

THE STATE OF SOUTH CAROLINA
In the Appellate Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

HONORABLE LETITIA H. VERDIN, CIRCUIT COURT JUDGE

Case No(s).: 2017GS2303939A

The State, Respondent.
v.
Miguel Angel Cano, Appellant.

APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS
TO STAY TRIAL PENDING APPEAL

RECEIVED
NOV 26 2018
SC Court of Appeals

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INTRODUCTION

Appellant is a child erroneously being prosecuted as an adult in General Sessions for a murder he is alleged to have committed when he was thirteen years old. The Circuit Court has issued erroneous rulings denying Appellant his right to fully litigate whether there is sufficient and proper evidence to support prosecuting him as an adult rather than as a child. The Circuit Court's erroneous rulings must be corrected now so as to prevent irreparable harm to Appellant.

Appellant is alleged to have killed his mother on August 31, 2015, by stabbing her multiple times at their home. He was thirteen years old. He is autistic, although neither he nor his family knew it. He was also suffering from depression at the time; another diagnosis neither he nor his family knew about. As of the filing of this petition, Appellant has lived his entire sixteen-year life without treatment for autism or depression. He has, however, been psychologically evaluated and tested during the litigation of this case (both prior to transfer and after). That is when the diagnosis of autism was made and when the depression was discovered. The post-arrest psychological evidence demonstrates that Appellant has been erroneously transferred to adult court, is wrongly being kept in adult court, and that the proper, constitutional forum for prosecuting him is adjudication as a child in Family Court.

Despite this evidence having been proffered and made available for consideration, the Circuit Court has erroneously ruled it does not have the authority to review this evidence nor the power to remedy the error the evidence establishes. Specifically, the Circuit Court has erroneously ruled that it does not have (1) the authority to consider whether Appellant was wrongly transferred to General Sessions or whether Appellant should, given the new, additional psychological evidence, continue to be prosecuted as an adult or (2) the power to transfer Appellant to Family Court. These rulings are incorrect, and have left Appellant to suffer a

demonstrable wrong without the ability to establish that wrong to the trial court or have the trial court provide a remedy.

The trial court's error has compelled Appellant to appeal. The appeal has been contemporaneously filed with this Petition on November 19, 2018. Appellant is not seeking appellate review of the substantive issues regarding proper prosecution of him as a child rather than as an adult; nor is he attempting piecemeal litigation of the evidentiary issues in his case through the appellate courts. The issue on appeal is narrow. It is centered on what procedure is proper in the trial court to protect Appellant's constitutionally and statutorily granted right to be adjudicated as a child in Family Court.

The right to adjudication in Family Court is a substantial trial-level right. The Circuit Court has a duty to protect this right by doing two things. First, the trial court has a duty to review the record and consider any evidence and argument showing the Family Court lacked evidentiary support for its transfer order. This would include reviewing any new psychological evidence and considering whether it (a) confirms the Family Court erred and (b) whether it independently shows that Appellant does not currently belong in adult court.

The Circuit Court has an additional duty to remedy any demonstrable error. Appellant is a litigant, the defendant, in a criminal prosecution and is entitled to have the trial court protect his rights. Failing to remedy these demonstrable errors equates to failing to protect Appellant's constitutional and statutory rights. By preventing presentation of substantive evidence and refusing to act to protect against the harm that evidence establishes, the trial court is depriving Appellant, without due process, of his constitutional and statutory liberty interest in being adjudicated as a child in Family Court.

Given the erroneous rulings, an immediate stay of the prosecution of this case in General Sessions pending appeal is necessary to prevent irreparable harm to Appellant. The Circuit Court's ruling directly affects a mode of trial to which he is entitled by law. As such, the ruling must be immediately appealed to prevent it from being waived for review after final judgment. Appellant has immediately appealed the ruling but his appeal does not automatically stay trial on the merits of the criminal case in General Sessions. Consequently, without a stay, the trial will go forward in General Sessions before the appeal is resolved. That will result in Appellant losing review of the ruling after final judgment. Therefore, a stay pending appeal is necessary to preserve the fruits of Appellant's meritorious appeal and prevent irreparable harm from befalling him.

STATEMENT OF THE CASE

1. The State charged Appellant with murder on September 3, 2015, and filed a petition to waive jurisdiction to General Sessions on September 18, 2015;

2. On September 22, 2016, Appellant filed a written motion to dismiss the State's motion to waive jurisdiction to General Sessions;

3. On November 1 and 2, 2016, the Honorable Alex Kinlaw, Jr., held a hearing in Family Court on the State's motion at which the parties presented testimony and arguments on the issue of waiving jurisdiction to General Sessions;

4. On January 30, 2017, Judge Kinlaw granted the State's motion and, in a written order, transferred Appellant to General Sessions at the age of fourteen for a crime he is alleged to have committed when he was thirteen. The order, however, did not address Appellant's previously filed motion to dismiss;

5. On February 3, 2017, Appellant filed a motion to stay the order transferring jurisdiction;

6. On February 9, 2017, Appellant filed a motion to stay the waiver order and for reconsideration of the waiver order;

7. On March 6, 2017, Judge Kinlaw denied Appellant's motions to stay and to reconsider without a hearing;

8. On March 15, 2017, Appellant filed a motion in Circuit Court seeking review of the transfer order and remand of the case back to Family Court (**Exhibit 1**);

9. On May 15, 2017, Appellant filed his Memorandum of Law in Support of His Motion for Review and Remand to Family Court (**Exhibit 2**);

10. On May 24, 2017, the Honorable Letitia H. Verdin, Circuit Court Judge, issued an order denying Appellant's motion for review and remand without a hearing. (**Exhibit 3**). Judge Verdin erroneously ruled that the Circuit Court did not have the authority to review the transfer of jurisdiction;

11. On June 5, 2017, Appellant filed his Motion to Reconsider Order Denying Defendant's Motion for Review and Remand to Family Court. (**Exhibit 4**). Appellant requested a hearing on his original motion and the motion to reconsider—as both had been denied to him in violation of his right to due process. The primary basis for reconsideration was that Appellant had been denied the opportunity to be heard on his motion, had been denied the opportunity to address issues presented by the court in its order and by the State in its reply, and that he had been denied the opportunity to proffer evidence. Appellant, by and through his undersigned

counsel, had previously made clear to the Circuit Court and to the State that he had relevant evidence to submit in support of his motions;

12. On June 21, 2017, Judge Verdin issued an order denying the defendant's request for a hearing on his motions. (**Exhibit 5**). The court, however, directed that "the parties are ordered to find a mutually agreeable time" for the defendant to proffer evidence in support of his motions;

13. On July 25, 2017, the Honorable W. Jeffrey Young, Circuit Court Judge, issued an order ruling that, despite the defendant's objection to his being arraigned in General Sessions Court on the offense (murder) for which the Family Court had transferred jurisdiction, Appellant had been properly arraigned. (**Exhibit 6**);

14. Additional, new psychological testing on Appellant was completed on July 19, 2018, and August 6, 2018. The test results provided two things: (1) support for Appellant's motions for review and remand back to Family Court and (2) an independent basis for transferring him back to Family Court. The results of these tests were provided to the State via letter dated August 7, 2018, and, as discussed more fully below, also presented to the court during the August 24, 2018, proffer hearing;

15. On August 7, 2018, Appellant filed his Motion to Transfer to Family Court. (**Exhibit 7**). This motion outlined Appellant's constitutional rights to (1) adjudication in Family Court and (2) a hearing in Circuit Court to protect those rights, both of which were based on the additional, new psychological evidence;

16. On August 24, 2018, a hearing was held before Judge Verdin at which Appellant proffered evidence to support his previously filed motions. Appellant proffered expert testimony concerning the lack of sufficient evidentiary support in the Family Court's order transferring jurisdiction and the new psychological testing, along with the psychological reports. Judge Verdin directed the parties to submit any written responses to the hearing within ten days;

17. On September 4, 2018, Appellant filed his Motion to Reconsider Order Denying Defendant's Motion for Review and Remand to Family Court (**Exhibit 8**). He also filed his Notice of Intent to Appeal and Petition for Supersedeas, notifying the Circuit Court that, should his motions be denied, he intended to appeal the rulings and seek a stay via petition for supersedeas. (**Exhibit 9**);

18. Also on September 4, 2018, Appellant filed his Memorandum In Support of Motion to Transfer to Family Court. (**Exhibit 10**); and

19. On November 7, 2018, the Clerk of Court filed an Order Denying Motion to Reconsider and Motion to Transfer signed by Judge Verdin on November 5, 2018. (**Exhibit 11**). A copy of this order was not provided to undersigned counsel. However, undersigned counsel checked the Greenville County Clerk of Court's on-line records on November 10, 2018, and learned that the order had been issued. As of the filing of the notice of appeal and this Petition, undersigned counsel still has not received a copy of the order. **Exhibit 11** is the order Appellant appealed on November 19, 2018.

STANDARD OF REVIEW

A writ of supersedeas to stay lower court proceedings pending appeal should be granted when it is necessary to "preserve to [an] appellant the fruits of a meritorious appeal where they

might otherwise be lost.” *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990). Losing such fruits would irreparably harm an appellant. Therefore, a stay of the lower court proceedings is necessary to protect against this permanent loss during the pendency of an appeal. *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E.2d 604, 606 (S.C. 1910).

LEGAL ARGUMENT

THE TRIAL OF THIS CASE IN GENERAL SESSIONS MUST BE STAYED PENDING APPEAL BECAUSE TRIAL ON THE MERITS WILL CAUSE THE CASE TO PROCEED TO FINAL JUDGMENT DURING THE PENDENCY OF THE APPEAL AND WILL THEREBY DENY APPELLANT THE FRUITS OF HIS MERITORIOUS APPEAL BY PREVENTING REVIEW OF THE CIRCUIT COURT RULING AFTER FINAL JUDGMENT.

Adjudication in Family Court is the specific mode of trial to which Appellant is entitled by statute and constitutional provision because the law defines him as a child. The Circuit Court’s ruling erroneously denies Appellant this lawful right. Because it affects a mode of trial, the ruling must be immediately appealed to prevent Appellant from waiving review of it after final judgment. Appellant has immediately appealed the ruling but his appeal does not automatically stay trial on the merits of the state’s indictment in General Sessions. Consequently, without a stay, a trial will go forward in General Sessions before the resolution of the appeal and that will result in Appellant losing review of the ruling after final judgment. Therefore, a stay pending appeal is necessary to preserve the fruits of Appellant’s meritorious appeal and prevent irreparable harm from befalling him.

- a. Adjudication in Family Court is the specific mode of trial to which Appellant is entitled by statute and constitutional provision because the law defines him as a child.**

Appellant was thirteen years old when he is alleged to have committed a murder. That means, pursuant to S.C. Code Ann. § 63-19-20(1), Appellant is a child for purposes of criminal

prosecution. Exclusive original jurisdiction of a child is vested in the Family Court by S.C. Code § 63-3-510. In order for exclusive original jurisdiction to be removed and the child to be “properly transferred” to Circuit Court, both § 63-19-1210’s procedures and the *Kent* factors must be satisfied. See *Kent v. United States*, 383 U.S. 541 (1966); *State v. Pittman*, 373 S.C. 527 (2007); and S.C. Code Ann. § 63-19-1210(1) (requiring a “proper transfer” of a child to General Sessions). It is the Circuit Court’s duty to make this determination.

The basis in law for the Circuit Court’s duty to review whether a child has been “properly transferred” by the Family Court is more fully discussed in **Exhibit 2**, Defendant’s Memorandum of Law In Support of His Motion For Review and Remand to Family Court.

However, it can be summarized by this excerpt:

The first basis [for review] is that the transfer statute itself requires [Circuit Court] to make a determination as to whether “jurisdiction has *properly* been transferred to the circuit court by the family court.” S.C. Code of Laws § 63-19-1210(1) (emphasis added). Whether transfer was “proper” requires [Circuit Court] to determine whether Family Court appropriately ordered [Appellant] be transferred to Circuit Court given the circumstances of this case and the provisions of § 63-19-1210.

The second reason is that judicial error—such as an insufficiency of the evidence to support waiver—is an impediment to the Circuit Court’s authority to hear a particular case. *State v. Rice*, 401 S.C. 330, 386-387 (2013). [Circuit Court], therefore, must determine whether there are any impediments to its authority to hear [Appellant’s] case.

Exhibit 2, p. 2. This, however, is not the limit of the Circuit Court’s duty to ensure a child is properly being tried as an adult.

Even if a child has been properly transferred by Family Court, statute and constitutional provisions hold that the child can remain in General Sessions only so long as waiver continues to be proper (*i.e.*, supported by the evidence). Moreover, it is the Circuit Court’s duty to make this determination, especially in light of any new evidence. The basis in law for this duty is discussed

more fully in **Exhibit 10**, Defendant's Memorandum of Law In Support of Motion to Transfer to Family Court. However, it can be summarized by this excerpt:

[Appellant] also has a statutorily defined liberty interest in being sentenced as a juvenile in Family Court. Exclusive original jurisdiction of a child is vested in the Family Court by S.C. Code § 63-3-510. In order for that exclusive original jurisdiction to be removed and the child transferred to Circuit Court, the procedures in § 63-19-1210 and the requirements of *Kent* must be satisfied. See *Kent v. United States*, 383 U.S. 541 (1966), *State v. Pittman*, 373 S.C. 527 (2007), and S.C. Code Ann. § 63-19-1210. Absent a justified showing under these authorities, transfer would be erroneous. Yet what is equally true is that a child, like [Appellant], who can present new evidence establishing that the requirements of *Kent* can no longer be satisfied, cannot remain in Circuit Court. To do otherwise, would deprive the child of his right to exclusive original jurisdiction of his case in Family Court pursuant to § 63-3-510 [without due process].

Exhibit 10, p. 4. This exhibit and **Exhibit 2** demonstrate the meritorious nature of the appeal and establish that the Circuit Court has a duty to conduct both the review and transfer Appellant requested.

To protect his right to be adjudicated as child, Appellant twice moved the Circuit Court to transfer him to Family Court. He moved first for transfer based on a lack of sufficient evidence to support the Family Court's transfer order, arguing that his transfer had not been proper and the lack of evidentiary support was an impediment to the Circuit Court's authority to hear his case. See **Exhibit 1**. He moved for transfer a second time based on additional, new psychological evidence (developed after he was transferred from Family Court) that demonstrates it is no longer proper for him to be prosecuted as an adult in General Sessions. See **Exhibit 7**. These requests were made to preserve a right he is entitled to by law.

The trial court denied both motions to transfer, ruling it did not have the authority to either review or transfer. See **Exhibits 3** and **11**. The Circuit Court's ruling was erroneous, hence

Appellant's appeal. But as it pertains to his petition for a stay, the Circuit Court's ruling denied Appellant a specific mode of trial to which he is entitled by statute and constitutional provision.

b. The Circuit Court's ruling affects a mode of trial and, therefore, it must be immediately appealed otherwise review after final judgment is waived.

Denying a party a mode of trial to which the law entitles him is not interlocutory. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1983). But it must be immediately appealed in order to preserve review of the denial after final judgment. *Id.*; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 612, 682 S.E.2d 498, 501(2009); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389 (Ct. App. 2004); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985); *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (quoting, without attribution, *Alston v. Limehouse*, 61 S.C. 1, 4, 39 S.E.2d 192, 193 (1901)). An order denying the right to a mode of trial is immediately appealable because it is an order affecting a substantial right. S.C. Code Ann. § 14-3-330(2); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 92, 529 S.E.2d 11, 12 (2000) (citing *Creed*, 285 S.C. 542); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 332 (2000); *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). By denying Appellant adjudication in Family Court, the Circuit Court's ruling clearly affects a mode of trial to which he is lawfully entitled.

Mode of trial is a literal term. It means the way or manner in which a trial takes place. Most often, it refers to the denial of a litigant's right to a jury trial. *See, e.g., Limehouse*, 61 S.C. at 3; *Mortgage Elec. Sys.*, 384 S.C. at 612; *Bateman*, 358 S.C. at 674; *Creed*, 285 S.C. at 542; *Pelfrey*, 270 S.C. at 693. The term, however, has is not limited only to trial by jury.

The supreme court in *Foggie v. CSX, supra*, interpreted mode of trial in its literal sense. The appeal involved the question of whether the damages portion of a civil lawsuit should be tried before a jury (as the trial court had directed) or whether it was statutorily required to be heard by the judge (as the defendant CSX had argued). 315 S.C. at 20, 23. The question before the court was in what manner (*i.e.*, mode) the issue should have been tried; it was not a narrow question concerned solely with whether the right to a jury trial was itself being denied. *Id.* Mode was broadly—not narrowly—used.

In the appeal, CSX had characterized the issue as one of “[i]mproper jurisdiction.” *Id.* But the supreme court held it was “[an] issue more properly framed as a question of the mode of trial.” *Id.* (emphasis added). Using the literal meaning of mode as method—not as a term of art that refers only to a jury trial—the court ruled the question of jury versus judge as trier of fact was, itself, a question of the proper mode/method of trial. *Id.* Importantly, the question to the court was not framed as specifically requesting a jury trial to which the law entitled the party. That was not CSX’s position in the appeal. CSX was asserting it was entitled by law to a bench trial of the issue. *Id.* This is a significant point. *Foggie* affirms that “mode” means what we normally understand it to mean: the way or manner or method in which something happens.

Another way to state the holding in *Foggie* is that the determinative factor on the immediate appealability of an order affecting a mode of trial is whether there is a genuine issue as to whether the law entitles an aggrieved party to more than one mode of trial. In *Foggie*, we have CSX as the aggrieved party claiming that it was entitled by law to have a judge determine damages and the supreme court held that, despite CSX being incorrect in its legal claim, the issue was still immediately appealable. Although other cases deal specifically with denials of a right to

jury trial, they should not be taken to mean that that is the only mode of trial that is immediately appealable. Mode includes jury trial but is not limited to it.

At first glance, *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), and the dissent in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), appear to be inconsistent with *Foggie*. But they are not.

In *Fulmer*, the supreme court quoted from Justice Pleicones' dissent in *Salmonsens* that “the ‘mode of trial’ exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” 380 S.C. at 466 (quoting 377 S.C. at 461). This quote appears to narrow what is immediately appealable. However, it must be read in its proper context. The appeal in *Fulmer* was of a probate court’s order denying a party’s motion to remove the case to Circuit Court for trial by jury. *Id.* The court of appeals found the probate court’s order denying the motion to remove was an order affecting the mode of trial and thus immediately appealable. *Id.* at 469. The supreme court overruled; holding the order was not, in fact, a final order from which an immediate appeal could be taken because S.C. Code Ann. § 62-1-306 provided for jury trials in probate court. *Id.* at 470. The probate court’s denial of removal had no effect on a mode of trial to which the plaintiff was entitled by law. That was not the case in *Foggie*. There was a real question in *Foggie* as to which mode of trial was, by law, available to CSX, the aggrieved party. Thus, the denial affected the mode of trial.

The *Fulmer* court noted that those cases “permitting” immediate appeals of orders denying a mode of trial to which a party is entitled were “distinguishable” by the *Salmonsens* dissent (as well as by *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 535 S.E.2d 331 (2000), *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), and *Creed*). *Id.* What distinguished those cases was that the effect was real—there was a real harm to a mode of trial

specifically provided for by law. But in *Fulmer*, there was no “abridgement of [the plaintiff’s] right to a jury trial” in light of the provision for a jury trial in § 62-1-306. *Id.* Justice Pleicones in his *Salmonsens* dissent, and the majority in *Fulmer*, were focused not on limiting mode of trial to refer only to the right to a jury trial. They were focused on the fact that § 62-1-306 mooted the issue of whether the right to jury trial was affected by the denial of removal. If anything, *Fulmer* and *Salmonsens* highlight that the determination of whether an order is immediately appealable concerning a mode of trial is based on the plain meaning of the words “affecting a mode of trial.” If the order does not affect the mode of trial—deny or abridge it in some way—then the ruling is not immediately appealable. If, as in *Fulmer*, there was already a right to a jury trial in probate court, then the order denying removal to Circuit Court did not abridge the jury trial right, meaning it did not affect a mode of trial.

The supreme court in other cases has similarly used mode of trial to mean more than a right to a jury trial. In *State v. McCrary*, 242 S.C. 506, 131 S.E.2d 687 (1963), the court held that a criminal defendant who had consented to consolidate two separate indictments for trial was in “no position” to claim error on appeal because he had not “raised [an] objection to such mode of trial in the lower Court.” *Id.* at 509. The reference to mode of trial here does not refer to jury versus bench trial. In *McCrary*, the “mode” was trial of one indictment versus two in a consolidated manner, irrespective of the assertion of any right to be tried by a jury. *See also State v. Hunter*, 89 S.C. 136, 71 S.E.2d 823 (1911) (“The question of whether the offense charged in each of several indictments is the same is one of fact to be tried by a jury, unless that mode of trial is waived” for bench trial, the only other obvious option).

The Circuit Court’s order denying Appellant’s request to transfer him to Family Court for adjudication directly affects the mode of trial he is entitled to under the law. He is entitled to be

adjudicated in Family Court not General Sessions. Those are completely different modes of trial. Family Court means trial by a judge. General Sessions by jury. While a child is entitled to assert a right to a jury trial while they are in Family Court, to do so they must have their case transferred to General Sessions. *In re Kevin R.*, 409 S.C. 297, 308-309, 762 S.E.2d 387, 393 (2014). There is no direct right to a jury trial in Family Court. *Id.* So, Appellant's case is not like *Fulmer*, where the lower court's ruling did not affect the mode of trial. It is more like *Foggie* (and the other cases cited above), in that the trial court's order directly affects a mode of trial. Appellant is entitled by statute and constitutional provision. The denial of transfer to Family Court directly affected—indeed it abridged—that right.

What is undisputed in the case law is that orders affecting the mode of trial are immediately appealable and, when not immediately appealed, are not subject to review after final judgment. *Foggie*, 315 S.C. at 23; *Mortgage Elec. Sys., Inc.*, 384 S.C. at 612; *Bateman*, 358 S.C. at 674; *Creed*, 285 S.C. at 543; *Pelfrey*, 270 S.C. at 693.

c. The Circuit Court's ruling affects a substantial right and, therefore, it must be immediately appealed otherwise review after final judgment is waived.

An order that affects a substantial right is immediately appealable under S.C. Code Ann. § 14-3-330(2) even when it does not directly implicate the right to a jury trial. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Neeltec Enters. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012). Such rulings are immediately appealable because, like the denial of a mode of trial, they essentially discontinue the action and/or determine the action and prevent a judgment from which an aggrieved party can appeal. *Id.* In this way, such orders are “closely related to the right to a particular mode of trial,” which is an already established substantial right. *Id.* Appellant's right to be adjudicated in Family Court is a substantial right from which an immediate appeal must be taken under § 14-3-330(2) or final review is waived.

In *Hagood v. Sommerville*, the trial court in a civil lawsuit issued an order disqualifying the plaintiff's lawyer from the case. 362 S.C. at 194. Reasoning that the disqualification of a lawyer is "closely related to the right of a particular mode of trial," the supreme court held that the lower court order was not interlocutory pursuant to § 14-3-330(2)(a) and "must be immediately appealed or any later objection in a subsequent appeal will be waived." *Id.* (emphasis in original) (citing *Flagstar Corp.*, 341 S.C. at 72)). The supreme court concluded:

The right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and overall litigation and trial of the case.

Id. at 198.

Similarly, in *Neeltec Enters. v. Long*, the trial court in an unfair trade practices suit issued an order requiring the plaintiff to substitute a defendant named in the lawsuit by that very plaintiff for two parties who had not been part of the original lawsuit. 397 S.C. at 564. The supreme court held that "[t]he right of the plaintiff to choose her defendant is a substantial right within the meaning of [§ 14-3-330(2)(a)]." *Id.* at 566. The court's reasoning was that the "order effectively discontinues the [plaintiff's] suit against [the original defendant]." *Id.*

A child's statutory and constitutional right to have the Circuit Court determine whether he was properly transferred by the Family Court or whether it continues to be proper to prosecute him as an adult in General Sessions is at least as substantial a right as the disqualification of an attorney or the substitution of a party to a lawsuit. Like those substantial rights, the impact of the Circuit Court's denial of transfer is to discontinue the action as it relates to transfer to Family Court. That is what happened in *Neeltec*: the lower court order discontinued the action against the original defendant but not the new defendant. *Id.* Once the Circuit Court determines it can

neither review errors related to transfer nor carry out a transfer when it is required, it has essentially determined the action relative to ensuring that Appellant has been properly transferred or that he continues to be properly before the court. No other issue in the remainder of the case will affect which court has jurisdiction over the Appellant. By concluding it cannot review errors or correct errors related to whether Appellant should be prosecuted as an adult or a child, the Circuit Court not only made it impossible for Appellant to protect his statutory right to be adjudicated as a child; it also made it impossible for the constitutional rights surrounding that statutory right to be protected.

The Circuit Court's ruling therefore must immediately be appealed as both affecting a mode of trial to which the law entitles him and as affecting a substantial right the law has granted him.

d. Appellant has immediately appealed the Circuit Court's ruling denying transfer to Family Court but his appeal does not automatically stay trial on the merits of the state's indictment in General Sessions and, thus, a stay is necessary to prevent Appellant from being denied the fruits of a meritorious appeal.

South Carolina Appellate Court Rule 205 states, in part, that “[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.” SCACR, Rule 205; *see Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (discussing results of an appeal of an injunction where the merits would otherwise be considered had S.C. Code Ann. § 14-3-450 not specifically stayed an appeal of that injunction under § 14-3-330(4)). Since guilt or innocence is not affected by this appeal, the trial will proceed absent a stay by this Court.

A stay of the trial is, therefore, necessary to “preserve to [Appellant] the fruits of [his] meritorious appeal where they might otherwise be lost [at trial].” *Graham*, 301 S.C. at 130. Since the Circuit Court's ruling directly affects a mode of trial to which Appellant is entitled by law, he

must immediately appeal that ruling or lose the right to have it reviewed after final judgment. The trial of the case on the merits in General Sessions will cause the case to proceed directly to final judgment during the pendency of Appellant's appeal. He will thereby be irreparably harmed, having lost the fruits of his appeal by way of foreclosure on his right to review the Circuit Court's erroneous ruling. An immediate stay is therefore necessary in this case.

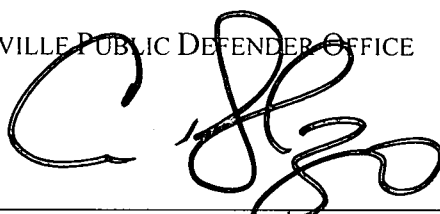
CONCLUSION

Based on the foregoing reasons, Appellant asks this Court to grant his petition for a stay of the trial on the merits of this case during the pendency of his appeal of the trial court's November 7, 2018 order.

Respectfully submitted,

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v.

Miguel Angel Cano, Appellant.

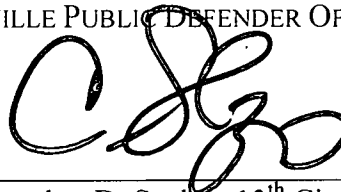
PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Writ of Supersedeas to Stay Trial Pending Appeal on W. Walter Wilkins by delivering unto him a copy thereof and leaving the same with him on November 19, 2018 at:

13th Circuit Solicitor's Office
Greenville County Courthouse
305 East North Street, Suite 325
Greenville, SC 29601

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE



By: _____
Christopher D. Scalzo, 13th Circuit Public Defender
Michael Martinez, Assistant Public Defender
Attorneys for the Juvenile
305 East North Street
Greenville, SC 29601

Date: November 19, 2018

EXHIBIT 1

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE INTEREST OF)

A JUVENILE)

MIGUEL CANO,)
DOB: 2/21/2002)
_____)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Case Nos.: 2015-JU-23-823¹

**MOTION FOR REVIEW AND
REMAND TO FAMILY COURT**

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CLERK OF COURT
PAUL S. WIGGENS/ME
GREENVILLE CO. SC

COMES NOW the juvenile-defendant, Miguel Cano, by and through his undersigned counsel, and respectfully moves this Court to issue an order remanding this matter to the Family Court.

Mr. Cano respectfully submits the following as the basis for this Court's review and remand of this matter:

1. The Family Court's order waiving jurisdiction is based on insufficient evidence to support the findings of fact and conclusions of law, and, as such, this insufficiency constitutes an impediment to this Court's authority to accept waiver of this matter, *See State v. Rice*, 401 S.C. 330 (2013);
2. The Family Court abused its discretion in ordering Mr. Cano be waived to General Sessions and this Court must review the Family Court's order and remand, *See S.C. Code of Laws § 63-19-1210*; and
3. The order waiving this matter to General Sessions for prosecution of the charge of Murder exposes Mr. Cano, who was 13 years old at the time of the offense and is now 15 years old, to the mandatory minimum term of 30 years to life sentence for Murder without allowing for meaningful consideration of the hallmark characteristics of his youth and concomitant

¹ The defendant has not yet been arraigned and therefore there is no General Sessions docket number at this time.

appropriate sentencing required by the Eighth Amendment, *See Miller v. Alabama*, 132 S.Ct. 2455 (2012) and *Aiken v. Byars*, 410 S.C. 534 (2014).

CONCLUSION

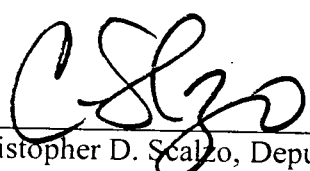
WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Cano respectfully requests:

1. A hearing on this motion; and
2. An order remanding the case to Family Court.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: _____


Christopher D. Scalzo, Deputy Public Defender
Heather V. Scalzo, Assistant Public Defender
Michael Martinez, Assistant Public Defender
Attorneys for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC
Date: March 14, 2017

EXHIBIT 2

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
IN THE INTEREST OF)
A JUVENILE)
MIGUEL CANO,)
DOB: 2/21/2002)
_____)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Case Nos.: 2015-JU-23-823

**DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
REVIEW AND REMAND TO FAMILY
COURT**

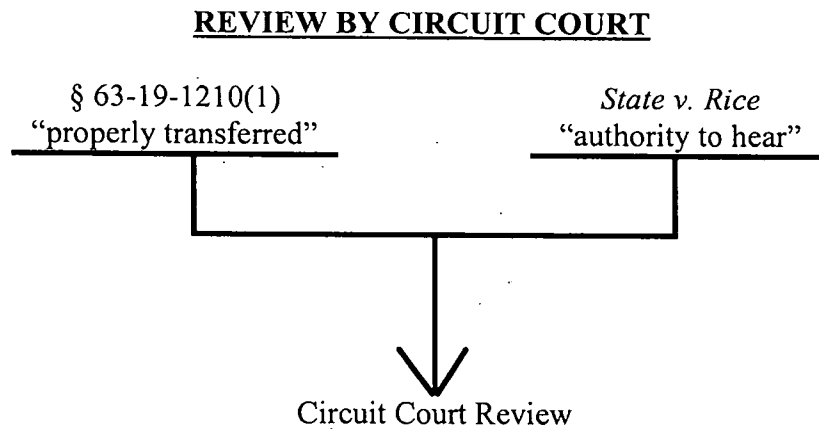
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FILED
CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SOUTH CAROLINA

COMES NOW Miguel Cano, a child, who the State seeks to prosecute for murder in this Court as an adult. Miguel, by and through his undersigned counsel, respectfully submits the following memorandum of law in support of his March 14, 2017, Motion for Review and Remand (of his case) to Family Court. The subject of Miguel's March 14th motion is the January 30, 2017, Family Court order transferring jurisdiction from Family Court to Circuit Court (the "Waiver Order"). The following is limited to a discussion of the law regarding Circuit Court's authority and duty to review the Waiver Order. This memorandum does not discuss the substantive merits of that review or remand.

INTRODUCTION

Miguel Cano was 13 years old when he was charged with murder and possession of a weapon during the commission of a violent crime on September 3, 2015. Miguel was charged for allegedly killing his mother three days earlier. He was 14 years and 9 months old when the Waiver Order was issued. After filing motions in Family Court seeking reconsideration, Miguel filed a motion on March 14, 2017, asking this Court to do two things: (1) review the propriety and sufficiency of the Waiver Order and (2) as a result of that review, as well as for other independent reasons, to remand the case back to Family Court.

This Court is required by law to review the Waiver Order. There are two bases in law for this required review, as the below chart demonstrates.



The first basis is that the transfer statute itself requires this Court to make a determination as to whether “jurisdiction has *properly* been transferred to the circuit court by the family court.” S.C. Code of Laws § 63-19-1210(1) (emphasis added). Whether transfer was “proper” requires this Court to determine whether Family Court appropriately ordered Miguel be transferred to Circuit Court given the circumstances of this case and the provisions of § 63-19-1210.

The second reason is that judicial error—such as an insufficiency of the evidence to support waiver—is an impediment to the Circuit Court’s authority to hear a particular case. *State v. Rice*, 401 S.C. 330, 386-387 (2013). This Court, therefore, must determine whether there are any impediments to its authority to hear Miguel’s case.

ARGUMENT

- I. **S.C. Code § 63-19-1210(1) requires this Court to determine whether “jurisdiction has properly been transferred to the circuit court by the family court” and to immediately remand the case to Family Court if it is determined that the transfer was improper.**

The separate courts—Circuit, Family, Magistrate and Municipal—each have a statutorily defined role to play in ensuring that a child is properly transferred to the appropriate court for criminal prosecution. Depending upon when and how the child is presently before a court, S.C. Code § 63-19-1210 directs that court to make certain determinations as to the propriety of jurisdiction. The clear goal and intent of § 63-19-1210 is to task the courts with ensuring that children are ultimately prosecuted in the appropriate jurisdiction (*i.e.*, court). In some circumstances, the statute requires one court to review what another court has done. This case is one of those circumstances. Section 1210, paragraph (1) requires the Circuit Court to determine whether “jurisdiction has properly been transferred to [it] by the family court” and to immediately remand the child if the transfer was improper. S.C. Code § 63-19-1210(1). Miguel was transferred by the Family Court and it is the statutory duty of this Court to determine whether that transfer was proper.

The authority of this Court to review the Waiver Order and the power of this Court to remand Miguel to Family Court is directly provided for (required, in fact) by the following statutory provision:

- (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen years at the time of committing the alleged offense, **it is the duty of the circuit court immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of**

this section. The court making the transfer shall order the child to be taken immediately to the place of detention designated by the court or to that court itself, or shall release the child to the custody of some suitable person to be brought before the court at a time designated. The court then shall proceed as provided in this chapter. The provisions of this section are applicable to all existing offenses and to offenses created in the future unless the General Assembly specifically directs otherwise.

S.C. Code § 63-19-1210(1) (emphasis added). Both review and remand are directly conferred on Circuit Court by § 63-19-1210(1). This Court, therefore, has the statutory authority to review and the statutory power to remand.

Does Miguel’s case fall under the purview of S.C. Code § 63-19-1210(1)?

As the comparison in the chart below shows, all of the statutory requirements of § 63-19-1210(1) are met by Miguel’s case and, consequently, his case specifically falls under the purview of § 63-19-1210(1).

<u>Statutory Requirement</u>	<u>Miguel’s Case</u>	<u>Satisfied</u>
• Pending criminal case	• Miguel is currently charged with murder	✓
• Against a child	• Miguel is currently a 15 year old child	✓
• In Circuit Court	• Miguel has been transferred to General Sessions	✓
• Child under 17 at time of the offense	• Miguel was 13 years old at the time of the offense	✓

Once these statutory requirements are met, the Circuit Court has the “duty...to immediately transfer the case...to the family court.” *Id.*

There are, however, two exceptions to the duty to immediately transfer. Where:

- (1) Circuit Court has exclusive jurisdiction pursuant to the Constitution; and
- (2) Jurisdiction has properly been transferred to the Circuit Court by the Family Court under the provisions of § 63-19-1210.

The first exception is inapposite to this case. The second, however, could apply to Miguel.

The 1st exception to an immediate remand to Family Court would not apply to Miguel.

Under the first exception, the Circuit Court must have “exclusive jurisdiction” of the criminal prosecution of Miguel pursuant to the Constitution. To state the obvious, Circuit Court does not have exclusive jurisdiction pursuant to the Constitution. Jurisdiction had to be transferred to Circuit Court by a Family Court order because the prosecution of Miguel, a child, had to originate in Family Court. There is no constitutional provision conferring exclusive jurisdiction on Miguel because Family Court has *exclusive* original jurisdiction over criminal cases brought against children. *See* S.C. Const. Art. V, § 11 (“The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts... .”); *see also* S.C. Code § 63-3-510 (“(A) Except as otherwise provided herein, the [family] court shall have exclusive original jurisdiction and shall be the sole court for initiating action: ... (3) Concerning any child seventeen years of age or over, living or found within the geographical limits of the court’s jurisdiction, alleged to have violated or attempted to violate any State or local law or municipal ordinance prior to having become seventeen years of age and such person shall be dealt with under the provisions of this title relating to children.”); *see also* S.C. Code § 63-19-1210; *see also State v. Graham*, 340 SC 352, 355 (2000) (charges against a child, which, pursuant to [S.C. Code § 63-19-20], is a person under the age of 17, must “begin in family court and may be transferred under some circumstances”); *In the Interest of Keith Lamont G.*, 304 S.C. 456, 460 (1991) (“Thus, a child cannot be held accountable as an adult for his criminal conduct unless the child’s case is transferred to the Court of General Sessions pursuant to S.C. Code [§ 63-19-1210]”). Miguel was a child when the charges were brought against him and, therefore, original exclusive jurisdiction was with Family Court.

Does the 2nd exception to an immediate remand to Family Court apply?

Unless the second exception applies, Circuit Court must immediately transfer Miguel's case to Family Court because, as demonstrated in the chart above, he and his case meet the statutory criteria of § 63-19-1210(1). Consequently, the statute requires this Court to determine whether jurisdiction has been "properly transferred" by Family Court. *Id.* In order to make that statutorily required determination, this Court must review the Waiver Order.

The waiver statute directs Circuit Court to do this review as part of its statutory duty to ensure that a child presently before it is being prosecuted in the appropriate court. *See* S.C. Code § 63-19-1210(1) ("it is the duty of the circuit court immediately to transfer the case...to the family court."). This review of the transfer order is not discretionary. It is, as the statute says, the circuit court's "duty." The only thing that is discretionary is the determination as to whether the transfer itself was properly made.

What does "properly transferred" mean?

The operative term in this second exception is "properly transferred." Given the plain meaning of the word and the context in which it is used in § 63-19-1210(1), "properly transferred" means that the transfer of jurisdiction was appropriately ordered given the circumstances of this case, the provisions of § 63-19-1210, and the relevant case law concerning waiver of children to Circuit Court.

There is no ambiguity to the term "properly transferred" and it must, therefore, be given its plain meaning. *Hodges v. Rainey*, 341 S.C. 79 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the

rules of statutory interpretation are not needed and the court has no right to impose another meaning. ‘What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the *courts* are bound to give effect to the expressed intent of the legislature.’”) (internal citations omitted) (emphasis added).

According to Black’s Law Dictionary “proper” means “[t]hat which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient. ... *See also* Reasonable.”¹ Black’s defines reasonable as “[f]air, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view.”² Thus, by definition, whether a thing is properly done carries with it both form and substance. It is not a purely procedural term; by definition it also carries with it a determination about content.

Whether jurisdiction was “properly transferred” encompasses determining whether the correct steps were taken—what is often termed procedure. So, for instance, evaluating whether the transfer was proper encompasses determining whether a petition was filed and a hearing was held as required by § 63-19-1210 (6). But it also encompasses determining whether the substantive decisions made at each procedural step were correct—*e.g.*, did the court correctly identify the *Kent*³ factors and did it have sufficient evidence to support its conclusion regarding those factors? In other words, the content of what took place in each procedural step must be considered, too. Lastly, and perhaps most significantly, evaluating the propriety of the transfer encompasses determining whether the final decision itself was “fit, suitable, appropriate, adapted [to the circumstances], correct.”⁴

¹ Proper, *Black’s Law Dictionary* (6th Edition, 1990).

² Reasonable, *Black’s Law Dictionary* (6th Edition, 1990).

³ *See In the Interest of Kevin R.*, 409 S.C. 297, FN 14 (2014).

⁴ Proper, *Black’s*, *supra*.

Determining whether jurisdiction was properly transferred means asking the question, do the circumstances, as a whole, make it appropriate to transfer this child, Miguel, to General Sessions?

This is consistent with how “proper” is used in this legal context (and others). Proper is really another word for ensuring the decision comports with due process, which is a right to more than merely a certain procedure. Even when minimal due process rights are implicated, due process requires there be a rational basis for the ultimate decision, regardless of the specific procedure carried out to arrive at the decision. *See State v. Dykes*, 403 S.C. 499 (2013) (“[even though] Dykes' mandatory enrollment in the satellite monitoring program invokes minimal due process protection. . . . courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary”) (internal citations omitted); *see also Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 499 (2008) (“[H]owever, Cooper does have a right to require the [Parole] Board to adhere to statutory requirements in rendering a decision. We find the apparent failure by the Parole Board to **consider the requisite statutory criteria** in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures. Therefore, we hold, Cooper's appeal was appropriate for disposition under the APA and should have been reviewed by the ALC.”) (emphasis added).

Moreover, in the context of the entire transfer of jurisdiction statute (§ 63-19-1210) it is clear that the Legislature did not mean for proper to be used as a rote checking off of purely technical steps. To begin with, transfer of jurisdiction of a criminal case against a child from Family Court—where the child is adjudicated as the child they are, not as the adult they are

not—is a process that involves a series of determinations based on facts, circumstances and law. Transferring a child to adult court is not, as devised by the statute, a mere check list.

Recognizing that the decision to transfer would require grappling with the facts and circumstances of cases on an individualized basis, the Legislature did not create a check-the-box statutory structure regarding the ultimate decision to transfer. Three of the four sections governing transfer use the same language to direct the court's determination on transfer:

if the court, after full investigation, considers it contrary to the best interest of the child or of the public to retain jurisdiction, the court, in its **discretion**, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

S.C. Code § 63-19-1210 (4), (5), and (10) (emphasis added). The Legislature knew it created a discretionary process for transferring a juvenile to Circuit Court. It did not suddenly forget that when it wrote paragraph (1). It specifically inserted the phrase “properly transferred” to ensure that Circuit Court reviewed Family Court's transfer order.

The Legislature did, however, take a check-the-box approach with the triggers for waiver. In all four paragraphs concerning transfer from Family Court to another court (usually Circuit Court) the Legislature set forth straight forward criteria that do not require the balancing of supporting or opposing facts. If the fact satisfies the criteria, then the box is checked and the discretionary part of the paragraph noted above is triggered.

So, in paragraph (4) the criteria is whether the child is 16 years old or older and committed an offense statutorily classified as a misdemeanor, a Class E or F felony or one that carries a maximum prison sentence of 10 years or less. *Id.* at (4). Similarly, paragraph (5)'s criteria are a child 14 or 15 years old and committed an offense statutorily classified as a Class A, D, C, or D felony or one that carries a maximum prison sentence of 15 years or more. *Id.* at (5). Lastly, in paragraph (10), the criteria is whether the child is 14 years or older and committed

an offense that carries a maximum prison sentence of 10 years or more and the child has two prior adjudications or convictions. *Id.* at (10).

Consequently, a “properly” transferred case, as devised by the statute, would never have been a mere check-the-box process. By definition it involved a complex of discretionary decisions made by the Family Court. The Legislature understood—because it devised the transfer process as discretionary—that proper transfer “under the provisions of this section” would not mean something like filling-out the proper forms, making the right number of copies, and filing them in the right place with the right person. It intended for there to be substance behind the process of transfer and it would lead to an absurdity to read the statute as merely requiring a transfer order that had been requested within 30 days of the petition (check!) and a hearing (check!) and the filing of the waiver order with the clerk of court (check!).

If the Legislature intended a check-the-box approach, then it would have written the statute differently. Foremost, it wouldn’t have needed to use the word proper. Remove proper from the statute and we would have a check-the-box exception:

except ... in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section.

If the event of a transfer order being issued was all that mattered, then there is no need for the word properly to be inserted as a modifier of transfer.

Had it meant to merely reference transfer as an event that took place—without concern for the substantive how and why—then the Legislature would have simply written the exception to say just that:

except ... in those cases where family court has issued an order transferring jurisdiction pursuant to paragraph (4), (5), (6), or (10) of this section.

But the exception was not written that way.

Properly is not a frivolous word. It is meant to modify transfer. Leave it out and all you have is the event of transfer. Conversely, put it in and you have the requirement to review the correctness, appropriateness, fitness, suitability, reasonableness of the transfer.

Furthermore, “[s]ections which are part of the same general statutory law of the state must be construed together.” *In the Interest of Keith Lamont G.*, 304 S.C. at 460 (citing *Smalls v. Weed*, 293 S.C. 364 (Ct. App. 1987)). Consequently, the Legislature’s use of proper in paragraphs (4), (5) and (10) show that it intended proper to describe the substantive nature of what it was modifying. Here is the exact language used in all three paragraphs:

bind over the child for **proper** criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

S.C. Code § 63-19-1210 (4), (5), and (10) (emphasis added). As discussed above, these three sections outline the process of waiving a child from Family Court to General Sessions based upon their age, the offense(s) they’re charged with, and their criminal history—or some combination of those criteria. Clearly the Legislature did not mean that the criminal proceedings for which the child was going to be bound over were merely perfunctory steps, a kangaroo court or some other non-substantive proceeding. It meant for them to be proper criminal proceedings: adversarial hearings on legal issues for bond or suppression of evidence or other constitutional issues, and ultimately a trial involving evidence and proof to a jury beyond a reasonable doubt. Again, proper is neither a redundant nor frivolous word. Proper as opposed to improper criminal proceedings is an identifiable distinction, one that the Legislature took pains to ensure was drawn. Specific use of the term proper throughout § 1210 highlights that what was intended in paragraph (1) by “properly transferred” was the same degree of substantive basis as was meant by “proper criminal proceedings” in paragraphs (4), (5), and (10).

This Court is required by S.C. Code § 63-19-1210(1) to review the Waiver Order and determine whether Miguel has been, under the circumstances of this case, “properly” (that is, correctly, appropriately, suitably, reasonably) transferred to Circuit Court.

II. Pursuant to *State v. Rice*, this Court must review the Waiver Order to determine whether any judicial error in the hearing or the waiver order itself constitutes an impediment to Circuit Court’s authority to hear this case.

Judicial errors in the transfer from Family Court—such as insufficiencies in the evidence—are impediments to this Court’s authority to hear Miguel’s case. *Rice* at 333. Miguel must either waive the error or it must be remedied by this Court. *Id.* Miguel does not, at this time, intend to waive any errors made by the Family Court in issuing the Waiver Order.⁵ Consequently, before the prosecution of Miguel as an adult moves forward, this Court must determine whether it has the authority to hear Miguel’s case. If this Court does not have the authority because of a demonstrable impediment, then it must remand the case.

“An erroneous order transferring a juvenile to general sessions court would be a judicial—not a jurisdictional error.” *Rice*, at 333. That was the conclusion of our Supreme Court when it took up the question as to whether errors in a waiver order would deprive Circuit Court of subject matter jurisdiction. *Id.* In holding that a Family Court’s error in waiving jurisdiction to Circuit Court was not jurisdictional but judicial, the Supreme Court followed a very specific line of reasoning from the Iowa Supreme Court in *State v. Yodprasit*, 564 N.W.2d 383 (Iowa 1997). *See Id.* The reasoning it followed for this conclusion in *Rice* came from *Yodprasit*’s discussion about the distinction between subject matter jurisdiction and the authority of a court to hear a particular case. *See Rice*, at 333 (citing to *Yodprasit*, at 386). The conclusion in *Rice*—that the

⁵ The State has indicated its intention to go forward with the charge of murder, S.C. Code § 16-3-10, which carries a mandatory minimum of 30 years and a maximum of life in prison without the possibility of parole or a reduced sentence. The State has rejected consideration of a plea to voluntary manslaughter, which would involve waiving any errors in the Waiver Order.

error in waiver was not jurisdictional but judicial—cannot be divorced from *Yodprasit*'s reasoning. In fact, the *Rice* opinion directly ties its conclusion to the *Yodprasit* rationale:

We find instructive [*Yodprasit*], which considered this very issue [whether error in a waiver was a subject matter jurisdictional error]. ... We agree with *Yodprasit*'s reasoning that ... [it is] a judicial error—not a jurisdictional error.

Rice, at 333.

The reasoning from *Yodprasit* that the *Rice* court relied on was, as cited by *Rice* at 333, the following:

- “Subject matter jurisdiction is the power of the court ‘to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court’s attention.’” *Yodprasit*, at 385 (internal citation omitted).
- “[Subject matter] jurisdiction flows from the constitution or from statutes and cannot be conferred by consent, waiver, or estoppel.” *Id.* (internal citation omitted).
- “A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case. In such a situation we say the court lacks the **authority** to hear that particular case.” *Id.* (internal citation omitted) (emphasis added).
- “A juvenile court might enter an **erroneous** order waiving jurisdiction. For example, there may not exist sufficient evidence to support the juvenile court’s fact-finding’s on the criteria for waiver.” *Id.* at 386 (emphasis added)
- “[An erroneous waiver] order, however, does not undermine the [adult trial] court’s subject matter jurisdiction to conduct the criminal proceedings... .” *Id.*
- “[T]he error [in the waiver order] is judicial, not jurisdictional.” *Id.* (internal citation omitted).
- “The insufficiency of the evidence to support the waiver order might be an **impediment to the [adult trial] court’s authority**, but such an impediment... can be obviated by consent, waiver, or estoppel.” *Id.* (emphasis added).

Given this analysis by our supreme court, *Rice* is the controlling law with regard to whether Circuit Court has the authority—not subject matter jurisdiction—to hear a waiver case from

Family Court. Moreover, given *Rice*'s direct reliance on *Yodprasit*, impediments to Circuit Court's authority must be resolved by Circuit Court before a case may proceed. For, just as both *Rice* and *Yodprasit* hold that the judicial error in a waiver order can be (and is) waived to the Circuit Court by a guilty plea, the converse must also be true: an objection to the authority of Circuit Court to hear the case must be heard and resolved by that court. To do otherwise would create an absurdity in the law—where an objection to the power of a court to hear a particular case was raised but could not be ruled upon by that very court.

Besides being the controlling law as a result of *Rice*, this reasoning is consistent with South Carolina law. Circuit Court has subject matter jurisdiction over all criminal cases, including adult and juvenile criminal cases. *State v. Smalls*, 364 S.C. 343, 346 (2005) (“The court of general sessions has subject matter jurisdiction to try criminal cases.”); *see also Rice* at 333. Subject matter jurisdiction is the power of a court to hear a certain class of cases. *State v. Gentry*, 363 S.C. 93, 100 (2005). General Sessions Court would lack subject matter jurisdiction over Miguel's case (as opposed to Miguel the person) if the case were not criminal. Say, for instance, the offense charged was running away from home. That is clearly a status offense, not a criminal offense,⁶ and Circuit Court would therefore lack subject matter jurisdiction. Since Miguel's case is criminal, General Sessions Court does have subject matter jurisdiction—it is the kind of case whose subject matter General Sessions can hear. But whether Circuit Court has the authority to hear Miguel's case is, according to *Rice* (and *Yodprasit*), a different question than whether it has subject matter jurisdiction.

⁶ Pursuant to S.C. Code §63-19-20(9), a status offense “means an offense which would not be a misdemeanor or felony if committed by an adult including, but not limited to, incorrigibility or beyond the control of parents, truancy, running away, playing or loitering in a billiard room, playing a pinball machine, or gaining admission to a theater by false identification.”

Take, for instance, *Austin v. State*, 352 SC 473 (2003). Austin was charged as a juvenile in Family Court with three counts of armed robbery, a single count of assault and battery with intent to kill and a single count of possession of a weapon during the commission of a violent crime when he was 15 years old. *Id.* All of the charges were transferred to Circuit Court by a Family Court waiver order, including the possession of a weapon charge. *Id.* The court held that “general sessions does not have jurisdiction over charges which are not within the ambit of [what is now §63-19-1210(5)].” *Id.* at 475. The use of the word “jurisdiction” in the court’s opinion was clearly intended to refer to the authority to hear the case, as opposed to subject matter jurisdiction. This is clear, first, because of context and, second, because the court has never overruled *Austin*.

In *Austin*, the court does not use the term “subject matter” when it references jurisdiction. The court also clearly discusses the case in terms of what is authorized to be sent to and received by Circuit Court. It did not discuss jurisdiction in terms of whether possession of a weapon during the commission of a violent crime was an offense that could not be heard in Circuit Court—clearly it can be. The context of *Austin* is the power of Family Court to send and Circuit Court to receive the charge.

Secondly, *Rice* was decided ten years after *Austin* (2013) and did not specifically overrule *Austin*. If *Austin* stood for the proposition that §63-19-1210 confers subject matter jurisdiction on Circuit Court, then the *Rice* court would have had to have addressed *Austin*. The fact that it did not view *Austin* as holding or relying on a subject matter jurisdiction determination is the obvious reason it did not cite, discuss, nor overrule *Austin*.

The impact of *Austin* on Miguel’s case is that it clearly establishes a requirement for a determination by Circuit Court as to whether it has the power to receive a case, despite it being

sent by order from Family Court. Our supreme court clearly held that Circuit Court did not have the authority (what it called jurisdiction) to hear Austin's case because of the waiver statute. *Austin* at 475. To use the language of *Rice* and *Yodprasit*, the failure of Austin's case to meet the statutory criteria of the waiver statute was an impediment to Circuit Court's authority to hear that particular case just as it was an impediment to the power of Family Court to send it.

This has been a consistently held position by our supreme court when faced with the question of the power of a court to hear a particular case (authority or simple jurisdiction) versus the power of the court to hear a particular class of cases (subject matter jurisdiction).

In *Slocumb v. State*, 337 S.C. 46 (1999), the question before our supreme court was: "Is a CSC charge committed by a juvenile under the age of fourteen years *transferrable* to general sessions court?" *Id.* at 47 (emphasis added). The court did not view the issue as a challenge to subject matter jurisdiction but to simple "jurisdiction" (*ie*, authority to hear a particular case). *Id.* The court wrote, similar to what it would write four years later in *Austin*, that:

the CSC charge could not be **transferred** to general sessions and general sessions was without **jurisdiction** to accept his plea.

Id. at 49. The issue was not whether Circuit Court had subject matter jurisdiction over the case but whether it had the power to hear that particular case in light of the Family Court's lack of power to transfer the case.

In *State v. Graham*, 340 S.C. 352 (2000), our supreme court addressed whether a juvenile who was 16 years old could plead guilty in Circuit Court without having been first sent to Family Court and then transferred for the offenses of murder and armed robbery. *Id.* Once again, the issue was not subject matter jurisdiction—as murder and armed robbery are clearly of the class of offenses Circuit Court is authorized to hear—but the power of the Circuit Court to hear "appellant's guilty plea" given the statutory restrictions on charging 16 year olds. *Id.* The court

held that Circuit Court did have the “jurisdiction to accept appellant’s plea” because he was not statutorily defined as a child, and therefore his case did not need to originate in Family Court. *Id.* at 355.

What these cases demonstrate is that the idea that impediments to the power of Circuit Court to hear an individual case was not a new concept to the *Rice* court. The case prior to *Rice—Austin, Slocumb, and Graham*—address impediments that are definitional but, nonetheless, go to the power of the court to hear a particular case.

This is similar to when a person is brought before Circuit Court to plead guilty when there is a true-billed indictment. In such a situation, a guilty plea waives any challenge to the sufficiency of the indictment. *Gentry* at 101; *see also Edwards v. State*, 373 S.C. 493, 496 (2007). A challenge to the sufficiency of the indictment is not a challenge to the subject matter jurisdiction of Circuit Court. *Gentry* at 101. But an insufficient indictment, nonetheless, is an issue that must be “promptly and properly determined” by the court before the case may go forward. *Id.* at 102 (quoting *State v. Torrence*, 305 S.C. 45 (1991)). Such a holding also means that if a defendant were brought before this Court with a true-billed indictment and he were to object to the sufficiency of that indictment, this Court would not only have the power but the duty to address that objection.

Rice and *Yodprasit* hold that errors constituting impediments to the adult trial court’s authority to hear a particular case are judicial errors that can be waived in order to confer authority to the adult trial court. *Rice* at 333; *Yodprasit* at 386-387. If, however, the judicial error is not waived, then the adult trial court would not have the authority to hear the particular case. *Rice* at 333; *Yodprasit* at 387; *see also Austin, Slocumb, and Graham*. In this case, Miguel has not—and, given the State’s posture on negotiations, does not—currently intend to waive any

errors in the Waiver Order. Therefore, this Court must determine whether there is sufficient evidence to support the Waiver Order or whether there are any other impediments to its authority to hear Miguel's case.

CONCLUSION

WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Miguel respectfully requests:

1. A hearing on his March 14th motion;
2. Review of the Waiver Order; and
3. An order remanding the case to Family Court.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: 

Christopher D. Scalzo, Deputy Public Defender
Heather V. Scalzo, Assistant Public Defender
Michael Martinez, Assistant Public Defender
Attorneys for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC
Date: May 15, 2017


EXHIBIT 3

(2013). This Court cannot, as the Defendant is requesting, opine as to whether the Family Court judge committed a judicial error when he waived jurisdiction of this case to the Circuit Court. The South Carolina Court of Appeals has jurisdiction to review orders issued by the Family Court. S. C. Code Ann. §14-8-200(A).

Therefore, finding no basis for review or remand, this Court hereby denies Defendant's Motion.

IT IS SO ORDERED.

Dated: 5/23/17
Greenville, SC



Hon. Letitia H. Verdin
Circuit Judge, Thirteenth Judicial Circuit

EXHIBIT 4

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

IN THE INTEREST OF)

Case Nos.: 2017GS2303939A

A JUVENILE)

**MOTION TO RECONSIDER
ORDER DENYING DEFENDANT'S
MOTION FOR REVIEW AND REMAND TO
FAMILY COURT**

MIGUEL CANO,)
DOB: 2/21/2002)
_____)

COMES NOW the juvenile-defendant, Miguel Cano, by and through his undersigned counsel, and respectfully moves this Court to reconsider its May 24, 2017 order denying his motion for review and remand of this matter to Family Court.

Mr. Cano respectfully submits the following as a basis for reconsideration.

1. Defendant's motion was denied without a hearing, and therefore an opportunity to fully and fairly address the legal issues in person. Defendant requested a hearing on the issue of review and remand to Family Court in his motion filed on March 14, 2017, and again requested a hearing in his memorandum of law filed on May 15, 2017. An in-person hearing before the Court is a due process right that Mr. Cano was not given prior to the denial of his motion. *See Dangerfield v. State*, 376 S.C. 176, 179 (2008) ("The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, **the opportunity to be heard in person**, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." emphasis added);

2. Defendant's memorandum of law in support of his motion for review and remand was submitted with the belief that a hearing would be held. Consequently, certain issues were not directly addressed in that memorandum in anticipation that a hearing would be held to more fully

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FILED
CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SOUTH CAROLINA

discuss all of the issues in person. Had a hearing been held—and it should now be held as requested in this motion—the defendant would show the following:

- a. The State's reliance on *State v. Lockhart*, 275 S.C. 160 (1980), and *State v. Rice*, 401 S.C. 330 (2013), for the proposition that review of the Family Court's decision to waive jurisdiction can only be reviewed by an appellate court is wrong. All that interlocutory means is that the decision is not a final decision that is immediately **appealable** to the Court of Appeals or the Supreme Court. *See State v. Samuel*, 411 S.C. 602, 604 (2015) (an interlocutory order is an intermediate order that is not, except for specific circumstances, immediately appealable to the Supreme Court or Court of Appeals); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 78 n.5 (2013) (“[The Supreme Court] believe[s] the reference to an ‘**interlocutory appeal**’ is a tacit recognition that there is a lack of finality [to the order].”) (emphasis in the original); *see also* S.C. Code of Laws § 14-3-330. There is nothing special about the interlocutory nature of the waiver order. It is only used to draw the distinction between a final order in a case and one that is intermediate or provisional when the issue is appellate review. The issue here, however, is not appellate review.

Lockhart is inapposite to this case. All that the Supreme Court said in *Lockhart* was that a waiver order was “not subject to immediate appeal to **this Court.**” 275 S.C. at 160 (emphasis added). The State has tacked onto the holding in *Lockhart* the phrase “and can only be reviewed by an appellate court.” State's Motion to Dismiss, para. 2. *Lockhart* says nothing about the limits of review by any other court.

The posture of *Lockhart* was a direct appeal from Family Court to the Supreme Court. 275 S.C. at 160. The interlocutory nature of the order meant that it was not a

final order, and thus not immediately appealable. *Lockhart* does not stand for the proposition that the **only** review of a waiver order is an **appellate** review. In fact, by definition, the interlocutory nature of the order is part of what makes the waiver order reviewable by this Court under the authorities cited in Defendant's memorandum of law—since it is not a final order resolving the lawsuit it remains a provisional order that this Court can review.

The State's logic here is unsound. It makes no sense to say that the reason a court order is not reviewable in Circuit Court is because it is interlocutory. Again, interlocutory means simply provisional or not final; it means the issue is pending during the current litigation, which is part of what makes it reviewable in Circuit Court and not currently reviewable by an appellate court. The State's argument turns the law of appellate review on its head. The reason the *Lockhart* court held the waiver order was not immediately appealable was because it was not a final order—and only final orders (with certain exceptions that are found in § 14-3-330) can be appealed to an appellate court. *See State v. Samuel*, supra. It does not follow from the rule that only final orders are reviewable by an appellate court that provisional orders cannot be reviewed until there is a final order.

Moreover, appellate review is a very specific request that the law recognizes as such, requiring a notice of appeal to be filed and specific unique rules to govern the handling of appellate review. No appeal or notice of appeal has been filed in this case. Consequently, applying standards of appellate review is a clear error of law.

The State's reliance on *Rice* gets it no further. That the Family Court's decision to waive jurisdiction is a judicial decision—not a jurisdictional decision—does not mean

this Court cannot review the waiver order. To begin with, *Rice* makes no determination regarding the interlocutory nature of the review and does not even cite § 14-8-200 or mention the term “interlocutory” or discuss appellate review. The posture of *Rice* was a direct appeal at which the defendant was raising a jurisdictional challenge. *See Rice*, supra, at 333. At no point did the *Rice* court hold that the interlocutory nature of a waiver order meant that only an appellate court could review it—there was no interlocutory order being appealed; it was a final order. As was shown in defendant’s memorandum of law, *Rice* actually contemplated the opposite: that Circuit Court could review the waiver order precisely because the *Rice* court had held that, despite the error in a waiver order not being jurisdictional, the judicial nature of the error did not affect the potential that the Circuit Court would lack the authority to hear a particular case. *Rice*, at 333; *see* Defendant’s Memorandum of Law at 12-18. As much as the State wants it to, the error being judicial as opposed to jurisdictional simply does not convert Circuit Court review into an **appellate** review. Circuit Court review pursuant to *Rice* is not appellate review but the required review by a trial court as to whether it has the authority to hear a particular case. *Rice*, at 333.

Review and appeal are not the same thing. The defendant asked for review based on statute and case law; he did not ask for **appellate** review. The State has misstated § 14-8-200(A). That code section does not say, as the State wrote, that “the [Court of Appeals] has jurisdiction over any review of orders by the Family Court.” *See* State’s Motion to Dismiss, para. 2. To the contrary, § 14-8-200(A) says “the court [of Appeals] has jurisdiction over any case in which an appeal is taken.” The State has incorrectly attempted to equate review with appeal. An appeal is a specific request

made by a party after a final judgment. Since the defendant has not asked for an appeal and there is no final judgment, § 14-8-200(A) does not control here. The State is incorrect in its attempt to use § 14-8-200(A) as establishing the scope of all review. This code section is only triggered when an appeal is sought; it cannot be used to control a circumstance for which it was never intended to control.

3. The denial of a hearing on the defendant's motion also deprived him of the opportunity to proffer evidence that establishes the waiver order was erroneous. A hearing was necessary to allow the defendant to proffer evidence of the Family Court's errors. Had a hearing been held, the defendant would have presented—and should now be allowed to present—to the Court expert testimony establishing that (1) the interrogation of the then-13 year old defendant was inadmissible and thus the reliance by the Family Court was erroneous; (2) the factual conclusions drawn by the Family Court were in error because certain necessary conclusions and findings were contrary to the testimonial and documentary evidence provided to the Family Court at the waiver hearing.

More specifically, the defendant would have presented Dr. Kate Kleinfelter as the psychologist who, after conducting an evaluation of the defendant for the Department of Juvenile Justice, wrote a report and testified at the waiver hearing. Dr. Kleinfelter has subsequently reviewed the waiver order and her current testimony would establish that the Family Court erred in several of the key conclusions drawn about the doctor's own prior testimony regarding the evaluation and psychological assessments of the defendant, including the appropriateness and reliability of the interrogation. Moreover, Dr. Kleinfelter's testimony would establish that the Family Court had insufficient evidence to support the psychological conclusions it made and

relied upon in making findings regarding the *Kent* factors and ultimately in ordering waiver in this case.

Only live in-person testimony by Dr. Kleinfelter—subject to both direct and cross examination—can properly and fully address the errors made by the Family Court. However, the following is submitted as a short summary of the areas in which Dr. Kleinfelter would testify.

- a. The Family Court concluded that the defendant's state of mind was "conscious and calculated." Waiver Order, para. 2. Dr. Kleinfelter's report and her testimony at the waiver hearing called this into question and there was no expert testimony countering Dr. Kleinfelter's assessments. Her current testimony would show that her report questioned the defendant's state of mind at the time of the offense. The report talked about depression, and a possible delusional process that sometimes occurs in juveniles with Autism Spectrum Disorder ("ASD") who are experiencing depression and are under a great deal of stress. This expert opinion was (and is) supported by the fact that the defendant did remember the assault but had memory loss before and afterwards.

The Family Court's conclusion regarding "planning" was (and is) called into question by the common lack of an ability to make and carry out plans, even in common everyday life activities for children with ASD, including those who are high functioning. This was (and is) supported by the fact that the assault itself was disorganized and that there was evidence from the family that the defendant could not plan anything in his day-to-day life.

- b. The Family Court concluded that the crime being against the defendant's mother warranted a heightened weight. Waiver Order, para. 3. To the extent this

conclusion was based on a psychological assessment of risk, there is no evidence to support that conclusion and Dr. Kleinfelter would testify that there would be a greater concern of risk had the crime been committed against a stranger.

- c. The Family Court concluded that the defendant had a “level of sophistication and maturity [that] is more developed than expected for a person his age, and his actions of premeditated plans on how to kill, and his plan to avoid responsibility for the crime afterwards, are indicative of a higher level of sophistication and maturity.” Waiver Order, para. 6. This conclusion is not what Dr. Kleinfelter testified to at the waiver hearing. Her testimony regarding IQ was qualified several times by her expert testimony that IQ is a limited measuring instrument and that the defendant’s emotional intelligence, which is a measure of sophistication and maturity, was very low.

Regarding the defendant’s plan to avoid responsibility, Dr. Kleinfelter discussed that the defendant demonstrated very poor and disorganized planning, offering evidentiary support that the defendant was found walking down a main road in broad day light and entering stores along the way; and that he was found staring up at a helicopter in the sky in a manner very consistent with children who have ASD. Dr. Kleinfelter did not make any psychological conclusion that the defendant was avoiding or planning to avoid responsibility.

Regarding the conclusion that the defendant was “reserved and a bit socially awkward” but was otherwise mature in dealing with friends and family, that conclusion is contrary to Dr. Kleinfelter’s expert testimony on autism. She testified to significant impairment with peer and family relations—since people

often incorrectly confuse compliance with maturity; that he indeed had highly awkward interactions with peers and were in fact non-existent in some instances; and that he was in fact described as “weird” by peers in the police reports.

Regarding the Family Court’s conclusion that defendant’s ASD is “mild and very [he is] high functioning,” Dr. Kleinfelter’s testimony counters this. She did not describe the defendant as “very high functioning” and such a psychological conclusion about the defendant is an incorrect assessment. ASD, although mild, is akin to Asperger’s Syndrome and does not mean the defendant does not have significant impairments. Dr. Kleinfelter would show that (1) even children with so-called high functioning ASD can often require extensive Individualized Education Programs at school due to their impairments; and (2) the DSM-5 outlines a list of the deficits these children face, despite other areas of higher functioning.

Regarding the conclusion that the “only domain that puts him in the category [of ASD] is social interactions and communications,” Dr. Kleinfelter establishes that this is a complete error in how the diagnoses was made. A diagnosis of ASD cannot be made without the individual meeting all of the criteria. Dr. Kleinfelter’s testimony showed that he evidenced problems in both (1) social communication and (2) restricted, repetitive behavior (RRB). The restricted interests, along with repetitive behaviors, is described in Dr. Kleinfelter’s report, as well as by the other psychologist, Dr. McCloy, in her own report. Dr. Kleinfelter’s expert testimony establishes that this conclusion is an

incorrect psychological conclusion to which no supporting evidence was provided, or could be provided.

Regarding the conclusion that the “criminal behavior is not a byproduct of ASD,” this is a gross mischaracterization of the testimony and is unsupported by the evidence. Dr. Kleinfelter’s testimony addressed the connection between ASD and any criminal behavior in describing how having difficulty in expressing feelings could lead to not being comforted when you felt sad or mad. The conclusion is a psychological conclusion that is not supported by the evidence or psychology. Dr. Kleinfelter’s expertise in this area establish the crucial errors in the psychological conclusions that the Family Court made in this area, and show that, while not being the primary cause of the criminal behavior, ASD can nonetheless contribute to such behavior.

- d. Regarding the conclusions that there was “months of planning” that somehow equate to a previous history of bad conduct, Dr. Kleinfelter, along with other evidence in the record, establish there was not months of planning. The State relied on internet searches as proof of the “months” of planning. However, the evidence demonstrates that those searches were made after the incident. Dr. Kleinfelter’s testimony shows how this evidence was not only incorrectly used to draw this conclusion but that it is inconsistent with her other assessments of the defendant concerning his lack of ability to plan and take organized action.
- e. Regarding the conclusion that “persons who commit antisocial and violent actions against other people are more difficult to rehabilitate,” this is a conclusion without support in the record. Dr. Kleinfelter testified to no pattern of antisocial or violent

actions, aside from this one incident. Dr. Kleinfelter testified to the cumulative effect of multiple pressures and losses related to ASD, which is in direct contradiction of the psychological conclusion that the defendant did not react to an event or situation. Dr. Kleinfelter did not testify—and neither did any other psychologist—that the statements of a desire to be serial killer were in fact accurate or evidence of such a state of mind. Moreover, because the ASD has been un-treated, there remains the real and likely possibility that the plan to become a serial killer was itself part of the manifestation of his ASD. This is a psychological conclusion that is at odds with Dr. Kleinfelter's expert opinions in this case.

Regarding the so-called "difficulty in rehabilitation," there is nothing in the record to establish that the "difficulty" was prohibitive, which is the conclusion drawn by the Family Court. Dr. Kleinfelter described the interactions she had with the defendant and the efforts made by DJJ to develop a care plan that was ASD specific. There was no evidence that the plan could not be developed both in enough time within the juvenile justice system and to be effective.

Regarding the defendant's father being the only support for him, Dr. Kleinfelter's report and expert opinion establish that the evidence is contrary to this conclusion.

Regarding the conclusion that it is not known why he did it and that being an impediment to rehabilitation, Dr. Kleinfelter's report and testimony cover that such a conclusion is premature; that without first receiving ASD-specific interviewing and counseling, such a psychological conclusion cannot be made.

Regarding the defendant's remorse being only for his incarceration, this conclusion is not supported by the record. Dr. Kleinfelter's report and testimony establish incidents of remorse expressed by the defendant to her and that she had not made any conclusion that he was only remorseful for his incarceration.

Regarding a lack of regret by the defendant, Dr. Kleinfelter did not testify to any lack of regret by the defendant. To the contrary, he expressed much sorrow for the loss of his mother. This conclusion is a furthering of the failures made in the police interview, which was a failure in appropriate interviewing of the defendant using proper ASD protocols so as to not inadvertently influence the child and thereby get inaccurate information.

Regarding the severity of the crime outweighing the lack of a previous history of violence, this conclusion is a complete misstatement of the social science research and does not have any evidence to support it in the record. Dr. Kleinfelter's testimony is that the defendant in fact has very strong positive factors for rehabilitation and that he does not exhibit Conduct Disorder or Antisocial Personality Disorder, each of which would detract from his ability to be rehabilitated. The evidence is supportive of rehabilitation, not against it.

Regarding the conclusion that the defendant only regretted his actions because he feared the consequences, this is an incorrect psychological assessment that has no basis in evidence. Dr. Kleinfelter would show that this is an incorrect linking of separate factors (which were included in her report and testified to) into an erroneous psychological conclusion; and she would show that, despite the

Family Court's negative conclusion, "fear of consequences" is a positive factor toward rehabilitation rather than a negative.

Regarding the conclusion that the defendant made "truthful responses to the investigator" in the interrogation, this is (1) itself, an erroneous psychological conclusion not supported by the evidence and (2) an erroneous conclusion because it is compounding on the error of admitting the interrogation. Dr. Kleinfelter's expert opinion in this case establishes the overall inappropriateness of admitting and relying on the interrogation of the defendant by the police for the lack of adherence to any of the appropriate guidelines for interviewing a child with ASD. Additionally, the Family Court's conclusion about the truthfulness of responses is a psychological assessment that ignores the effects that ASD would have on the defendant's responses in the interview and the accuracy of his "truthfulness" during that interview. Dr. Kleinfelter noted several memory problems that the defendant had regarding the interview that highlighted the defendant did not understand his Miranda rights and that the questioning by law enforcement distorted the accuracy and reliability of what the defendant said. Dr. Kleinfelter has supporting literature and specific observable instances during the interview that show the defendant was exhibiting symptoms of ASD during the interview.

CONCLUSION

WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Cano respectfully requests:

1. A hearing on this motion;

2. A reconsideration of the May 24, 2017 Order Denying Defendant's Motion to Review and Remand to Family Court; and
3. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: 

Christopher D. Scalzo, Deputy Public Defender
Heather V. Scalzo, Assistant Public Defender
Michael Martinez, Assistant Public Defender
Attorneys for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC
Date: June 5, 2017

EXHIBIT 5

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF GREENVILLE)
)
)
IN THE INTEREST OF)
)
)
A JUVENILE)
)
)
MIGUEL CANO)
)
DOB: 2/21/2002)
_____)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Case No(s): 2017GS230393

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2017 JUN 21 PM 1 56

This matter comes before the Court on a Motion of Defendant For Reconsideration Of Order Denying Defendant's Motion For Review And Remand To Family Court and Defendant's Motion For Order Requiring The State To Respond In Writing To Each Motion That It Opposes.

After careful review of the matter, Defendant's request for a hearing on the Motion For Reconsideration Of Order Denying Defendant's Motion For Review And Remand To Family Court is respectfully denied. To the extent that Defendant wishes to proffer any evidence or testimony with regard to this Motion, the parties are ordered to find a mutually agreeable time to do so.

The Court has also considered Defendant's Motion For Order Requiring The State To Respond In Writing To Each Motion That It Opposes. The Court grants this Motion.

Therefore, it is hereby ORDERED that Defendant's Motion For Reconsideration Of Order Denying Defendant's Motion For Review And Remand To Family Court is denied and Defendant's Motion For Order Requiring The State to Respond In Writing To Each Motion That It Opposes is granted.

IT IS SO ORDERED.



Presiding Judge
Thirteenth Judicial Circuit

Dated: 6/21, 2017
Greenville, South Carolina

EXHIBIT 6

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
STATE OF SOUTH CAROLINA)
)
VS)
)
MIGUEL ANGEL CANO,)
)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
Indictment # 2017-GS-23-03939A
Direct Presentment

ORDER

FILED-CLERK OF COURT
PAUL B. WICKENSMEYER
GREENVILLE CO. SC
2017 JUL 25 PM 12:38

This matter is before me on motion of the State to serve the above-named defendant with a Direct Presentment Indictment and to reaffirm all bond issues related to this indictment. This defendant was arrested on September 1, 2015, and charged with murder in the death of his mother on August 31, 2015. The defendant was 13 years of age at the time of the offense, and was originally charged as a juvenile in the Greenville County Family Court under petition 201[5]-JU-23-824. The defendant has been held at the Greenville Juvenile Assessment Center without bond since his arrest.

A juvenile waiver hearing was held before the Honorable Alex Kinlaw on November 1 and 2, 2016, whereupon the Court ruled that this case should be transferred to the Court of General Sessions where the defendant shall be tried as an adult. On May 23, 2017, the Greenville County Grand Jury returned a true bill indictment (2017-GS-23-03939A) against this defendant for one count of murder pursuant to South Carolina Code subsection §16-3-10.

On this date, the defendant is present and represented by his attorney, Deputy Public Defender Chris Scalzo. The State is also present and represented by Deputy Solicitor Andrew Culbreath. The defendant affirms that he has previously been provided with a copy of this indictment by his attorney(s), and was formally served with

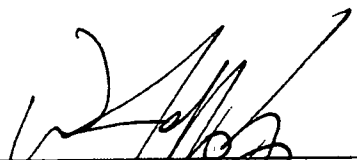
a copy of the true bill indictment during this hearing on July 25, 2017. During the hearing the defendant was advised of the charge against him, his right to a jury trial, and an opportunity to enter a plea. The defendant acknowledged that he understood the charge against him, entered a plea of not guilty, and requested a jury trial.

Defense counsel objected to the defendant being arraigned in General Sessions court, and explained that his objection was consistent with prior defense motions wherein the defendant seeks a remand of this charge to Family Court. The Court overruled defense counsel's objection. Further, defense counsel stipulated to a continuation of the defendant's detention without bond, but preserved his right to request a bond hearing at a later time.

Upon reviewing the evidence presented by the State and the arguments of counsel, I hereby find that the indictment referenced above has been properly served on the defendant. Further, the denial of defendant's bond as set forth in the Family Court Waiver Order shall remain in place.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT the defendant MIGUEL ANGEL CANO has been properly served with the above-referenced direct presentment indictment. Further, the defendant shall remain detained without bond under the terms and conditions of the Family Court Waiver Order.

IT IS SO ORDERED.



Honorable W. Jeffrey Young
Court of General Sessions
Thirteenth Judicial Circuit

Date: 25 July 2017
Greenville, South Carolina

EXHIBIT 7

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
THE STATE)
v.)
MIGUEL CANO,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
Warrant No.: 2017GS2303939A

**MOTION TO
TRANSFER TO FAMILY COURT**

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Paul Wickensimer CDD GUL SC

COMES NOW Miguel Cano, the defendant and a child, who, by and through his undersigned counsel, respectfully moves this Court for an order transferring the above-referenced matter to Family Court for adjudication.

LEGAL AUTHORITY

Miguel Cano is a child and has the following rights:

I.

An Eighth Amendment right to be sentenced in Family Court if he is found guilty of the charge of murder in the above-referenced matter. This right is guaranteed by the U.S. Const. Amend. VIII, S.C. Const. Art. I, § 15, and S.C. Code Ann. § 63-3-510 and § 63-19-1210; and

II.

A Due Process right to a hearing in Circuit Court to ensure the protection of his right to be sentenced in Family Court. This right is guaranteed by the U.S. Const. Amend. XIV, Article I, § 3 of the South Carolina Constitution, *Kent v. United States*, 383 U.S. 541 (1966), and S.C. Code Ann. § 63-19-1210.

FACTUAL AND LEGAL SUPPORT

In support of this motion, Miguel Cano would present the following factual and legal support for his rights to (i) adjudication in Family Court and (ii) a hearing in Circuit Court to ensure that right protected:

(1) Miguel Cano was 13 years old when he was charged with murder and is now 16 years old. Pursuant to S.C. Code Ann. § 63-19-20(1), he is a child;

(2) New psychological evidence has been developed since the Family Court issued its order waiving jurisdiction to Circuit Court on January 30, 2017 (the “Waiver Order”);

(3) This new evidence has a direct, significant, and determinative impact on the issues of whether (i) Miguel Cano should remain in Circuit Court to be prosecuted as an adult, (ii) he should have been transferred from Family Court to Circuit Court in the first place, and (iii) the Family Court erred in the Waiver Order;

(4) This new psychological evidence comes in the form of psychological evaluations known as (i) a Risk-Sophistication-Treatment Inventory (“RSTI”), which was completed on or about July 19, 2018, and (ii) a Structured Assessment of Violence Risk in Youth (“SAVRY”), which was completed on or about August 6, 2018;

(5) The RSTI is a psychological instrument developed in 2004 by Randy Salekin, a professor of psychology at the University of Alabama. The RSTI was specifically developed for use in assessing juveniles for dispositional and transfer hearings. It was designed to comprehensively track the psychological constructs that a court must use when making waiver determinations. *See Kent v. United States*, 383 U.S. 541(1966) and *State v. Pittman*, 373 S.C. 527, 558 (2007). Of the current psychological instruments, the RSTI most directly and accurately addresses the psychological issues courts are required to consider when making a waiver

evaluation. As such, the RSTI addresses (i) Risk of Dangerousness, (ii) Sophistication-Maturity, and (iii) Treatment Amenability;

(6) The RSTI was not used by the Department of Juvenile Justice (“DJJ”) in its psychological assessments for waiver hearings in 2016, including in its assessment of Miguel Cano. That, however, is changing. DJJ has determined that the RSTI is scientifically valid and accurate. As a result, DJJ is now making agency level preparations to use the instrument in waiver hearing assessments going forward;

(7) The following summary of the diagnostic findings of the RSTI results for Miguel Cano support a review by this Court of the appropriateness of him remaining in Circuit Court:

- a. Miguel Cano poses a low risk for dangerousness—he is in the 3rd percentile, meaning 97% of youth in detention pose a higher risk of dangerousness than him;
- b. Miguel Cano is in the middle of the scale for sophistication and maturity—he is in the 27th percentile (making it out of the low range by 4 points and 2 percentiles), meaning 67% of youth in detention are more sophisticated and mature than him;
and
- c. Miguel Cano is in the high range for amenability to treatment—he is in the 93rd percentile for amenability to treatment, meaning 7% of youth in detention are more amendable to treatment than him.

(8) The SAVRY is a structured risk assessment tool developed by psychologists in 2006. In developing this instrument, items were selected based on research on juvenile offending and violence. Multiple studies have shown the predictive validity of the SAVRY. It was designed for children ages 12 to 18;

(9) According to the SAVRY, Miguel Cano poses a Low Risk for future serious violence;

(10) Miguel Cano will present at a hearing in support of this Motion (i) the RSTI and SAVRY reports/test results and (ii) expert testimony of the psychologist who conducted both the RSTI and the SAVRY;

(11) The RSTI and SAVRY—as well as the corresponding expert testimony—establish an independent basis that Miguel Cano should no longer remain in Circuit Court given the requirements of § 63-19-1210 regarding waiver and the requirements of *Kent v. United States*, 383 U.S. 541(1966);

(12) Given this independent basis that Miguel Cano should no longer remain in Circuit Court, failure to transfer his case violates his right to be sentenced in Family Court, if found guilty, and, therefore, violates the right, guaranteed by the Eighth Amendment to the United States Constitution, Article I, § 15 of the South Carolina Constitution, and S.C. Code § 63-3-510 and § 63-19-1210, of a child to be sentenced in Family Court as a child;

(13) It is cruel and unusual punishment for a child to be sentenced as an adult when the evidence establishes that the child should be punished as a child in Family Court. Sentences that are disproportionate are considered cruel and unusual punishment under the Eighth Amendment. *See Aiken v. Byars*, 410 S.C. 534, 537 (2014) (including internal citations). Punishing a child as an adult in ignorance of, or contrary to, evidence of their youth constitutes disproportionate sentencing under the Eighth Amendment. *Id.*; *see also Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005);

(14) Miguel Cano has a constitutional and statutory liberty interest in being adjudicated in Family Court. U.S. Const. Amend. VIII, S.C. Const. Art. I, § 15, and S.C. Code

Ann. § 63-3-510 and § 63-19-1210. Given this liberty interest, Miguel Cano is entitled to a hearing in Circuit Court to ensure his right to be sentenced in Family Court is protected. U.S. Const. Amend. XIV, S.C. Const. Art. I, § 3, *Kent v. United States*, 383 U.S. 541 (1966), *State v. Pittman*, 3737 S.C. 527 (2007), and S.C. Code Ann. § 63-19-1210;

(15) In addition to establishing an independent basis for transfer to Family Court, the RSTI and SAVRY—as well as the corresponding expert testimony—provide additional evidence and support for Miguel Cano’s Motion for Review and Remand to Family Court filed on March 14, 2017, in which he requested review of the Waiver Order’s erroneous factual findings and conclusions of law. This additional evidence also supports his June 5, 2017 Motion to Reconsider;

(16) The Waiver Order, with these demonstrable errors in fact and conclusions of law, violates Miguel Cano’s right to be sentenced in Family Court as a child. As stated above, this right is guaranteed by the Eighth Amendment to the United States Constitution, Article I, § 15 of the South Carolina Constitution, and S.C. Code § 63-3-510 and § 63-19-1210; and

(17) Given Miguel Cano’s liberty interest in being adjudicated in Family Court, as established in paragraph 14 above, he is entitled to a hearing in Circuit Court to ensure his right to be sentenced in Family Court is protected against a waiver order that is demonstrably erroneous. U.S. Const. Amend. XIV, S.C. Const. Art. I, § 3, *Kent v. United States*, 383 U.S. 541 (1966), *State v. Pittman*, 3737 S.C. 527 (2007), and S.C. Code Ann. § 63-19-1210.

CONCLUSION

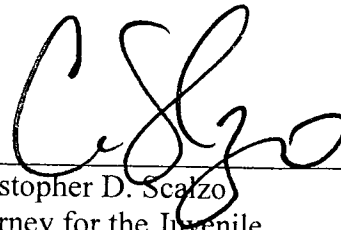
WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Miguel Cano respectfully requests:

1. A hearing on the issues raised by this motion and his motions of March 14, 2017 and June 5, 2017;
2. Review of the errors in the Waiver Order and of the new psychological evidence demonstrating he should be transferred to Family Court for adjudication; and
3. An order transferring the case to Family Court for adjudication.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: _____



Christopher D. Scalzo
Attorney for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC
Date: August 7, 2018

EXHIBIT 8

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
THE STATE)
v.)
MIGUEL CANO,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Warrant No.: 2017GS2303939A

**MOTION TO RECONSIDER
ORDER DENYING DEFENDANT'S
MOTION FOR REVIEW AND REMAND
FAMILY COURT**

18 SEP 4 PM 4:38
Paul Wickensimer CUC 611 SC

COMES NOW the defendant, Miguel Cano, by and through his undersigned counsel, and respectfully moves this Court to reconsider its May 24, 2017 order denying his motion for review and remand of this matter to Family Court.

Mr. Cano respectfully submits the following as a basis for reconsideration.

- 1) This Court's order of May 24, 2017 denying the defendant's motion for review and remand to Family Court (the May 24th Order) does not finally resolve the outstanding issues concerning this motion, which was filed on March 14, 2017;
- 2) The May 24th Order was issued without a hearing and, therefore, was issued without presentation of evidence and argument;
- 3) On June 5, 2017, the defendant filed a motion to reconsider the May 24th Order on the basis of it being issued without presentation of evidence or receipt of oral argument;
- 4) The Court issued an order on June 21, 2017 (the June 21st Order) denying the defendant's motion to reconsider and ordering an evidentiary hearing to be scheduled for the defense to submit testimony to support its motion. That hearing was held on August 24, 2018;
- 5) At the August 24th hearing, the defense presented expert testimony by Dr. Kate Kleinfelter demonstrating that the order issued by the Family Court on January 30, 2017 transferring jurisdiction to Circuit Court (the Waiver Order) was issued in error;

6) More specifically, the expert testimony established that multiple psychological conclusions were drawn by the Family Court in each of the substantive paragraphs of the Waiver Order and that those psychological conclusions were drawn in error because they were unsupported by the evidence presented at the waiver hearing;

7) The psychological errors established by the expert testimony provided on August 24th along with the record provided to the Court by way of court's exhibits entered on August 24th (to include the transcript of the waiver hearing and the psychological reports presented at the waiver hearing) establish that each of the psychological bases the Family Court relied on to rule against the defendant in its assessment of the *Kent* factors, and in ultimately ordering jurisdiction be transferred to Circuit Court, were—and continue to be—unsupported by evidence and therefore erroneous; and

8) The errors in the Waiver Order are demonstrable and, as such, fully support this Court reviewing and remanding this matter to the jurisdiction of Family Court consistent with the law outlined in the defendant's previously filed memoranda on the law and his previously filed motion and motions to reconsider.

CONCLUSION

WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Miguel Cano respectfully requests:

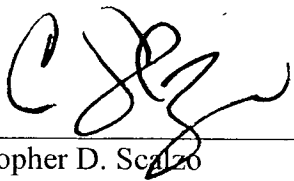
1. This Court, in light of the testimony provided at the August 24th hearing, reconsider its June 21st order;
2. This Court hold a hearing to allow the defendant to place on the record the legal argument on the issues raised by this motion and his motions of March 14, 2017 and June 5, 2017;

3. Review of the errors in the Waiver Order, including the testimony provided at the August 24th hearing demonstrating that the matter should be remanded to Family Court for adjudication; and
4. An order remanding the case to Family Court for adjudication.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: _____



Christopher D. Scalzo
Attorney for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC

Date: September 4, 2018

EXHIBIT 9

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
THE STATE)
v.)
MIGUEL CANO,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

Warrant No.: 2017GS2303939A

**DEFENDANT'S NOTICE OF
INTENT TO APPEAL AND
PETITION FOR SUPERSEDEAS**

18 SEP 4 PM 4:32
Paul Wickensimer COC GUL SC

COMES NOW the defendant, Miguel Cano, by and through his undersigned counsel, and respectfully submits notice of his intention to appeal and petition for a writ supersedeas pursuant to Rule 241, SCACR of this Court's final ruling on his (1) motions relating to the review of the erroneous Family Court order transferring jurisdiction to Circuit Court and request to remand this case to Family Court for adjudication and (2) transfer of this case to Family Court for adjudication in light of additional evidence establishing that the defendant should not remain in Circuit Court to be tried as an adult.

NOTICE OF INTENT TO APPEAL AND PETITION FOR SUPERSEDEAS

Mr. Cano respectfully gives notice to the Court that, should the Court deny his motions (1) relating to review and remand, dated March 14, 2017, May 24, 2017 and September 4, 2018 and (2) his motion for transfer dated August 7, 2018, he intends, pursuant to Rule 241, SCACR, to file and serve both a notice of appeal and a petition for a writ for supersedeas to stay the matter during the pendency of the appeal.

Rule 241, SCACR, authorizes a party to seek a writ for supersedeas of decisions that are not automatically stayed by the service of a notice of appeal. Denial of the motions on the issues referenced above will result in irreparable harm to Mr. Cano. Given the significance of the issue and the finality of the decision, an immediate appeal is necessary to protect his constitutional and statutory right to be treated as a juvenile. *See* U.S. Const. Amend. VIII; U.S. Const. Amend.

XIV, S.C. Const. Art. I, § 15; S.C Const. Art I, § 3; *Kent v. United States*, 383 U.S. 541 (1966);
S.C Code Ann. §§ 63-3-510, -1210.

Should this Court deny the defendant's motions, as outlined above, the remaining litigation in the case is concerned with Mr. Cano's guilt or innocence on the underlying substantive offenses. As such, whether jurisdiction is appropriate in the Circuit or Family Court will be a final judgment¹ appropriate for review by the appellate courts. Consequently, a stay of the remaining litigation is necessary to preserve jurisdiction of the appeal, to prevent the contested issue of waiver from becoming moot, and to prevent irreparable harm to Mr. Cano.

Respectfully submitted,
Greenville Public Defender Office



By: _____

Christopher D. Scalzo
Attorney for the Defendant
305 East North Street
Greenville, SC 29601

Greenville, SC

Date: September 4, 2018

¹ "A judgment, order, or decree to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings." *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 41-42 (1942) (quoting 2 Am. Jur., 860, Section 22).

EXHIBIT 10

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
THE STATE)
v.)
MIGUEL CANO,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
Warrant No.: 2017GS2303939A
**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO
TRANSFER TO FAMILY COURT**

18 SEP 4 PM 4:34
Paul Wickensmer, COC GVL, SC

COMES NOW Miguel Cano, the defendant and a child, who, by and through his undersigned counsel, respectfully submits this memorandum in support of his August 7, 2018 Motion to Transfer to Family Court.

ARGUMENT

Miguel Cano was 13 years old when he was charged with murder and possession of a weapon during the commission of a violent crime on September 3, 2015. Miguel was charged for allegedly killing his mother three days earlier. He was 14 years and 9 months old when the Waiver Order was issued. In July and August of 2018, additional psychological testing of Mr. Cano was conducted. The results of this testing establish as additional independent evidence that Mr. Cano should not remain in Circuit Court to be prosecuted as an adult but, rather, should be transferred to Family Court for adjudication as a juvenile. Failure of this Court to consider (1) the evidence and (2) its impact on whether Mr. Cano should continue to be prosecuted as an adult in Circuit Court will result in a denial of due process and a violation of his right to be sentenced as the juvenile that he was at the time of alleged offense and as the juvenile he currently is, which violates his rights under the Eighth Amendment and S.C. Code § 63-19-1210.

- I. **Because there is new evidence establishing that Miguel Cano should not remain in adult court but, instead, should, given the standards set forth in *Kent v. United States*, 383 U.S. 541 (1966) and *Miller v. Alabama*, 567 U.S. 460 (2012), be transferred to Family Court for adjudication as a child, a hearing in Circuit Court is required pursuant to the Due Process clause in order to protect his statutory and constitutional right to be adjudicated and sentenced as a child in Family Court.**

Punishing a child as an adult in ignorance of, or contrary to, evidence of their youth constitutes disproportionate sentencing under the Eighth Amendment. *Id.*; see also *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005). Sentences that are disproportionate are considered cruel and unusual punishment under the Eighth Amendment. See *Aiken v. Byars*, 410 S.C. 534, 537 (2014) (including internal citations). Therefore, it is cruel and unusual punishment for a child to be sentenced as an adult when the evidence establishes that he should be punished as a child in Family Court.

Miguel Cano was 13 years old when he was charged with murder. He is now 16 years old. Pursuant to S.C. Code Ann. § 63-19-20(1), he was, and remains, a child. Consequently, he has a constitutional and statutory liberty interest in being adjudicated in Family Court. U.S. Const. Amend. VIII, S.C. Const. Art. I, § 15, and S.C. Code Ann. § 63-3-510 and § 63-19-1210.

The Eighth Amendment protects juveniles from being punished as adults without consideration of the unique characteristics of children. See *Miller*; see also *Aiken v. Byars*. The new psychological evidence has a direct, significant, and determinative impact on whether Miguel should remain in Circuit Court to be prosecuted as an adult. This new evidence calls into question the conclusions in the January 30, 2017 order transferring Miguel to Circuit Court for prosecution as an adult (the Waiver Order). Moreover, this evidence establishes that, under a proper evaluation of this evidence through consideration of the *Kent* factors and the overall

evaluation of whether adult court is the appropriate jurisdiction in which to prosecute Miguel, he no longer belongs in Circuit Court.

The determination of the appropriateness of prosecuting a child as an adult carries with it the concomitant determination that it does not violate the Eighth Amendment's admonition against disproportionately sentencing children as if they were adults. The capacity for change and rehabilitation, in concert with the reduced culpability of children, have consistently been held to by the Supreme Court of the United States to be factors that must be considered by a court making sentencing determinations. *See Miller, Graham, and Roper*. Transferring a child from Family Court to Circuit Court is solely a sentencing determination. No other substantive issue, guilt versus innocence or trial versus guilty plea or the admission versus suppression of evidence, changes with a transfer in jurisdiction to Circuit Court. The only substantive issue that is affected by transfer is sentencing. All other questions in the litigation remain the same. The question that is answered by transfer is that the child can be sentenced as an adult. In this regard, the Eighth Amendment's protections are triggered in a transfer decision, such as the one made pursuant to S.C. Code § 63-19-1210(6), during the initial transfer. Similarly, the very same protections under the Eighth Amendment are triggered when, as it is here, the Circuit Court is presented with new evidence that the child should no longer remain in adult court subject to adult punishments that do not, and by law cannot, adequately consider the characteristics of the child's youth when he is sentenced.

What has just been described is a liberty interest in being sentenced in the appropriate court as a child. A liberty interest established, as was discussed above, by the Eighth Amendment. Due process is required to be provided before a liberty interest can be taken from

any person, including a child. *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Dangerfield v. State*, 376 S.C. 176 (2008); *Moore v. Moore*, 376 S.C. 467 (2008).

Miguel also has a statutorily defined liberty interest in being sentenced as a juvenile in Family Court. Exclusive original jurisdiction of a child is vested in the Family Court by S.C. Code § 63-3-510. In order for that exclusive original jurisdiction to be removed and the child transferred to Circuit Court, the procedures in § 63-19-1210 and the requirements of *Kent* must be satisfied. See *Kent v. United States*, 383 U.S. 541 (1966), *State v. Pittman*, 373 S.C. 527 (2007), and S.C. Code Ann. § 63-19-1210. Absent a justified showing under these authorities, transfer would be erroneous. Yet what is equally true is that a child, like Miguel, who can present new evidence establishing that the requirements of *Kent* can no longer be satisfied, cannot remain in Circuit Court. To do otherwise, would deprive the child of his right to exclusive original jurisdiction of his case in Family Court pursuant to § 63-3-510.

Given both of these liberty interests—an Eighth Amendment right to sentencing as a child and the statutory right to exclusive original jurisdiction—Miguel is entitled to a hearing in Circuit Court to ensure his rights to be sentenced in Family Court are protected. This is the essential holdings of *Kent v. United States*, 383 U.S. 541 (1966) and *State v. Pittman*, 373 S.C. 527 (2007), since both cases apply the due process clause to protect the liberty interest of the child. Just as a hearing with consideration of the *Kent* factors is required, under the due process clause, before a child can be transferred to adult court (*see Kent and Pittman*), so too is a hearing with consideration of the *Kent* factors required when new evidence establishes that a child should no longer remain in Circuit Court but, instead, should be transferred to Family Court. To do otherwise would result in the preservation of the child's rights in one court but not the other; and the preservation of the child's rights during the first half of the litigation but not the second half.

CONCLUSION

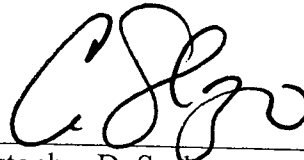
WHEREFORE, for the above-stated reasons as well as any other reasons which may appear to this Court, Miguel Cano respectfully requests:

1. A hearing and review of the new psychological evidence demonstrating he should be transferred to Family Court for adjudication; and
2. An order transferring the case to Family Court for adjudication.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: _____



Christopher D. Scalzo
Attorney for the Juvenile
305 East North Street
Greenville, SC 29601

Greenville, SC
Date: September 4, 2018

EXHIBIT 11

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
THE STATE)
)
vs.)
)
Miguel Cano,)
)
)
DEFENDANT)

THIRTEENTH JUDICIAL CIRCUIT
IN THE COURT OF GENERAL SESSIONS

Indictment: 2017GS2303939A

**ORDER DENYING MOTION TO
RECONSIDER AND MOTION TO TRANSFER**

FILED
2017 AUG 7 PM 3:30
CLERK OF COURT
DR

This matter comes before the Court on Defendant's Motion to Reconsider the Court's May 23, 2017 order denying Defendant's Motion for Review and Remand to Family Court, and on Defendant's Motion to Transfer to Family Court.

The Honorable Alex Kinlaw, Jr., transferred jurisdiction over this matter from Family Court to Circuit Court in an order dated January 28, 2017. Defendant filed a Motion to Reconsider the Order Waiving Jurisdiction, a Motion for Stay of the Order Waiving Jurisdiction, and a Motion to Dismiss the State's Motion to Waive Jurisdiction, all of which were denied by Judge Kinlaw on March 6, 2017. On March 14, 2017, in General Sessions, Defendant filed a Motion for Review and Remand to Family Court. This Court denied that motion without a hearing in an order dated May 23, 2017, and in a subsequent June 21, 2017 order, denied Defendant's Motion for Reconsideration and request for a hearing. This Court, however, did direct the parties to find a "mutually agreeable time" for Defendant to proffer evidence and testimony with regard to said motion. On August 7, 2018, Defendant filed a separate Motion to Transfer to Family Court.

Pursuant to the June 21, 2017 order, a hearing was held on August 24, 2018 to allow Defendant to proffer evidence in support of his motions. Defendant proffered evidence that would have been presented to this Court had the Court determined it had a legal basis to review the Family Court's decision to transfer jurisdiction of this matter to Circuit Court. This Court

1 of 2
[Signature]

