehemiah, at least since May of 2014, are that he is amenable to treatment. Has the State proven that he's not amenable to treatment in available facilities for juveniles? Dr. Davis opines that they can meet Nehemiah's needs. The question is, and is the elephant in the room or not, . . . what happens when he turns 21? . . . [W]e don't know. We do know that Dr. Fields has waffled on his magic age 23 by saying there is no magic age. Has also stated that for some youth, that development occurs earlier, and for some youth, it occurs later.

[2/11/16 CD 5:48:32-5:51:00] Based on this reasoning, the court found that "Nehemiah [G.], based on the testimony presented, has not been found to be not amenable to treatment in available juvenile facilities." **[2/11/16 CD 5:51:30-5:51:51]**

ARGUMENT

I. The State Is Entitled To Appeal The Trial Court's Order Finding That Nehemiah G. Had Not Been Found To Be Not Amenable To Treatment.

Article VI, Section 2 of the New Mexico Constitution guarantees "an aggrieved party [] an absolute right to one appeal." In particular, it "gives the State an absolute, constitutional right to appeal a ruling that is contrary to law." *State v.*

Heinsen, 2005-NMSC-035, ¶ 9, 138 N.M. 441; *State v. Santillanes*, 1980-NMCA-183, ¶ 17, 96 N.M. 482 ("The State is without question a party to every criminal proceeding in the district courts; a claim of disposition contrary to law is a valid and legal grievance which indisputably makes the State 'an aggrieved party.'"), *aff'd in part, rev'd in part on other grounds*, 1981-NMSC-064, 96 N.M. 477. This right is independent of any statutory right of appeal. *State v. Montoya*, 2011-NMCA-009, ¶ 5, 149 N.M. 242.

Because the State's right of appeal under Article VI, Section 2 is dependent on a finding that it is appealing from a disposition contrary to law, this Court must reach the merits of the State's claim; it cannot satisfy the New Mexico Constitution unless it allows a State's appeal to proceed. *State v. Horton*, 2008-NMCA-061, ¶ 1, 144 N.M. 71. Only after determining that the State's claim fails on the merits can this Court dismiss the State's appeal for want of an appealable order. *See Montoya*, 2011-NMCA-009, ¶ 5 ("Our jurisdiction depends on the merits of the [S]tate's argument on appeal; if after examining the [S]tate's argument, we determine that the district court's disposition is not contrary to law, we will dismiss the appeal.").

The State's constitutional right of appeal is not diminished by NMSA 1978, Section 39-3-3 (1972), which authorizes a State's appeal in a criminal matter in only two circumstances: from an order dismissing a complaint, indictment or

information, and from an order suppressing evidence or requiring the return of seized property. *Santillanes*, 1980-NMCA-183, ¶ 17. In particular, our Supreme Court has concluded that Section 39-3-3 does not limit the State's right to an immediate appeal of an order where the case presents "a question of law easily reviewed by an appellate court and not a question of fact as to the correctness of a discretionary ruling." *State v. Griffin*, 1994-NMSC-061, ¶¶ 3, 11, 14, 117 N.M. 745 (State has "absolute right to appeal an order granting a new trial" where State claims "the grant of a new trial was based on an erroneous conclusion that prejudicial legal error occurred").

Section 32A-1-17 governs appeals in children's court. Nothing in its terms would limit the State's appeal in this case, if it is otherwise allowed by law. *See* § 32A-1-17(A) ("[a]ny party may appeal from a judgment of the court to the court of appeals in the manner provided by law"). The order at issue is a judgment, and it is final. The Child has entered a plea of guilty and no other proceedings are contemplated. *See Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 14, 113 N.M. 231 ("The general rule in New Mexico for determining the finality of a judgment is that 'an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.'"); *State v. Apodaca*, 1997-NMCA-051, ¶ 16, 123 N.M. 372

(final judgment rule reflects the court's "powerful interest in avoiding piecemeal appeals").

Further, to the extent delinquency proceedings under the Children's Code are considered to be civil rather than criminal—*see In re Larry K.*, 1999-NMCA-078, ¶ 4, 127 N.M. 461 ("We have held . . . that the statute governing interlocutory appeals from civil cases and special statutory proceedings, Section 39-3-4, applies to children's court delinquency proceedings.")—the trial court's order finding that Nehemiah G. is amenable to treatment and therefore not subject to be sentenced as an adult constitutes a "final order after entry of judgment which affects substantial rights" under NMSA 1978, § 39-3-2 (1966). That section provides for an appeal for any "aggrieved party." The State's substantial rights are affected because of the State's "legitimate interest in punishment and rehabilitation." *Manlove v. Sullivan*, 1989-NMSC-029, ¶ 18, 108 N.M. 471.

Moreover, absent the State's right to an appeal from an order finding a child amenable to treatment, the disposition contrary to law claimed by the State "would not, as a practical matter, otherwise be able to be reviewed." *Martinez v. Chavez*, 2008-NMCA-071, ¶ 9, 144 N.M. 166. The prospect that an invalid trial court order will escape appellate review is very real. Without an appeal, there is no mechanism by which the trial court's order—which affects substantial rights of the parties—can be reviewable at all. As the Supreme Court has stated, this decision

of whether a youthful offender should be sentenced as an adult or a juvenile is a "critical determination." *State v. Stephen F.*, 2006-NMSC-030, ¶ 12, 140 N.M. 24. "The interests of the child and the public are paramount to the decision of whether to give adult or juvenile sanctions." *Id.* ¶ 13. The shocking facts of this case only serve to highlight the vital importance of this decision.

In *State v. Cheadle*, 1987-NMSC-100, 106 N.M. 391, the Supreme Court held that it was a double jeopardy violation for the trial court to set aside a valid sentence and impose a greater sentence once the defendant began serving his sentence. Here, however, the State's position is that the imposed sentence was not valid because the trial court failed to adhere to the applicable statute, Section 32A-2-20. The question before the trial court was not simply a discretionary sentencing matter of concurrent versus consecutive sentences, as it was in *Cheadle*. The issue involves the application of a specific statute to the facts.

Under Article VI, Section 2, the State is an aggrieved party because it believes the trial court failed to apply the statutory factors in its finding that the State did not carry its burden to show that Nehemiah G. is not amenable to treatment. The trial court did not follow the statute, Section 32A-2-20, and its conclusion is contrary to law. Therefore, to the extent the court's order is not a nullity, the State has a right of appeal and this Court is obligated to proceed to determine whether the order is a "disposition contrary to law." If this Court were

to summarily dismiss the State's appeal without review on the merits, it would deny the State its right of appeal, abdicate its duty as arbiter of the law, and undermine the effectiveness and operation of the criminal justice system.

II. The Trial Court Abused Its Discretion By Failing To Make The Required Findings In Its Amenability Determination And By Ruling That The Evidence Did Not Show That Nehemiah G. Was Not Amenable To Treatment.

A. Standard of Review.

The determination of whether a defendant is amenable to treatment or rehabilitation as a child is reviewed for abuse of discretion. *State v. Sosa*, 1997-NMSC-032, ¶ 12, 123 N.M. 564. A trial court abuses its discretion by failing to comply with a statutory requirement that certain amenability evidence be considered. *State v. Doe*, 1979-NMCA-122, ¶ 13, 93 N.M. 481. Additionally, this Court will find an abuse of discretion when the trial court's decision "is clearly against the logic and effect of the facts and circumstances of the case," or is "clearly untenable or not justified by reason." *Sosa*, 1997-NMSC-032, ¶ 12. "[J]udicial discretion is not consonant with the will of, or the arbitrary discretion of, the court adduced from whim or caprice." *State v. Alaniz*, 1951-NMSC-049, ¶ 16, 55 N.M. 312.

B. Discussion.

New Mexico's Children's Code provides that a child 14 years of age or older who is charged with first degree murder, but who is found to have committed a

"youthful offender" offense, is subject to the dispositions set forth in Section 32A-2-20. NMSA 1978, Section 32A-2-20(G) (2009). Youthful offender offenses include second degree murder and abuse of a child that results in great bodily harm or death. NMSA 1978, Section 32A-2-3(J)(1)(a)&(m) (2009). Under Section 32A-2-20(A), "the court has discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender." But as our Supreme Court has explained: "In order to make this critical determination, the Children's Code requires the court to determine whether the child is amenable to treatment or is eligible for commitment to an institution for children with disabilities." *Stephen F.*, 2006-NMSC-030, ¶ 12; *see* § 32A-2-20(B).

The trial court must hold an evidentiary hearing to make this determination. *Rudy B.*, 2010-NMSC-045, ¶¶ 1, 5, 19. It also "must make findings" on eight statutory factors set forth in Section 32A-2-20(C) "to show that the district court gave proper consideration to the issue of amenability to treatment or rehabilitation." *Sosa*, 1997-NMSC-032, ¶¶ 8-9; Rule 10-247(F). These factors include the "seriousness" of the offense, whether it was committed in an "aggressive, violent, premeditated, or willful manner," whether a firearm was used, and whether it resulted in personal injury. Section 32A-2-20(C)(1)-(4); Rule 10-247(F)(1)-(4).

1. The court erred because it failed to make findings on each statutory factor listed in Section 32A-2-20(C).

Nehemiah G. was charged with five counts of first degree murder, but pled guilty to two counts of second degree murder and three counts of intentional child abuse resulting in death. **[RP 130]** He therefore was subject to disposition as a "youthful offender" and the court was required to determine whether he was amenable to treatment and to consider each of the statutory factors. *Stephen F.*, 2006-NMSC-030, ¶ 12; *Sosa*, 1997-NMSC-032, ¶¶ 8; Rule 10-247(F). This Court specifically has held that consideration of all the factors listed in Section 32A-2-20(C) is mandatory:

> We note that the court was required to consider and balance [the Section 32A-2-20(C)] factors in making its finding. Furthermore, contrary to Defendant's assertion that factor (C)(7) is the only factor relevant to determining a child's amenability to treatment, we believe that every factor provides important information about the child and the child's prospects for rehabilitation.

State v. Gonzales, 2001-NMCA-025, 130 N.M. 341, ¶ 45 (citing § 32A-2-20(C)), *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, *rev'd*, *Rudy B.*, 2010-NMSC-045.

The trial court abused its discretion because it failed to do so. *Doe*, 1979-NMCA-122, ¶ 13. The court failed to address any of the first four factors listed in § 32A-2-20(C), reasoning that, under *Rudy B.*, "the focus of the findings, set out in

32-A-2-20, must be on the child, not on the particular offense committed." **[2/11/16 CD 5:47:41-5:48:23]** The court thereby misread *Rudy B.*

In *Rudy B.*, our Supreme Court held that the Sixth Amendment right to a jury trial does not require the Section 32A-2-20 amenability determination to be made by a jury. 2010-NMSC-045, ¶ 2. In so ruling, the Court relied on *Oregon v. Ice*, 555 U.S. 160 (2009), where the U.S. Supreme Court held that the determination regarding whether two offenses constituted "separate incidents" for sentencing purposes was properly made by a judge rather than a jury, because it was not an "offense-specific" determination. *Rudy B.*, 2010-NMSC-045, ¶ 27. The Court in *Rudy B.* concluded that an amenability determination was properly made by a judge, because the *findings required by Section 32A-2-20(B)* are not "offense specific." *Id.* ¶ 34. The Court reasoned:

> At its core, Section 32A-2-20(B) mandates a careful balancing of individual and societal interests involving a delinquent child's prospects for reintegration into public life by the time the child turns twenty-one. Importantly, the focus of the findings at issue is on the child, not on the particular offense committed.

Id.

The Court however, did not hold that a trial court was not required to consider any offense-specific factors. Indeed, the Court specifically observed that "some of the *factors* that the judge must weigh under Section 32A-2-20(C) are 'offense specific.'" *Id.* ¶ 35 (citing § 32A-2-20(C)(2)-(4)). But the amenability

determination itself is nonetheless not offense specific because, regardless of the particular offense, the inquiry under Section 32A-2-20(B) is the same: "Can the child be rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one?" *Id.* ¶¶ 35-36.

Once again, the court "must weigh" the factors listed in Section 32A-2-20(C), *Rudy B.*, 2010-NMSC-045, ¶ 35, and "must make findings" on these statutory factors, *Sosa*, 1997-NMSC-032, ¶ 8. The court abused its discretion in this case because it failed to do so. *See Doe*, 1979-NMCA-122, ¶ 13.

2. The court abused its discretion by finding that the evidence did not show that Nehemiah G. was not amenable to treatment, because the evidence that treatment could not be completed before the age of 21 was uncontradicted.

In pertinent part, Section 32A-2-20(B)(1) requires a determination as to whether a youthful offender is "amenable to treatment or rehabilitation as a child in available facilities." Treatment or rehabilitation as a child necessarily ends at 21, because the maximum disposition available to a children's court judge for a delinquent offender is "commitment to age twenty-one, unless sooner discharged." NMSA 1978, § 32A-2-19(B)(1)(c) (2009). For this reason, the real question is "Can the child be rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one?" *Rudy B.*, 2010-NMSC-045, ¶ 36.

This Court addressed this issue in *State v. Ira*, 2002-NMCA-037, 132 N.M. 8. There, in affirming a finding of non-amenability, the Court observed:

> The district court was ultimately presented with the task of fashioning a sentence that would recognize the gravity of the Defendant's offenses, and the threat that he poses to society, without ignoring the possibility for rehabilitation. But as the district court noted in its thoughtful decision, the limited jurisdiction it has over offenders sentenced as juveniles is simply inadequate when the juvenile offender is extremely dangerous and in need of intensive treatment that, if there is any hope of rehabilitation, must extend well beyond the time that our current statutory scheme gives our courts to rehabilitate juvenile offenders.

Id. ¶ 25. The Court reiterated: "[I]n some instances, successful rehabilitation would require a longer commitment to the rehabilitative resources of the juvenile justice system." *Id.* ¶ 27; *see also Sosa*, 1997-NMSC-032, ¶ 10 ("The court noted that the brief period of treatment available to [the defendant] was insufficient to accomplish rehabilitation and protection of the public, providing further support for an adult sentence."); *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 16, 121 N.M. 562 (affirming non-amenability finding based on concern that jurisdiction of Children's Code would not provide sufficient time for Child's therapeutic and rehabilitation needs to be met consistent with security needs of public).

The trial court abused its discretion by finding that the evidence did not show Nehemiah G. was not amenable to treatment under Section 32A-2-20(B) because the finding was "clearly against the logic and effect of the facts and circumstances of the case." *Sosa*, 1997-NMSC-032, ¶ 12. Indeed, the evidence was uncontradicted that Nehemiah G. required continued treatment until at least the age of 23. The trial court was presented with testimony and reports from three

mental health professionals who had evaluated Nehemiah G., and none expressed the opinion that he could be successfully treated and rehabilitated by the age of 21.

Dr. Mohandie opined that Nehemiah G. could not be successfully treated by age 21. **[1/11/16 CD 3:21:41-3:23:41]** Indeed, in his report, Dr. Mohandie opined that Nehemiah G.'s brutal killing of his own family reflected an "impaired attachment and bonding" that made his condition "difficult, at best to treat," adding that it was "only likely to be suppressed in a safe, controlled setting." **[Ex. 2, at 57]** Of course, the court is entitled to disregard evidence presented by either party, and to disregard the testimony of experts. *Gonzales*, 2001-NMCA-025, ¶ 40. But while the court chose not to credit Dr. Mohandie, it did credit the testimony of Dr. Fields and, to a lesser extent, Dr. Manlove, **[2/11/16 3:27:11-3:27:42, 5:49:40-5:50:11]**, and both opined that Nehemiah G. needed continued treatment until at least the age of 23.

Dr. Manlove—Nehemiah G.'s own expert—testified that he could not say how Nehemiah G. would be doing in two years, that the "trajectory should be extended as long as possible," and that "we would . . . have a good feel for how he was doing by the time he was . . . somewhere in his mid-20's range," at which time he should be reassessed. **[1/14/16 CD 3:35:40-3:35:54; 1/15/16 CD 9:05:24-9:06:10]**

Similarly, Dr. Fields made it clear that his opinion that Nehemiah G. was amenable to treatment included the "important caveat" that he needed "at least five more years of treatment and externally-imposed structure," and that even then "[f]uture psychotherapists, evaluators, and probation officers may conclude he needs significantly more time than the minimum five years being suggested here." **[Ex. I, at 39; *see also* 2/10/16 CD 9:11:09-9:11:35, 9:12:47-9:13:00]** He specifically testified that he did not think Nehemiah G. "should just be sentenced as a juvenile, do something for two and a half years, and cut him loose the day he turns 21. . . . [T]hat doesn't seem appropriate to me . . . at all." **[1/15/16 CD 5:35:46-4:35:59; *see also* 1/15/16 CD 3:05:32-3:06:21]** He also acknowledged the possibility that Nehemiah G. could never safely return to the community. **[2/10/16 CD 11:11:11-11:11:53]**

The court discounted Dr. Fields' testimony on this point, reasoning that "Dr. Fields has waffled on his magic age 23 by saying there is no magic age," and that "for some youth, that development occurs earlier, and for some youth, it occurs later." **[2/11/16 CD 5:50:40-5:51:00]** The court thereby referred to Dr. Fields' discussion of when the brain fully develops. Contrary to the trial court's characterization of the evidence, Dr. Fields' opinion that a minimum of five more years of treatment were required did not depend on when Nehemiah G.'s brain would fully develop. Rather, it was based on the "extreme nature of the acts he

committed, and the persistence of mental health problems and some of the underlying attitudes that gave rise to his actions." **[Ex. I, at 39]** He explained:

> I would seriously doubt that anything under five years would suffice to produce the kinds of changes that I think he needs to undergo before being deemed appropriate to release from . . . court supervision, or probation supervision. Regardless, I'm not talking about frontal lobes now. I'm just talking about, you know, . . . if we just look at what he did and . . . the . . . psychological makeup he has and problems he has, . . . I just don't see that sooner than that is going to suffice to produce . . . the kinds of changes that I think need to happen.

[2/10/16 CD 9:11:35-9:12:47]

The court recounted testimony from Ms. Aiken that Nehemiah G. cooperated with psychotherapy, and that he therefore was "treatable." **[2/11/16 CD 4:09:09-4:10:11]** But Ms. Aiken also made clear that she was not qualified to diagnose Nehemiah G.—that task fell to the treating psychiatrist at Sequoyah. **[1/14/16 CD 9:52:47-9:53:21]** Nor did she purport to give an opinion as to whether Nehemiah G. could be "rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one," as contemplated by Section 32A-2-20(B). *See Rudy B.*, 2010-NMSC-045, ¶ 36. Rather, she simply testified: "[H]e's been in treatment, he's done the treatment and he's made progress, so that, that in itself shows that he's treatable." **[1/14/16 CD 9:39:22-9:40:25]**

The court also referred to Dr. Davis's testimony that CYFD could "meet Nehemiah's needs." **[2/11/16 CD 5:50:11-5:51:00]** But Dr. Davis did not—and

could not—provide any testimony as to amenability, because he had never evaluated Nehemiah G. Indeed, he admitted that he met with Nehemiah G. only for about an hour in December 2015. **[2/10/16 CD 2:13:55-2:14:12]** Rather, he testified: "From what I've read and, and from meeting him that one time, I assume he's in most respects pretty much like the rest of our population. . . . [A]nd so, I think we have capacity to address those needs." **[2/10/16 CD 2:02:09-2:02:35]**

Dr. Davis also testified that CYFD can only provide care to committed youths until the age of 21, and that the most CYFD could do after that would be to "make referrals, . . . make plans, . . . do independent living, [and] . . . help them get jobs." **[2/10/16 CD 2:02:59-, 2:07:06-2:07:36, 2:22:11-2:22:55]** Further, when asked if it would benefit Nehemiah G. and his treatment providers to send him to CYFD for treatment and then bring him back for adult sentencing when he turned 21, Dr. Davis answered that he thought it would, because "people's behavior is always better when it's watched," and because "it would add some kind of weight to and expectations to the need to perform and get engaged." **[2/10/16 CD 2:36:17-2:37:29]**

The court also referred to research studies, but these studies were never admitted nor specifically identified. Moreover, our Supreme Court made clear in *Rudy B.* the focus of the amenability determination is on the child. 2010-NMSC-045, ¶ 34. Dr. Fields similarly testified that "[t]o make an individual . . . prediction

. . . on the likelihood of somebody reoffending, . . . you do have to look at an individual case." **[2/10/16 CD 9:07:57-9:08:25]** Every mental health professional who conducted such an individual evaluation of Nehemiah G. concluded that he could not be sufficiently rehabilitated or treated by the time he reached age 21. Once again, there was no evidence to the contrary.

State v. Doe involved analogous facts. There, the Court reversed the transfer of a juvenile to district court for trial as an adult, on the ground that the evidence was uncontradicted that the juvenile was amenable to treatment. 1979-NMCA-122, ¶¶ 1, 13, 15. The Court reasoned:

> If the court thought about the uncontradicted evidence of amenability with a degree of care and caution, and rejected it, it was an abuse of discretion. If the court accepted the uncontradicted evidence of amenability, and nevertheless ordered the transfer, it was an abuse of discretion because of a failure to think about the evidence with care and caution. If the court failed to consider the uncontradicted evidence of amenability, the transfer order was an abuse of discretion because of a failure to comply with the statutory requirement that the amenability evidence be considered.

Id. ¶ 13 (citation omitted).

The same is true here. The evidence was uncontradicted that Nehemiah G. could not be sufficiently rehabilitated or treated by age 21. When this evidence is considered along with the egregious nature of the murders—as it must be under Section 32A-2-20(C) and Rule 10-247(F)—the trial court's amenability

determination was "clearly untenable [and] not justified by reason." *Sosa*, 1997-NMSC-032, ¶ 12.

CONCLUSION

The trial court's amenability determination and the resulting sentence should be reversed, and the case should be remanded for the required findings, for a new amenability determination, and for resentencing.

Respectfully submitted,

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October 6, 2016

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CERTIFICATE OF SERVICE

I certify that on October 6, 2016, a true copy of this brief was mailed by first-class mail, postage paid, to:

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