ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

NEHEMIAH G.,

Child-Appellee

No. 35,528

CHILD-APPELLEE'S ANSWER BRIEF

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable John J. Romero, Presiding

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NOTE: The issue of whether the State may appeal an amenability determination is also raised in *State v. Jacob M.*, No. 35,552.

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Nature of the Case

The State originally charged Nehemiah with five counts of first-degree murder. Just one conviction for first-degree murder would have guaranteed that Nehemiah received an adult sentence. But the State agreed that Nehemiah could plea to two counts of second-degree murder and three counts of child abuse resulting in death, youthful offender offenses that allowed for the possibility of a juvenile disposition. As required by law, the children's court held a hearing to determine whether Nehemiah was amenable to rehabilitation. If so, he would receive a juvenile disposition. If, however, the court determined Nehemiah was incorrigible, he would be given an adult sentence.

The hearing lasted seven days. After considering the evidence presented, Judge Romero decided the State had failed to prove that Nehemiah was not amenable to rehabilitation as a juvenile. Judge Romero's decision reflects what science demonstrates and what the United States Supreme Court has recognized: "Deciding that a 'juvenile offender forever will be a danger to society' would require "mak[ing] a judgment that [he] is incorrigible;" but "'incorrigibility is inconsistent with youth.' " *Graham v. Florida*, 560 U.S. 48, 72-73 (2010).

The State asserts that the children's court could not possibly have properly considered the seriousness of and the manner of the murders in finding Nehemiah was amenable to rehabilitation. But Judge Romero did consider those factors, along with all of the other required factors. He decided that although Nehemiah's actions were "horrific," considerations of Nehemiah's

1. Home environment,
2. Social and emotional health,
3. Pattern of living,
4. Brain development,
5. History of trauma and disability,
6. Record and previous history,

Together with

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" NMSA 1978, § 32A-2-20(C).

Outweighed the aggravating facts surrounding the murders.

Because Judge Romero appropriately exercised his discretion in making his decision, the State has no right to appeal Nehemiah's juvenile disposition. Should this Court determine the State has a right to appeal, Judge Romero's decision was not an abuse of discretion and should be upheld.

Facts

All the people who evaluated Nehemiah as well as the judge recognized that "the shootings and murders of the family was violent. And it was indeed horrific – notwithstanding that it was the first and only violent act by Nehemiah." [2-11-16 CD4:33] At the amenability hearing, the State presented evidence that Nehemiah shot his mother twice in the head while she was sleeping, killing her. [1-11-16 CD 2:39; 1-13-16 CD 9:04] His younger brother, who was asleep in the bed with her, woke up. Nehemiah shot and killed him. [1-11-16 CD 2:40; 1-13-16 CD 9:12] Nehemiah then shot and killed his two younger sisters. [1-11-16 CD 2:42; 1-13-16 CD 9:18-25]

Nehemiah did not think the rifle he used to kill his siblings and his mother would kill his father, so he retrieved an AR-15. [1-11-16 CD 2:48] He waited for his father to come home and then shot and killed

him. [1-11-16 CD 2:48; 1-13-16 9:31] He then drove himself to Calvary Church. [Ex. G, 11]

Nehemiah also texted his girlfriend throughout the night and discussed the murders. [Ex. 3]The State introduced the text messages into evidence. [Ex. 3; 1-12-16 CD 10:07-15] Although the State spent over a day presenting evidence on the murders themselves, the majority of the testimony focused on Nehemiah himself – his home life, his mental health, his brain development, his response to treatment thus far and his prospects for rehabilitation.

After listening to approximately twenty-eight hours of testimony and to closing arguments, Judge Romero ruled the State failed to prove that Nehemiah G. was not amenable to rehabilitation. Before announcing his ultimate ruling, the court gave an extensive explanation of its findings over the course of an additional two and one-half hours. [2-11-16 CD 3:11-5:52] Throughout this comprehensive oral ruling, Judge Romero, quoting *State v. Rudy. B.*, 2010-NMSC-045, ¶ 38, 149 N.M. 22, acknowledged "the fallibility and lack of precision inherent in the amenability determination renders certainties virtually beyond reach." [2-11-16 CD 5:49]

The court had previously appointed Barry Fields to evaluate Nehemiah for amenability. The defense had retained Dr. Stephen Manlove, a psychiatrist who was board certified in forensic psychiatry and neurology, to evaluate Nehemiah. The State hired Dr. Kris Mohandie, a psychologist, to determine whether Nehemiah was sane at the time of the murders. The court ascribed greater weight to the opinions of Dr. Manlove and Dr. Fields than those of Dr. Mohandie.

It struck Judge Romero that Dr. Mohandie "had no involvement with the treatment or rehabilitation of delinquent boys." [2-11-16 CD 3:22] By contrast, Dr. Manlove had extensive experience with adolescents, who made up between thirty and forty percent of his practice. [Id. 4:20] Dr. Manlove also founded Wellspring, an adolescent residential treatment center for "psychiatrically and behaviorally disturbed unstable adolescents." [1-14-16 CD 4:47; 2-11-16 CD 4:20] Further, Dr. Manlove and Dr. Fields relied upon research by Thomas Grisso, a leading expert in the intersections of juvenile justice and mental health. By contrast, Dr. Mohandie was unfamiliar with Grisso's work. [2-11-16 CD 11:21; 4:38; 1-11-16 CD 3:53-54]

Judge Romero also noted that Dr. Mohandie "has no expertise in amenability." Rather, "the purpose of his evaluation was to determine whether Nehemiah G. was sane or insane." [2-11-16 CD 3:18] Barry Fields, the court appointed evaluator, however, specifically evaluated Nehemiah for amenability to rehabilitation. [2-11-CD 4:59] Throughout his oral ruling, Judge Romero repeatedly relied upon Dr. Manlove's and Dr. Field's written reports [Ex. G, I.] and testimony.

Dr. Fields characterized Nehemiah's home life as "disturbed at best and bizarre at worst." [Ex. I, 29] In announcing his findings, Judge Romero reiterated this phrase. [2-11-CD 5:02] Judge Romeo also relied on reports that "his father, Greg [G.], was afraid of the neighbors, [and] he was also afraid of a government takeover and an ensuing civil war." [2-11-CD 4:06] Greg G. wanted to be sure his family would be safe; so the family lived on a fenced, one and one-half acre compound. Family members were not allowed to leave the compound without Greg, and he was the only one in the family permitted to drive. As a result of these restrictions, the children were homeschooled. They also did not see medical doctors because Greg mistrusted "modern medicine." The children were only allowed to go to Calvary Church and family

gatherings. [2-11-16 CD 4:01-07; 4:31; 4:34-35; 5:02-07; 1-14-16 CD 9:30-32; Ex. I 4-12; 29]

Dr. Fields report explained Nehemiah's half-sister reported that Greg "wanted the house to be secure and for a gun to be available at all times." [Ex. I, 15] Greg collected several guns, including an AR-15, two shotguns, a 22 rifle, 22 revolver, and a 357 revolver. [Ex. I, 7] On nights Greg worked, he gave Nehemiah the AR-15 and instructed him to patrol the property every fifteen minutes to make sure no one entered the compound. Greg told him to shoot anyone who tried to come onto the property. [Ex. I, 7; Ex. G, 6; 2-11-16 CD 5:07; 1-15-16 CD 3:21-22]

Greg's siblings further relayed that "Greg and Sara [Nehemiah's mother] as a family practiced a rigid form of religion; that it was Old Testament type of religion, very disciplined, very black and white." [2-11-16 CD 4:37] Greg credited finding Jesus with turning his life around because previously he'd been a gang leader in La Puenta, California. During this time he'd participated in drive-by shootings and other violence. [Ex. I, 9; 2-11-16 CD 4:13] In telling his story of redemption, Greg nevertheless glamorized gangs and violence. [Id.] Even though

Greg believed he had turned his life around through Christ, he viewed other religions as cults. [Ex. G, 25]

Reared in this environment, Nehemiah began to hear voices between the ages of eight and nine. Dr. Fields emphasized the voices were not due to schizophrenia but rather to severe depression. [1-15-16 CD 3:26; 3:32] Nehemiah did not tell anyone about the voices because he believed his family "would presume he was inhabited by the devil." [1-14-16 CD 2:40; 1-15-16 CD 1:36] Nehemiah thought that his father would punish him for hearing voices. [Id.]

Nehemiah's father disciplined Nehemiah by hitting him. [1-15-16 3:13; 2-11-16 5:04] Nehemiah's mother punished Nehemiah by spanking him with a belt even though Nehemiah was a teenager. [1-15-16 3:15; Ex. G, 32; Ex. I, 8] Vanessa, Nehemiah's older sister, confirmed that Greg would hit and kick Nehemiah and that Sarah used a belt to beat Nehemiah. [1-15-16 4:34; 2-11-16 5:04] From the perspective of their peculiar upbringing, neither Nehemiah nor Vanessa considered this to be abuse; they believed it was simply discipline. [Ex. G, 32; Ex. I, 8] Dr. Fields felt compelled to point out in his report that, to the contrary, "being hit twice a week by one's parents throughout one's life, including

regularly with a belt and at times kicked and punched, constitutes severe and chronic physical abuse." [Ex. I, 8]

From MRI's of Nehemiah's brain, Dr. William Orrison diagnosed Nehemiah with traumatic brain injury. [2-11-16 CD 3:41; Ex. B] Dr. Orrison explained that he sent Nehemiah's MRI's to other experts who, without knowing his diagnosis, confirmed his diagnosis of traumatic brain injury. [Id. 3:42-45] The State's expert, Dr. Neil Maddan, initially stated that he did not believe the MRI's showed traumatic brain injury but qualified his statement that "just because the MRIs don't show, in his judgment, a traumatic brain injury, does not mean that one did not exist or that one had never occurred." [2-11-CD 3:15] Judge Romero found Dr. Maddan's ultimately had concluded "he could not rule out that Nehemiah had suffered traumatic brain injury." [Id. 3:16] The court also noted "the MRI analysis did not suggest that [Nehemiah] had characteristics commonly seen in adolescents [which] will later develop antisocial personality disorder." [Id.4:29 (bracketed material added.)]

Dr. Manlove believed Nehemiah's hallucinations "were a significant contributor to the killings." [1-14-16 CD 3:14; 2-11-16 CD 4:26] Judge Romero acknowledged the experts disagreed on how much

Nehemiah's hallucinations had contributed to Nehemiah's state of mind at the time of the murders, and it was unlikely that there would ever be conclusive evidence one way or another. [2-11-16 CD 4:26] Nevertheless, the staff psychiatrist at the detention center where Nehemiah was first held found Nehemiah "was very much psychotic" at that time. [2-10-16 CD 1:47]

Judge Romero also noted both Dr. Manlove and Dr. Fields agreed that Nehemiah's hallucinations were real and not the product of malingering. [2-11-16 CD 4:32; 5:12;] Even Dr. Mohandie "did admit, finally, that he could not conclude whether Nehemiah was malingering or not." [2-11-16 CD 3:20] After adjusting types and dosages of psychotropic medications, these voices disappeared entirely. [2-11-16 CD 4:08; 4:26; 4:52; 5:12]

Additionally, Judge Romero credited Dr. Manlove's report "that, Nehemiah was faking bad," and that it "was a fantasy he created to give context to what he's committed and to where he is" to explain Nehemiah's initial reports, which included representations such as being paid fifteen-thousand dollars to kill someone. [2-11-16 4:21; 1-15-16 CD 3:36-37]

Thus, initial reports made by Nehemiah while he was still in a psychotic state were not reliable indicators of Nehemiah's history or motivations. Dr. Fields explained because these statements were demonstrably false, he, unlike Dr. Mohandie[1], did not depend on the statements in evaluating Nehemiah. [1-15-16 CD 3:36-37] Ultimately, Judge Romero concluded that Dr. Mohandie's view of Nehemiah was an outlier and as such the majority view "deserves, perhaps, more credibility than the other." [3:27]

Nehemiah has other mental health issues that contributed to his mindset at the time of the killings. He was severely depressed. He also had tried to kill himself previously but had failed. [Ex. G, 15; 1-14-16 CD 2:39-40] He told Dr. Manlove that for over a year he thought about killing himself every day. [Ex. G, 15] Psychiatrists diagnosed him with Depression accompanied by psychotic features and Post Traumatic Stress Disorder in part caused by chronic physical and emotional abuse inflicted by his parents. [1-14-16 CD 2:39-40; 1-15-16 CD 3:25; 2-11-16 CD 5:08] Dr. Fields was adamant that Nehemiah does not have a

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[1] Dr. Fields did not fault Dr. Mohandie for relying on these statements because the latter did not realize they were false.

conduct disorder or anti-social tendencies. [1-15-16 CD 3:29; Ex. I 31-32; 2-11-16 CD 5:09.]

Cheryl Aiken, Nehemiah's therapist at Sequoyah Adolescent Treatment Center, had worked with Nehemiah for almost two years and saw significant progress. [2-11-16 CD 4:00; 4:09] He learned coping skills and recognized his thinking was distorted. [2-11-16 CD 4:05] She emphasized that Nehemiah is engaged during therapy and this indicates he is treatable. [2-11-16 CD 4:07; 4:09] Judge Romero summarized that according to her "Nehemiah is delayed in emotional development and in cognitive development. He has difficulty identifying emotions and responding appropriately." [2-11-16 CD 4:10] The court noted that because of Nehemiah's parents' "paranoia and black-and-white rules, Nehemiah was not in a position to develop better coping strategies." [2-11-16 CD 4:24] But his therapist believed he worked hard and was learning "more perspective, learning tolerance and acceptance" and coping skills. [2-11-16 CD 4:03] Importantly, he can utilize these coping skills on his own. [Id]

Nehemiah also saw Dr. Samuel Roll before entering into Sequoyah. Dr. Manlove spoke to Dr. Roll about Nehemiah and

incorporated Dr. Roll's conclusions about Nehemiah into his written evaluation. Judge Romero summarized:

> Dr. Roll felt that [Nehemiah][2] was a good psychotherapy candidate, for a number of reasons, including the following:
>
> - [Nehemiah] seemed able to develop a relationship, quickly.
> - [Nehemiah] was actively involved in the therapy process.
> - [Nehemiah] was able to connect thoughts, and make abstractions.
> - [Nehemiah] was able to understand metaphors.
> - [Nehemiah] seemed able to learn to modulate his response to anxiety triggers.
>
> And,
>
> - [Nehemiah] had remorse for the killings.

[2-11-16 CD 4:28] In other words, Dr. Roll believed that Nehemiah was treatable and making progress.

The Children, Youth, and Families Department of New Mexico (CYFD) runs most of the long-term juvenile detention centers in the

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[2] Judge Romero referred to Nehemiah as Mr. [Full Last Name]; to comply with the spirit of Rule 12-305.1 Judge Romero's designation has been replaced with Nehemiah.

State. Dr. George Davis, the director of psychiatry for the Juvenile Justice Division, testified that in his opinion CYFD had the capacity to address Nehemiah's challenges. [2-10-16 CD 2:02; 2-11-16 CD 5:32] In particular Dr. Davis explained that "reintegration is more important than the actual stay, meaning the duration of stay is not as well correlated with recidivism and improvement as the quality of the discharge planning is." [2-10-16 CD 2:03]

Dr. Davis also commented, "you think mental illness of any kind or mental condition of any kind would make the prognosis worse, but it generally makes it better." [2-10-16 CD 2:36] He felt that Nehemiah was no longer psychotic. [2-10-16 CD 1:51; 2-11-16 5:27] Further, he emphasized that all the therapies provided by Sequoyah required Nehemiah's voluntary involvement and that because Nehemiah was fully engaged in it he was benefiting from it. [2-10-16 1:52-54; 2-11-16 CD 5:28-29]

Additionally, Dr. Fields repudiated Dr. Mohandie's conclusions about Nehemiah. [Ex. I, 31-32] Dr. Fields opined that Dr. Mohandie "took some isolated incidents and Nehemiah's false statements about gang violence, and wove them into a line of argument that does not

represent who Nehemiah is." [2-11-16 CD 3:26; Ex. I, 31] Dr. Mohandie's conclusions reveal what troubled Judge Romero – Dr. Mohandie did not understand the framework of adolescence. [2-11-16 CD 3:22]

Dr. Davis, Dr. Manlove, and Dr. Fields all referred to Thomas Grisso's work on juvenile offenders as part of the reason they believed Nehemiah to be amenable. [1-14-16 CD 3:21-22 ;1-15-16 CD 2:52-53; 2-10-16 CD 2:09-10; 2:23-25; 2:32-33; 2-11-16 CD 4:38-39; 4:59-5:00; 5:15-16; 5:38-39] Judge Romero quoted Dr. Fields as saying that "Nehemiah shouldn't be sent to prison; that to send him to prison would be the waste –a waste of a human being's life." [2-11-16 CD 5:16]

Argument Introduction

New Mexico, recognizing that children are different, created a unique scheme for dealing children accused of violent crimes. The Delinquency Act, NMSA 1978, §§ 32A-2-1 to 32A-2-33 creates three classes of juvenile offenders: Serious Youthful Offenders, Youthful Offenders, and Delinquent Offenders. A Serious Youthful Offender is a child fifteen-years-old or older charged with first-degree murder; the

child is automatically treated as an adult for trial purposes and, if convicted of first-degree murder, sentenced as an adult. But the sentencing court has broad discretion crafting the sentence. *See* NMSA 1978, § 31-18-15.3 (D)("The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult."); *see also* NMSA 1978, § 31-18-13 (A) ("[A] person sentenced as a serious youthful offender ... may be sentenced to less than the basic or mandatory sentence [.]"). If the child is not convicted of first-degree murder, but of a delinquent offense, the child must receive a juvenile disposition; if the child is convicted of a Youthful Offender offense, the child may receive either an adult sentence or a juvenile disposition.

A Youthful Offender is a delinquent child who has had three prior, separate felony adjudications within the preceding three years, or who is fourteen years of age and adjudicated for first degree murder or who is adjudicated guilty of a count of: 1) second degree murder; or 2) assault with intent to commit a violent felony; or 3) kidnapping; or 4) aggravated battery (great bodily harm or deadly weapon); or 5) aggravated battery against a household member (great bodily harm or deadly weapon); or 6) aggravated battery upon a peace officer(great

bodily harm or deadly weapon); or 7) shooting at a dwelling or occupied building or shooting at or from a motor vehicle; or 8) dangerous use of explosives; or 9) criminal sexual penetration (force or coercion); or 10) robbery; or 11) aggravated burglary; or 12) aggravated arson; or 13) abuse of a child that results in great bodily harm or death to the child. NMSA 1978, § 32A-2-3(J)(1).

If the State seeks an adult sentence, the court must have a hearing on the child's amenability to treatment and rehabilitation after an adjudication of guilt. *State v. Jones*, 2010-NMSC-012, ¶ 14, 148 N.M. 1. Only if the child is found non-amenable may the court impose an adult sentence. *Id.* ¶ 34 ("The Legislature intended to make an amenability determination a necessary predicate to the court's exercise of adult sentencing authority.")

In order to sentence a youthful offender as an adult, the State must prove by clear and convincing evidence that "the child is not amenable to treatment or rehabilitation as a child in available facilities." NMSA 1978, § 32A-2-20 (B); *See State v. Gonzales,* 2001-NMCA-025, ¶¶ 52-65, 130 N.M. 341 (Bustamante, J., specially concurring); *cf. State v. Rudy B.* 2010-NMSC-045, ¶ 59, 149 N.M. 22

(holding that the Sixth Amendment does not require the amenability determination to be submitted to a jury and proven beyond a reasonable doubt); *cf.* IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Transfers Between Courts § 2.2(A)(2). Section 32A-2-20(C) sets out seven factors the court must consider in making the amenability determination. The New Mexico Supreme Court cautioned that "none of those factors, standing alone, is dispositive." *Jones,* 2010-NMSC-012, ¶ 41. Trial courts giving an adult sentence to a youthful offender can craft a sentence less than the basic adult sentence. NMSA 1978, § 32A-2-20(E). *See also* NMSA 1978, § 31-18-13(A).

Issue I: The State has no right to appeal a finding that a child is amenable to rehabilitation as a juvenile.[3]

Standard of Review

The Appellate Court reviews whether the State has a right to appeal de novo. *State v. Heinsen*, 2005-NMSC-035, ¶6, 138 N.M. 441.

[3] The issue of whether the State may appeal an amenability determination is also raised in *State v. Jacob M.*, No. 35,552.

Argument

The State's right to appeal an adverse ruling in a criminal proceeding exists only by constitutional provision or statute. *State v. Montoya*, 2008-NMSC-043, ¶ 10, 144 N.M. 458. The State concedes that there is no statutory right to appeal here. [BIC 27] Nehemiah does not dispute that the finding that he was amenable to rehabilitation is, in essence, a final order. [BIC 29] Thus, the State's right to appeal could only come from N.M. Const. Art. VI, § 2, insuring that "an aggrieved party shall have an absolute party shall have an absolute right to one appeal."

But, "the State does not have an absolute right to appeal in every situation in which it may feel 'aggrieved' by a trial court's ruling." *State v. Aguilar*, 1981-NMSC-027, ¶ 7, 95 N.M. 578. Here, the State claims to be aggrieved because it disagrees with how the district court balanced the factors under Section 32A-2-20(C). But where the district court acts within its discretionary authority, the disposition is not contrary to law. *State v. Grossetete*, 2008-NMCA-088, ¶ 10, 144 N.M. 346.

The State is not aggrieved where "[w]ithin the limitations of the provision prescribing the punishment for a particular offense, the trial

court [exercised] discretion to structure the sentence to best fit the defendant and the crime." *State v. Clah,* 1997-NMCA-091, ¶ 19, 124 N.M. 6. This is exactly what the children's court did here – after spending seven days carefully considering both the crime and the child himself, the court concluded that a juvenile disposition was the best fit.

For a discretionary ruling to be contrary to law it must be based on a misapprehension of law, *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, or be "contrary to the reasonable, probable, and actual deductions that may be drawn from the facts and circumstances." *State v. Soto*, 2007-NMCA-077, ¶ 11, 142 N.M. 32 *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008. For sentencing purposes, the State is only aggrieved when the district court fails to comply with a mandatory law, such as failing to impose a firearm enhancement, or fails to state whether a sentence is a serious violent offense. *See Aguilar,* 1981-NMSC-027; *State v. Abril,* 2003-NMCA-111, 134 N.M. 326, *overruled on other grounds by State v. Torres,* 2012-NMCA-026.

This Court recently explained that "trial judges [] are in the best position to assess and weigh whether justice will be served by a

sentence of imprisonment or probation." *State v. Lindsey,* 2017-NMCA-__, ¶ 22 (March 20, 2017). For over fifty-years, New Mexico has recognized that sentencing involves "many intangible and imponderable factors." *State v. Serrano*, 1966-NMSC-166, ¶ 12, 76 N.M. 655. The *Serrano* Court explained sentencing "involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling." *Id.* Thus, the Court concluded "[t]hese matters, which are to be considered in connection with the prior record of the accused, are of such nature that the problem of probation must of necessity rest within the discretion of the judge who hears the case." *Id.*

The State's insistence that Judge Romero did not make the appropriate findings, and so abused his discretion, appears to rest on the proposition that court must make findings on each factor as required by *State v. Sosa*, 1997-NMSC-032, ¶ 8, 123 N.M.564. [BIC 32, 35] But at that time Section 32A-2-20 read: "[T]he court **shall make the following findings** in order to invoke an adult sentence: [the eight factors currently listed under Section 32A-2-20(C)]" In 2005, the Legislature amended Section 32A-2-20; the children's court no longer had to make **findings** on the eight factors. Rather, the court must make

two findings: "the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders."

The Legislature retained the factors as mandatory considerations for the court in making its determinations about the child but no longer required the children's court to articulate findings on each factor.

This Court has cautioned that a "distinction should be made between failure to exercise discretion and failure to articulate the exercise on the record." *State v. Trejo*, 1991-NMCA-143, ¶ 6, 113 N.M. 342. The court below manifestly did exercise its discretion in considering and balancing the factors. The disposition imposed was valid – the court made the required findings and considered the necessary factors.

Thus, "[t]he State does not have the right under New Mexico law to appeal an otherwise valid sentence." *State v. Porras*, 1999-NMCA-016, ¶10, 126 N.M. 628. The State can only appeal an illegal sentence because a defendant has an objectively reasonable expectation of finality in a valid sentence. *See State v. Allen*, 1971-NMSC-026, 82

N.M. 373. Any increase in a valid sentence violates double jeopardy. *Id.*, ¶ 4.

As *Allen* explained "(T)here has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.'" *Id.*, quoting *Ex Parte Lange,* 85 U.S. 163, 168 (1873). Had Nehemiah received an adult sentence less than the maximum 120[4] years he was facing, the State would have no claim that the sentence was invalid because the Statute does not specify any factors the court must consider in crafting the sentence. NMSA 1978, § 31-18-15.3 (D)("[T]he court shall sentence the offender pursuant to the provisions of the Criminal Sentencing Act. The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult."); NMSA 1978, § 31-18-13(A) ("[A] person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act.")

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[4] Nehemiah would have an Eighth Amendment challenge as 120 years is the functional equivalent of life without parole, which is disfavored for juveniles. *See Miller v. Alabama*, 567 U.S. 460 (2012)

In determining that the State failed to prove that Nehemiah was not amenable to rehabilitation, Judge Romero carefully considered all the statutorily required factors and exercised his discretion. The State has no right to appeal the determination.

Issue II: The trial court did not abuse its discretion in finding Nehemiah amenable to rehabilitation.

Standard of Review

Appellate courts review district court's findings regarding a youthful offender's amenability to treatment for abuse of discretion. *State v. Trujillo*, 2009-NMCA-128, ¶ 13, 147 N.M. 334. An abuse of discretion must be affirmatively established. *See Hanberry v. Fitzgerald*, 1963 -NMSC- 100, ¶ 9, 72 N.M. 383. "[I]f the record is silent as to the reasons for a ruling, regularity and correctness are presumed." *Serrano*, 1966-NMSC-166, ¶ 13, 76 N.M. 655. *See also Trejo*, 1991-NMCA-143, ¶ 6 (explaining when trial court does not fully articulate reasons underlying its ruling but it is evident from the record that there exist reasons for and against the ruling, the appellate court may apply the usual presumptions to affirm the trial court).

Argument

"[C]hildren are constitutionally different from adults for sentencing purposes." *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2464 (2012). *Jones* acknowledges the evolving science demonstrating "[t]he personality traits of juveniles are more transitory, less fixed" so that "[there is] a greater possibility ... that a minor's character deficiencies will be reformed." *Jones,* 2010-NMSC-012, ¶ 45, *quoting Roper v. Simmons*, 543 U.S. 551, 570 (2005) (internal quotation marks and citation omitted). The amenability hearing and the factors specified by Section 32A-2-20(C) reflect this reality. The hearing is an individualized, careful inquiry to that particular child's culpability and potential for rehabilitation.

Our Supreme Court relied upon the current version of Subsection B of Section 32A-2-20 when it held "the focus of the findings at issue is on the ***child***, not on the particular offense committed." *Rudy B.*, 2010-NMSC-045, ¶34 (emphasis in the original). *Rudy B.* continued "the particular circumstances of the child's offense may have some bearing on this decision. For example, some of the ***factors*** that the judge must weigh under Section 32A-2-20(C) are 'offense specific'." *Id.* ¶35

(emphasis in original). The four offense specific factors are clear questions of historic fact.

Judge Romero was aware of these offense specific factors; as he acknowledged that "you can't really talk about, can't really focus on the child, without talking about the offenses committed." [2-11-16 CD 5:48] The judge acknowledged the facts were "horrific" – there was no need to elaborate on them. He was well aware that it was a serious crime: Nehemiah admitted to killing his parents and three younger siblings; he used two different guns; Nehemiah texted his girlfriend about the killings revealing that it was premeditated.

But contrary to the State's suggestion, the four offense specific factors do not determine of the outcome of the amenability hearing. All youthful offender offenses involve violence or the threat of violence. *See* NMSA 1978 § 32A-2-3(J)(1). All, except shooting at a dwelling or occupied building/shooting at or from a motor vehicle and dangerous use of explosives, necessarily involve violence against a person. *See id.* This reflects the Legislature's determination that with the exception of a conviction for first-degree murder (which Nehemiah does not have),

the mere fact that a child committed a crime or crimes, no matter how horrific, does not automatically result in an adult sentence.

Our Supreme Court has explained "[w]e agree with the State that the findings required by Section 32A-2-20(B), like the findings in *Ice*, are ***not offense-specific***." *Rudy B.*, 2010-NMSC-044, ¶ 34 (emphasis added). Rather, in the amenability determination the court must "careful[ly] balanc[e] individual and societal interests." *Id.* "[I]t is the court's individual responsibility to make a case-by-case determination with regard to each youthful offender's amenability to treatment or rehabilitation." *Jones*, 2010-NMSC-012, ¶ 41. Thus, no one factor is dispositive. *Id.*

Nonetheless, the State argues, essentially, that these murders were so awful that as a matter of law they must outweigh the remaining factors. But, as *Rudy B.* stated, "the judge must also consider a range of other information relating to the child that has little or nothing to do with the charged offenses." 2010-NMSC-045, ¶ 35.The remaining factors are "forward-looking determinations, which necessarily involve a level of uncertainty and informed judgment—as opposed to historical fact-finding." 2010-NMSC-045, ¶ 37.

The experts who believed Nehemiah amenable all relied upon research about juveniles who murder family members. "Anecdotal observations and case studies of adolescents who kill their parents generally reflect positive adjustment and reintegration in society after release over extended (10 years plus) follow-up periods." Randy Borum, David Verhaagen, Assessing and Managing Violence Risk in Juveniles[5] Part II: Conducting Violence Risk Assessments with Juveniles, Special Topics in Youth Violence, Recidivism in Juvenile Homicide Offenders (Guilford Press 2006).

There is no reason to believe Nehemiah would fare any differently. "Juveniles who murder family members often have no delinquent history and, in follow-up studies, almost never engage in any future violent behavior." Thomas Grisso, Forensic Evaluations of Juveniles 153 (2nd ed. Professional Resource Press 2013).

Dr. Davis and Dr. Fields also noted in particular that because Nehemiah has no history of delinquency, he is much less likely to reoffend. "A good deal of research now suggests a greater risk of

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[5] Undersigned used the Kindle edition of Assessing and Managing Violence Risk in Juveniles; quotation at locations 1838-39; no page numbers available, so undersigned gave all section titles.

harmful aggression and its continuance into adulthood for young people whose aggressive behavior predates their adolescence." Grisso, 153. Grisso cautioned "[d]uring adolescence, the nature of the aggressive acts of these two types [life-course persistent and adolescence limited] is not particularly distinguishable." *Id.*

This echoes the repeated admonishments of the United States Supreme Court that significant gaps between juveniles and adults reduce juveniles' moral culpability and increase their potential for reform. *Miller,* 132 S.Ct at 2464.

First, juveniles have an "underdeveloped sense of responsibility" that can result in "recklessness, impulsivity, and heedless risk-taking." *Miller,* 132 S.Ct at 2464 (internal quotation marks omitted.) Second, juveniles are more susceptible to peer pressure and negative influences. *Id.* This vulnerability is exacerbated by the fact that juveniles are generally unable to exert control over their environment and "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* Finally, a juvenile's character and attitudes are still developing; thus, "his actions [are] less likely to be evidence of irretrievabl[e] deprav[ity]." These deficiencies, the court further explained, undermine

the traditional penological justifications for imposing "the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller,* 132 S.Ct. at 2465.

Heeding these developments in science, our Supreme Court counseled

> to sentence a child as an adult, the trial court must make a conscious determination that, in spite of the foregoing [science], the child is beyond reform—that instead of a chance at rehabilitation, the child must be separated from society and placed in the confines of an adult correctional facility. This is not a responsibility to be taken lightly.

Jones, 2010-NMSC-012, ¶ 45. Judge Romero listened carefully to the evidence. He explained his ruling for over two and one-half hours. "[S]entencing decisions involve myriad factors and should be left to the sound discretion of trial judges who are in the best position to assess and weigh whether justice will be served by a sentence of imprisonment" or, here, a juvenile disposition. *Lindsey*, ¶ 22.

The *Jones* Court remarked that before giving a child an adult sentence "the trial court must weigh not only the interests of the child, but also the interests of the child's family and of society as a whole. We are hard-pressed to conceive of a decision that cuts closer to the core of

society's interest than an election to give up on one of its children." 2010-NMSC-012, ¶ 46. Judge Romero, having weighed the factors, determined that society should not give up on Nehemiah.

The State asserts that the evidence was "uncontroverted" that Nehemiah could not be fully rehabilitated by age twenty-one and contends this fact alone should require an adult sentence. But the evidence was not so black-and-white; as Judge Romero explained in his oral ruling "Dr. Fields departed a bit from his hard line of twenty-three by saying, some cases take longer for rehabilitation, and some cases take less time. There is no magic age for concluding that there is full formation of the frontal lobe and full formation of the executive brain function." [2-11-16 CD 5:50] From this testimony, the judge made an allowable inference that Nehemiah's brain would be matured sufficiently by age twenty-one to allow for "adequate protection of the public" and "reasonable rehabilitation." NMSA 1978 § 32A-2-20 (C).

Notably, the question for amenability is not *when* will the child's brain be fully formed but *if* the child can be rehabilitated – everyone who worked with Nehemiah agreed he could be rehabilitated. The finding that he is amenable comports with the requirement "that

children be treated as children so long as they can benefit from the treatment and rehabilitation provided for in the Delinquency Act." *Jones*, 2010-NMSC-012, ¶ 32.

Although Dr. Manlove and Dr. Fields would prefer that Nehemiah continue therapy until his brain is fully developed, this is not required by the Children's Code. NMSA 1978, §32A-2-20(C). Further, as Dr. Davis noted, therapy is only useful so long as the patient is engaged in the process. In other words the usefulness of therapy isn't measured by the time spent in therapy but rather in the effort put forth in therapy. Everyone involved in Nehemiah's treatment believed he working very hard at it.

The children's court considered Nehemiah's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller,* 132 S. Ct. at 2468. The court heard about Nehemiah's "family and home environment that surround[ed] him—and from which he [could not] extricate himself—no matter how brutal or dysfunctional." *Id.* The court balanced this along with the other enumerated factors of Section 32A-2-20(C) and decided that Nehemiah was amenable to treatment.

"It was for the children's court as fact finder to resolve any conflict in the testimony of the witness and to determine where the weight and credibility lay." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 56. Judge Romero determined the weight and credibility lay with Dr. Fields, Dr. Manlove, and Dr. Davis – all of whom believed Nehemiah amenable and relied upon research about juvenile homicide offenders to inform their opinions. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal." *Gall v. United States*, 552 U.S. 38, 51 (2007) "Absent a compelling reason, not present here, the judiciary should not impose its own views concerning the appropriate punishment for crimes." *State v. Archibeque*, 1981-NMSC-010, ¶ 5, 95 N.M. 411.

Conclusion

The trial court had all the information on each factor it needed to make an informed decision and exercise discretion under Section 32A-2-20(C). The State presented the text messages, the autopsy results, the police investigation, and Nehemiah's police interview in the amenability

hearing. The State did not, and could not, refute the science and research upon which Drs. Manlove, Fields, and Davis relied. The weight of the expert testimony was in favor of amenability. The trial court did not abuse its discretion with its reasoned decision. The State is not aggrieved by this determination. The appeal should be dismissed.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the ~~Supreme~~ Court of Appeals this 1st day of May, 2017.

Public Defender Department