IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
MAY 24 2017

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 REPLY BRIEF

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May 24, 2017

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STATEMENT REGARDING CITATIONS TO THE RECORD

Citations in this brief follow the conventions of Rule 23-112 NMRA and its appendix.

STATEMENT OF COMPLIANCE WITH RULE 12-213(F)

This reply brief complies with the length limitations of Rule 12-213(F) NMRA. It was prepared in 14-point Times New Roman font. Although it exceeds 15 pages, the body of the brief, including headings and footnotes, contains 4,366 words, according to Microsoft Word 2010's "word count" function.

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ARGUMENT

I. The State Has A Right To Appeal.

A. The State has a constitutional right to appeal.

As explained in the State's brief in chief, the State has a constitutional right to appeal under Article VI, Section 2 of the New Mexico Constitution, which provides that "an aggrieved party shall have an absolute right to one appeal." **[BIC 26-27]** "The State is aggrieved by a disposition contrary to law and may properly challenge such a disposition on appeal." *In re Cristobal V.*, 2002-NMCA-077, ¶ 8, 132 N.M. 474.

Nehemiah G. asserts that "the State claims to be aggrieved because it disagrees with how the district court balanced the factors under Section 32A-2-20(C)." **[AB 19]** On the contrary, as explained below and in the State's brief in chief, the State is aggrieved because the trial court refused to balance the factors as required under NMSA 1978, Section 32A-2-20(C) (2009). **[*See* BIC 33-35]**

State v. Aguilar, 1981-NMSC-027, 95 N.M. 578, involved analogous facts. There, the trial court refused to sentence the defendant under the mandatory incarceration provision of the firearm enhancement statute, reasoning the statute was unconstitutional. *Id.* ¶ 1. Our Supreme Court concluded the State had a constitutional right to appeal, because "the State is an 'aggrieved party' . . . where it alleges a disposition contrary to law in a criminal proceeding." *Id.* ¶¶ 5-6; *see*

also State v. Abril, 2003-NMCA-111, ¶ 22, 134 N.M. 326 (noting that if trial court had failed make statutorily required determination that defendant was convicted of "serious violent offense," judgment would have been disposition contrary to law, giving State constitutional right to appeal), *overruled on other grounds by State v. Torres*, 2012-NMCA-026.

Here too, the disposition was contrary to law because the trial court failed to follow the requirements of Section 32A-2-20(C). The State therefore has a constitutional right to appeal. Further, because the disposition was contrary to law, there is no double jeopardy bar to this appeal. *State v. Acuna*, 1985-NMCA-083, ¶ 5, 103 N.M. 279; *State v. Aguilar*, 1982-NMCA-116, ¶ 28, 98 N.M. 510; *see also State v. Redhouse*, 2011-NMCA-118, ¶ 11 ("Where the state's time to exercise its constitutional right to appeal has not expired, a defendant has no reasonable expectation of finality in his or her sentence."); *cf. State v. Allen*, 1971-NMSC-026, ¶ 7, 82 N.M. 373 (where original sentence was valid, double jeopardy barred amending it to increase maximum term).

B. The State has a statutory right to appeal.

Nehemiah G. also asserts that "[t]he State concedes there is no statutory right to appeal here." **[AB 19]** He is mistaken. As indicated in the State's brief in chief, NMSA 1978, Section 32A-1-17(A) (1999) governs appeals in children's court. **[BIC 28]** That statute applies here, because the proceedings below were

children's court proceedings. The rules specifically provide: "[T]he Children's Court Rules govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state . . . to be a 'youthful offender' as that term is defined in the Children's Code." Rule 10-101(A)(1)(b) NMRA; *see also* NMSA 1978, § 32A-1-8(A)(1) (2009) (giving children's court exclusive jurisdiction of all proceedings under Children's Code involving "a child alleged to be . . . a delinquent child"); NMSA 1978, § 32A-2-3(J) (2009) (defining "youthful offender" as "a delinquent child subject to adult or juvenile sanctions").

Thus, the appeal in this case is governed by Section 32A-1-17(A), which provides: "Any party may appeal from a judgment of the [children's] court to the court of appeals in the manner provided by law." The State is a party in delinquency proceedings. Rule 10-121(A) NMRA; *State v. Doe*, 1978-NMCA-124, ¶ 9, 92 N.M. 354. An order adjudicating a child delinquent constitutes a judgment. *See* NMSA 1978, § 32A-2-18(A) (1996) ("The court shall enter a judgment setting forth the court's finding and disposition in the proceeding."). This is true even when the judgment is a result of amenability proceedings. *See* NMSA 1978, § 32A-2-20(F) (2009) (if court invokes juvenile disposition, it "shall follow the provisions set forth in Section 32A-2-19"); NMSA 1978, § 32A-2-19 (2009) (governing "dispositional judgments" for adjudicated delinquent offenders). The State pursued its appeal in this case in the manner provided by law. *See generally*, Rules 12-201

to -202, -208 NMRA (applicable rules of appellate procedure); *see also State v. Crystal B.*, 2001-NMCA-010, 130 N.M. 336 ("[A]ppeals are permitted from disposition of an adjudicated delinquent child as that is the final act that the trial court must complete to dispose of the case.").

The State therefore has a statutory right to appeal in this case. *See Health & Soc. Servs. Dept. v. Doe*, 1978-NMCA-045, ¶ 2, 91 N.M. 675 (holding that under prior codification of Section 32A-2-17, State had right to appeal disposition ordering juvenile placed at particular facility, and that statute governing appeals in criminal proceedings did not apply because "Children's Court matters are not criminal proceedings").

II. The Court's Ruling Was Based On An Erroneous View Of The Law And A Clearly Erroneous Assessment Of The Evidence.

A. The court not only failed to make findings regarding the offense-specific factors in Section 32A-2-20(C), but it also failed to give these factors proper consideration.

As explained in the State's brief in chief, the lower court committed legal error because, contrary to *State v. Sosa*, 1997-NMSC-032, ¶ 8, 123 N.M. 564, it refused to make findings showing that it had considered the offense-specific factors set out in Section 32A-2-20(C). **[BIC 33-35]**

Nehemiah G. attempts to distinguish *Sosa* on the theory that the language of Section 32A-2-20(C) specifically required the court to make findings at the time *Sosa* was decided, but that the statute was amended in 2005 to remove this

requirement. **[BIC 21-22]** He is mistaken. The relevant language has remained unchanged since the statute was enacted in 1993. Then, as now, Subsection B provided that the children's court "shall make findings" as to amenability and eligibility for commitment, and Subsection C provided that "[i]n making the findings set forth in Subsection B of this section, the judge shall consider" the factors listed in Subsection C. *Compare* NMSA 1978, § 32A-2-20(B)-(C) (1993 Repl.), *with* NMSA 1978, § 32A-2-20(B)-(C) (2005). Reading these subsections together, the *Sosa* Court concluded that the court "must make findings" on the factors listed in Subsection C. *Sosa*, 1997-NMSC-032, ¶ 8. The Court explained: "The purpose of these findings is to show that the district court gave proper consideration to the issue of amenability to treatment or rehabilitation." *Id.* ¶ 9. Accordingly, Children's Court Rule 10-247 provides that the court "shall make findings on the record on each of the [Section 32A-2-20(C)] factors." Rule 10-247(F) NMRA.

Here, contrary to *Sosa* and Rule 10-247(F), the court refused to address the offense-specific factors. **[2/11/16 CD 5:43:49-5:48:23]** Nehemiah G. suggests this should not matter, because these factors were "clear questions of historical fact," and the court was "aware" of them. **[BIC 26]** But the law requires not only that the court be aware of these factors, but that it give them "proper consideration," and findings are required to show this was done. *Sosa*, 1997-NMSC-032, ¶ 9. Here, not

only did the court refuse to make the required findings, but it also specifically discounted the importance of the offense-specific factors, 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 misread *Rudy B.*

In *Rudy B.*, the Supreme Court rejected the argument that a jury had to make the finding required by Section 32A-2-20(B)—whether "the *child* is not amenable to treatment or rehabilitation as a child in available facilities"—partly because that finding focused "on the *child*, not the particular offense committed." 2010-NMSC-045, ¶ 34. But the Court also noted: "Admittedly, 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. In *State v. Jones*, 2010-NMSC-012, 148 N.M. 1, the Supreme Court reiterated: "Section 32A-2-20(C) lists seven factors that a trial court must consider in making its amenability determination, and none of those factors, standing alone, is dispositive. The trial court *must consider each of them*, plus 'any other relevant factor' in determining whether the child is amenable to treatment or rehabilitation." *Id.* ¶ 41 (emphasis added).

Rudy B. therefore does not suggest the offense-specific factors in Section 32A-2-20(C) can be ignored. Indeed, the Court's observation that these factors

"may have some bearing" on the ultimate amenability decision was borne out in this case. Dr. Fields repeatedly indicated that the way Nehemiah G. killed his family necessarily affected his amenability. Under the heading, "Description of features of the current adjudicated offense relevant to weigh for future risk of offending," Dr. Fields observed:

> [T]he degree of violence was extraordinary and shocking, and the murders included three siblings who had nothing to do with whatever anger he had towards his parents. The shootings were planned, as evidenced by texts h[e] sent to his girlfriend and his reports he had been thinking of killing his parents in the weeks prior to his actually doing so. Comments by others noted his calmness and lack of emotion after the deaths of his family members. Shortly after the homicides, he was able to speak and interact coherently and clearly, with no signs of a thought disorder.

[Ex. I, at 34] Dr. Fields explained that the "extreme nature of the acts" was one factor that led him to conclude Nehemiah G. needed "at least five more years of treatment and externally-imposed structure to guarantee he will present a minimal risk to public safety." **[Ex. I, at 39]** He also testified that he seriously doubted "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 . . . *if we just look at what he did* and . . . the . . . psychological makeup he has and problems he has." **[2/10/16 CD 9:11:35-9:12:47 (emphasis added)]** Likewise, he testified that sentencing Nehemiah G. as a juvenile "doesn't seem appropriate to me . . . *just on*

the basis of what he did that night." **[1/15/16 CD 4:34:28-4:36:23 (emphasis added)]**

Despite the clear statutory requirement that the "judge shall consider" the factors set out in 32A-2-20(C); despite the admonition in *Sosa* and Rule 10-247 that the court must make findings on these factors, 1997-NMSC-032, ¶ 8; despite the observation in *Rudy B.* that "some of the *factors* that the judge must weigh under Section 32A-2-20(C) are 'offense specific,'" 2010-NMSC-045, ¶ 35; despite the instruction in *Jones* that the court must consider each factor, 2010-NMSC-012, ¶ 41; and despite the evidence that the "extraordinary and shocking" nature of the killings in this case was an important factor in assessing Nehemiah G.'s amenability, **[Ex. I, at 34]**, the court made no findings regarding the offense-specific factors, and actually seemed to dismiss them as unimportant. **[2/11/16 CD 5:47:41-5:48:23]** Insofar as the court based its ruling on an erroneous view of the law, it necessarily abused its discretion. *See Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 17, 111 N.M. 670 ("[A] district court necessarily would abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

B. Given the uncontradicted evidence that Nehemiah G. could not be rehabilitated by age 21, the court's contrary ruling was an abuse of discretion.

Nehemiah G. characterizes the State's argument as being that the offense-specific factors "were so awful that as a matter of law they must outweigh the remaining factors." **[AB 27]** He is mistaken. The trial court abused its discretion not only because it failed to consider the offense-specific factors, but also because the other factors established that Nehemiah G. could not be rehabilitated by age 21. **[*See* BIC 35-42]**

The facts in this case bear repeating. On the night of January 18, 2013, 15 year-old Nehemiah G. texted back-and-forth with his 12-year-old girlfriend about how he was going to kill his family that night, and how he wanted to have sex with her afterwards. **[Ex. 3, at 1-23, 29]** He then shot his mother twice in the head while she slept; he woke his 9 year-old brother before shooting him; he shot his crying 5 year-old and 2 year-old sisters, and he then laid in wait until his father came home hours later, at which time he shot him in the back and then in the head. **[Ex. 2, at 8-9; Ex. 5, at 03:16:58-03:30:30; Ex. G, at 10-11]** He then met his girlfriend at an Albuquerque church, where the two "made out." **[Ex. 3, at 23-25; Ex. G, at 11]**

Nehemiah G. was interviewed several times while awaiting trial and sentencing. In addition to admitting that he killed his family, he claimed that he was a gang member who had participated in drive-by-shootings and gun battles,

[Ex. G, at 4, 23; 1/14/16 CD 2:10:21-2:10:57]; that he regularly used cocaine and marijuana, **[Ex. I, at 19; Ex. 2, at 29]**; that he got in fights every week since the second grade, **[Ex. G, at 23]**; that he had been hearing voices telling him to hurt people since the age of ten, **[Ex. G, at 11, 17; Ex. 2, at 17]**; that he regularly patrolled his yard with a rifle at night on his father's orders, **[Ex. I, at 14]**; that his father would beat him when he disobeyed orders or hurt a family member, **[Ex. I, at 6]**; and that his mother regularly berated and beat him. **[Ex. G, at 5, 9; 1/14/16 CD 2:19:32-2:20:27]**

Dr. Stephen Manlove and Dr. Barry Fields evaluated Nehemiah G. based largely on his self-reported history, on various test results, and on his behavior while awaiting trial and sentencing. Both dismissed some of Nehemiah G.'s claims as "faking bad," **[*see* 1/14/16 CD 2:12:28-2:13:01]**, but credited others—even when contradicted by Nehemiah G.'s surviving sister Vanessa. **[*See* BIC 17 n.12]** Even so, after effectively construing all the evidence in the light most favorable to Nehemiah G., neither Dr. Manlove nor Dr. Fields could say that he could be successfully rehabilitated by the age of 21.

Nehemiah G. nonetheless asserts that the experts "believed him amenable." **[AB 28, 33]** By this he presumably means they thought he was treatable. But an amenability determination requires more. As explained in *Rudy B.*, the amenability inquiry under Section 32A-2-20 boils down to the question: "Can the child be

rehabilitated or treated sufficiently to protect society's interests by the time he reaches the age of twenty-one?" 2010-NMSC-045, ¶ 36; *accord Sosa*, 1997-NMSC-032, ¶¶ 10-12; *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 16, 121 N.M. 562. This is because a juvenile sentence ends at age 21, even though in some cases treatment must extend beyond that time for there to be any hope of rehabilitation. *State v. Ira*, 2002-NMCA-037, ¶ 27, 132 N.M. 8. Dr. Manlove and Dr. Fields agreed this was such a case.[1]

Dr. Manlove opined that Nehemiah G. was "amenable to treatment," but cautioned that rehabilitative efforts "should be extended as long as possible," and while it was "hard to say" how long, "a rule of thumb is 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 point he should be reassessed. **[1/14/16 CD 3:35:40-3:36:19; 1/15/16 CD 9:05:24-9:06:10]**

Dr. Fields likewise opined that Nehemiah G. was "amenable to treatment," but added "one important caveat":

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[1] Dr. George Davis, Director of Psychiatry for the Children, Youth, and Families Department, offered no opinion as to whether Nehemiah G. could be successfully rehabilitated by age 21. Rather, he testified that he had met with Nehemiah G. for about an hour, and that "[f]rom what I've read and . . . from meeting him that one time, I assume he's in most respects pretty much like the rest of our population, and so I think we have capacity to address those needs." **[2/10/16 CD 2:02:09-2:02:35]**

> Given the highly disturbed character of the family in which he grew up for 15 years, 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, Nehemiah needs at least five more years of treatment and externally-imposed structure to guarantee he will present a minimal risk to public safety, and minimal risk once he is no longer in the juvenile or criminal justice system. Nehemiah will be 21 years old in about 2 1/2 years, and this is not enough time for him to do all the work necessary to be considered rehabilitated. If rehabilitation continues another 2 1/2 years beyond that—in other words, five more years from the present—it will then be eight years since the killing of his family. This may be sufficient time for him to be able to participate in the adult world without undue risk that he will act violently in the future. However, in a case like this, input from professionals, including probation officers, needs to be continuous throughout a period of rehabilitation. Future psychotherapists, evaluators, and probation officers may conclude he needs significantly more time than the minimum five years being suggested here.

[Ex. I, at 39] Dr. Fields also said it was possible that it would never be safe for Nehemiah G. to return to the community, and that he would like to see him "on probation for the rest of his life, or however long it could be permitted." **[2/10/16 CD 11:00:36-11:01:18, 11:11:11-11:11:53]**

The trial court ultimately relied upon the testimony of Dr. Fields, and to a lesser extent Dr. Manlove and Dr. Davis. **[2/11/16 CD 5:59:40-5:50:11; *see* AB 6]** Nonetheless, it dismissed the testimony that supervision was needed beyond the age of 21, reasoning that Dr. Fields' opinion was based on the idea that juveniles' brains do not fully develop until they reach their mid-20's, but that Dr. Fields had "waffled" in his testimony by acknowledging there was no "magic age" for full brain development. **[2/11/16 CD 5:50:40-5:51:00]** Nehemiah G. echoes this

reasoning in his answer brief, arguing that "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.'" **[AB 31]** The argument fails because the evidence demonstrates that Dr. Field's opinion was not based on brain development.

After being questioned about the age when frontal lobes typically develop fully (22 or 23), Dr. Fields 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 later reiterated that he believed supervision should extend beyond age 21 "on the basis of what he did that night." **[2/10/16 4:35:59-4:36:23]**

There was no contrary evidence, and Nehemiah G. points to none. Rather, he cites to two books that refer to unidentified studies showing that some number of juveniles who killed some unspecified family members under unknown circumstances had a low risk of committing violent offenses, presumably after serving a sentence at some sort of facility for some unidentified period of time.

[AB 28-29] But the experts who testified at trial considered these same studies, and nonetheless concluded that Nehemiah G. needed treatment and supervision beyond the age of 21. **[*See* 1/14/16 CD 3:20:53-3:21:37; 1/15/16 CD 4:36:23-4:38:30]** It is difficult to see how the trial judge could have reached a different conclusion based on these same studies, which he presumably never read since they were neither provided to the court nor identified by the witnesses. *See id.* The experts' summaries of the studies' conclusions certainly provided no real insight into whether *Nehemiah G.* would reoffend, given the dearth of facts regarding the circumstances surrounding the murders committed by the studies' subjects and how they compared to this case.

Nehemiah G. also cites extensively to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012). **[AB 25, 29-30, 32]** There, the United States Supreme Court held that the Eighth Amendment prohibits mandatory sentences of life imprisonment without parole for juvenile defendants. 132 S. Ct. at 2469. The Court reasoned that the "hallmark features" of youth—"transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2465, 2468. The Court further reasoned that "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but

incorrigibility is inconsistent with youth." *Id.* at 2465 (brackets, quotation marks, and citations omitted).

But the *Miller* Court did not suggest that this meant a juvenile could not or should not be sentenced as an adult. On the contrary, the Court observed:

> Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Id. at 2474-75 (citations omitted).

Thus, although the *Miller* Court agreed that "incorrigibility is inconsistent with youth," *id.* at 2465; **[*see* AB 1]**, that there is a greater possibility that a minor's "deficiencies will be reformed," 132 S. Ct. at 2465; **[*see* AB 25]**, and that a juvenile's actions are "less likely to be evidence of irretrievable depravity," 132 S. Ct. at 2464; **[*see* AB 29]**, this did not foreclose an adult sentence, as Nehemiah G. seems to think it should. Rather, it meant that sentencing judges must have a choice between the inappropriate extremes of a light juvenile sentence that ends at age 21, and the severe penalty of life-without-parole.

The trial court in this case seemed to think it faced a choice between similar extremes: "Nehemiah shouldn't be sent to prison—that to send him to prison would be . . . a waste of a human life." **[2/11/16 CD 5:16:40-5:16:55; *see* AB 15]** In reality, though, the court faced no such choice, because there was no mandatory sentence if it chose to sentence Nehemiah G. as an adult. Rather, the Code specifically provides that "a person sentenced as a . . . youthful offender may be sentenced to less that the basic or mandatory sentence prescribed by the Criminal Sentencing Act." NMSA 1978, § 31-18-13(A) (1993). The Code further contemplates treatment and rehabilitation services as part of such a sentence:

> The Probation and Parole Act shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation under probation supervision instead of in an institution, or under parole supervision when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare.

NMSA 1978, § 31-21-4 (1963). Thus, an adult sentence is not reserved for the "incorrigible," as Nehemiah G. suggests. **[*See* AB 1]** Rather, an adult sentence is both necessary and appropriate in cases like this, where rehabilitation cannot be accomplished before the age of 21.

In the end, the evidence was overwhelming that Nehemiah G. was not amenable to treatment as a juvenile. Even where the trial court is vested with

"considerable discretion," the exercise of that discretion "must be consistent with the evidence." *Schuermann v. Schuermann*, 1980-NMSC-027, ¶ 8, 94 N.M. 81. Here, every expert who offered an opinion as to amenability testified that Nehemiah G. could not be successfully rehabilitated by the age of 21. There was no evidence suggesting otherwise. Even the trial court was unwilling to say that Nehemiah G. was amenable to treatment as a juvenile. Rather, the court made the awkwardly worded ruling 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]** Even so phrased, the trial court's ruling was clearly erroneous.

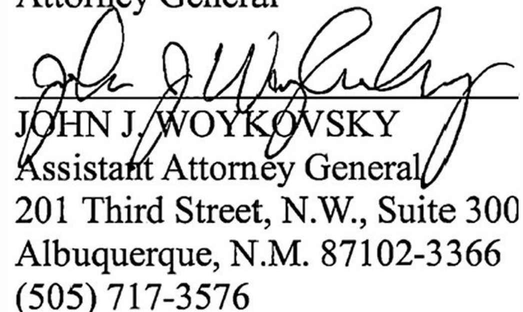
The uncontradicted evidence certainly proved that Nehemiah G. was not amenable to treatment as a juvenile by the clear and convincing evidence standard that this court has found acceptable in previous amenability cases, much less the preponderance of the evidence standard that the majority of jurisdictions apply in similar cases. *See State v. Gonzales*, 2001-NMCA-025, ¶¶ 36-37, 130 N.M. 341, *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, *rev'd*, 2010-NMSC-045. Insofar as the trial court held otherwise, its ruling was based on a clearly erroneous assessment of the evidence. For this reason, the court necessarily abused its discretion. *Rivera*, 1991-NMSC-030, ¶ 17.

CONCLUSION

The trial court's amenability determination and the resulting sentence should be reversed.

Respectfully submitted,

HECTOR H. BALDERAS
Attorney General



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May 24, 2017

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CERTIFICATE OF SERVICE

I certify that on May 24, 2017, a true copy of this brief was mailed by first-class mail, postage paid, to:

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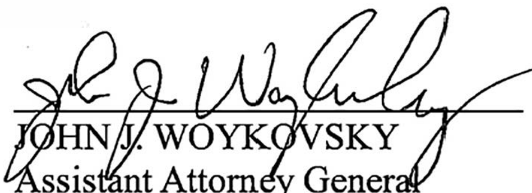

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