

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

DEC 21 2018

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

HONORABLE LETITIA H. VERDIN, CIRCUIT COURT JUDGE

The State of South Carolina,..... Respondent.

v.

Miguel Angel Cano,Appellant.

Appellate Case No. 2018-002077

RETURN TO RESPONDENT'S MOTION TO DISMISS
NOTICE OF APPEAL AS INTERLOCUTORY

Respondent's motion to dismiss the notice of appeal as interlocutory must be denied because Appellant has not filed an interlocutory appeal. Respondent's motion incorrectly asserts that Appellant has appealed the Family Court's order transferring jurisdiction. Appellant has made no such appeal. Appellant has, however, properly appealed the Circuit Court's erroneous order denying his motions for (1) review and remand and (2) transfer of the case back to Family Court because that order denies Appellant a mode of trial to which the law entitles him and is, pursuant to statute and case law, a final ruling that is immediately appealable.

BACKGROUND

On January 30, 2016, Appellant was transferred from Family Court to General Sessions to be prosecuted as an adult for a murder he is alleged to have committed on August 31, 2015,

when he was thirteen years old. Appellant is autistic, and the decedent was his mother.

The Honorable Alex Kinlaw, Jr., issued the order transferring Appellant to be tried as an adult. Appellant filed post-transfer motions in Family Court for reconsideration and a stay of the proceedings in General Sessions that were denied by Judge Kinlaw on March 6, 2017.

On March 15, 2017, Appellant filed a motion in Circuit Court to have that court review and remand the case back to Family Court. *See* Exhibit 1 to Petition for Supersedeas. This motion alleged that (1) the Family Court's transfer order lack sufficient evidentiary support for its conclusions, (2) the Family Court had abused its discretion in transferring the case, and (3) the mandatory minimum sentence of thirty years in prison for the charge of murder would not allow the Circuit Court to do what was required under *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012) and *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), which is to fashion a proportionate individualized sentence that accounts for all of the factors of youth as required by the Eighth Amendment.

Appellant filed a memorandum of law in support of his motion for review and remand on May 15, 2017. *See* Exhibit 2 to Petition for Supersedeas. The Honorable Letitia H. Verdin, Circuit Court Judge, denied the motion on May 24, 2017, without a hearing. *See* Exhibit 3 to Petition for Supersedeas. The court's reasoning was that it did not have the power or authority to review the Family Court transfer order.

On June 5, 2017, Appellant filed a motion for reconsideration, in which he requested a hearing on his previously filed motions so as to proffer evidence and make arguments on the record, neither of which had been done because the Circuit Court had ruled without a hearing. *See* Exhibit 4 to Petition for Supersedeas. Judge Verdin issued an order on June 21, 2017, denying the request for a hearing but ordering the parties to "find a mutually agreeable time" for

Appellant to proffer evidence in support of his motions. *See Exhibit 5 to Petition for Supersedeas.*

By letter on July 25, 2017, the State proposed to resolve the case by guilty plea to murder, which carries a mandatory minimum of thirty years and a maximum of life in prison.

Subsequently, additional evidence was developed in the form of new psychological testing. This evidence supported Appellant's motion for review and remand; it also created an independent basis for transfer of the case back to Family Court. Appellant, therefore, filed a motion on August 7, 2018, requesting the case be transferred back to Family Court and asked for a hearing on his motion. *See Exhibit 7 to Petition for Supersedeas.*

On August 24, 2018, a hearing was held before Judge Verdin. Appellant proffered expert testimony as well as the new psychological reports. The expert testimony and psychological reports further demonstrated that the Family Court lacked sufficient evidentiary support for its order transferring jurisdiction and also independently established that Appellant was no longer properly before the Circuit Court for criminal prosecution as an adult and should be transferred back to Family Court.

On September 4, 2018, Appellant filed a motion for reconsideration of his March 15, 2017, motion for review and remand based on the proffered testimony and evidence. *See Exhibit 8 to Petition for Supersedeas.* Also on September 4, 2018, Appellant filed and served on the Circuit Court a notice of his intention to appeal and seek supersedeas relief should the court deny his motions. *See Exhibit 9 to Petition for Supersedeas.*

Judge Verdin issued an order dated November 5, 2017, and filed with the Clerk of Court on November 7, 2017, denying Appellant's motions concerning review and remand as well as denying the motion to transfer the case back to Family Court. *See Exhibit 11 to Petition for*

Supersedeas. A copy of this order was not provided to undersigned counsel. However, undersigned counsel checked Greenville County Clerk of Court's on-line records on November 10, 2018, and learned it had been filed.

On November 19, 2018, Appellant filed a Notice of Appeal and a Petition for Writ of Supersedeas to Stay Trial Pending Appeal. The basis for the appeal was that the Circuit Court's November 7th order denied Appellant a mode of trial to which the law entitles him, which is not an interlocutory order but a final order that is immediately appealable. The basis for the petition for supersedeas was that orders affecting a mode of trial must be immediately appealed or the issue is lost for final appellate review; therefore, the fruits of Appellant's meritorious appeal would be lost if the merits of the criminal case went to trial before the appeal was resolved.

Respondent filed a motion to dismiss the notice of appeal as being interlocutory on December 6, 2018. It was received by undersigned counsel on December 12, 2018.

LEGAL ARGUMENT

I.

Respondent's basis for dismissal is mistaken: Appellant has not appealed the Family Court's transfer order—he appealed the Circuit Court's order, which affects a mode of trial and is therefore immediately appealable under § 14-3-330.

Respondent has mistakenly characterized Appellant's appeal as seeking appellate review of the Family Court's transfer order.¹ The appeal seeks no such review.² The notice of appeal

¹Respondent incorrectly asserts in its motion that Appellant is appealing the Family Court's order transferring jurisdiction:

Petitioner's appeal of the waiver hearing is interlocutory by the express holding of the Supreme Court.

Motion to Dismiss Notice of Appeal as Interlocutory at p. 4 (emphasis added).

clearly refers to the Circuit Court’s November 7, 2018 order denying the motions filed in that court and asking that court to take action it is compelled by law to take in order to protect Appellant’s constitutional and statutory rights. Appellant has not filed a notice of appeal of the January 30, 2016, Family Court order transferring jurisdiction to Circuit Court. Moreover, as stated in the notice of appeal, the order is being appealed pursuant to § 14-3-330(2), which defines an order directly affecting a substantial right—like a mode of trial to which an appellant is entitled by law—as an immediately appealable final order.

To begin at the start of this appeal, Appellant’s notice clearly states two things. First—“Miguel Angel Cano appeals the order issued by the Honorable Letitia H. Verdin, Circuit Court Judge, on November 5, 2018 and filed with the Clerk of Court on November 7, 2018.” Notice of Appeal at p. 1. The appeal is not from Judge Kinlaw’s but Judge Verdin’s order; and it is not from Family Court but Circuit Court.

Second—“[t]his appeal is filed pursuant to S.C. Code Ann. § 14-3-330.” *Id.* The heart, therefore, of Respondent’s argument is simply mistaken: the appeal is neither of the waiver order from Family Court nor is it interlocutory. The appeal is of an order that is classified as an immediately appealable final judgment by § 14-3-330(2).

Respondent relies on *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016), and *State v. Lockhart*, 275 S.C. 160, 267 S.E.2d 720 (1980), to support its argument that this appeal is interlocutory. Those cases are inapposite to this appeal.

An order denying a party a mode of trial to which the law entitles them is not interlocutory but is a final order that is immediately appealable. *Foggie v. CSX Transp., Inc.*, 315

² Respondent’s motion neither quotes the Notice of Appeal nor references the specific order from which Appellant gave notice that he was appealing: the November 7, 2018, Circuit Court order. Respondent is asking this Court to ignore the specific language (which refutes Respondent’s assertion) of the very notice of appeal it seeks to have dismissed.

S.C. 17, 23, 431 S.E.2d 587, 590 (1983); *see also* Petition for Writ of Supersedeas at pp. 11-17 (more fully discussing how the Circuit Court’s order affects a mode of trial and is thus immediately appealable). *Rearick* is a double jeopardy case; it is not an appeal involving an order that affects a mode of trial to which an appellant is entitled by law. Consequently, it is not the controlling law in this appeal.

Respondent cites to *Rearick* for the proposition that “generally, a criminal defendant may not appeal until sentence is imposed.” Motion to Dismiss at p. 4. But Respondent ignores that S.C. Code Ann. § 14-3-330(2) is an exception to this general rule. *See Foggie* at 23; *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 92, 529 S.E.2d 11, 12 (2000); *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); and *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). It also ignores that *Rearick*’s appeal was not based on § 14-3-330 but on a purely constitutional argument. *See Rearick* at 397.

In point of fact, *Rearick*—although not the controlling law—highlights the very appealability analysis that *Foggie* and the other mode of trial cases follow. The *Rearick* court explicitly stated:

To appeal, a [criminal] defendant must be “aggrieved” by a decision that is statutorily classified as one that is appealable, which *generally* involves final judgment.

Rearick, at 398-399 (footnote omitted) (emphasis added). Appellant has been aggrieved by the Circuit Court’s order: he has been denied a proper transfer from Family Court to Circuit Court and adjudication in Family Court, both of which he is entitled to under law,³ and therefore has

³ The right to adjudication in Family Court is discussed at length in the Petition for Writ of Supersedeas, pp. 8-11. Appellant is a child pursuant to S.C. Code Ann. § 63-19-20(1) and Family Court has exclusive original jurisdiction over him pursuant to § 63-3-510. To remove (or transfer) a child from Family Court’s original jurisdiction, the transfer must be “proper” pursuant

been “injured in a legal sense.” *Id.* at note 9 (defining an aggrieved party as one “injured in a legal sense”) (internal citation omitted). Moreover, the decision of the Circuit Court that Appellant has appealed is “classified” by § 14-3-330(2) as an exception to the general rule Respondent is attempting to invoke. *Id.* at 399. *Rearick* is simply not the controlling law in this appeal.

Respondent’s argument fares no better with its reliance on *Lockhart*. This is not an appeal of Judge Kinlaw’s transfer order, for which *Lockhart* would be a relevant authority. Once again, the order being appealed is the Circuit Court’s order not the Family Court’s order. The issue on appeal is not the substantive question of whether Appellant was properly transferred (which was the question in *Lockhart, supra.*, at 160) but the procedural question of whether the Circuit Court must conduct the requested review of the transfer and the requested evaluation as to whether Appellant should continue to be prosecuted as an adult if there is new evidence establishing he should not be. Once again, this was addressed in the Petition for Writ of Supersedeas:

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.

Petition for Supersedeas at p. 3.

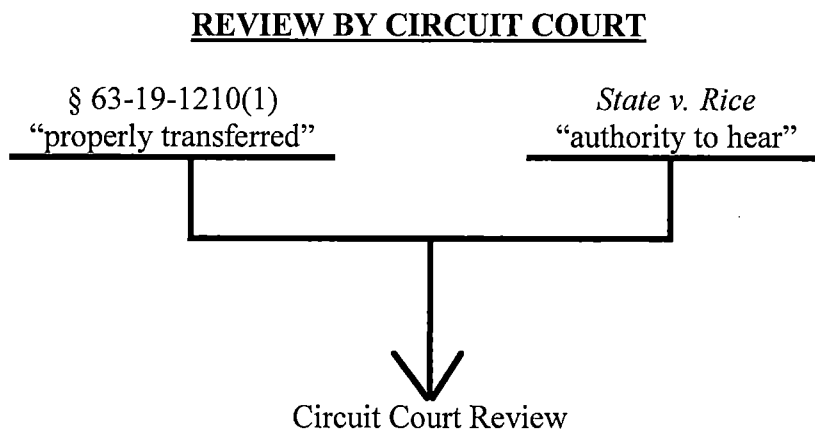
Respondent’s further citations to other criminal cases where the appellate courts have held that pre-trial decisions were interlocutory further miss the mark. *See* Motion to Dismiss at pp. 3-4. None of those cases are mode of trial appeals. The word “mode” does not even appear in those decisions. None of them address a right deemed substantial nor overturn or diminish the

to § 63-19-1210(1) and, thus, the Circuit Court must review the transfer as well as ensure prosecution as an adult continues to be proper. *See Kent v. United States*, 383 U.S. 541 (1966), and *State v. Pittman*, 373 S.C. 527 (2007).

cases cited above that hold an order depriving a mode of trial to which the law entitles a party in a litigation are final and immediately appealable because the order affects a substantial right under § 14-3-330.

Appellant has, from the beginning, been very specific about the relief he has sought in Circuit Court. It is clearly set forth in Appellant’s motion for review and remand filed on March 15, 2017, that he sought to have the Circuit Court issue an order remanding the case back to Family Court. *See* Exhibit 1 to Petition for Supersedeas. In his memorandum of law supporting the March 15th motion, Appellant clearly demonstrated the statutory and case law basis for the Circuit Court’s duty to determine whether Appellant was properly transferred for adult prosecution. On page 2 of that memorandum, Appellant set forth the following:

This Court [the Circuit 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 [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). This Court, therefore, must determine whether there are any impediments to its authority to hear [Appellant’s] case.

See Exhibit 2 to Petition for Supersedeas at p.2. Appellant has been clear in his requests that it is the Circuit Court he is asking to conduct a review and remand—not Family Court as Respondent mistakenly claims.

In every subsequent motion in Circuit Court seeking review and/or transfer of the case back to Family Court through the notice of appeal and petition for supersedeas relief it has been clear that Appellant has asked the Circuit Court to conduct a constitutionally and statutorily required review and remand. *See* Exhibits 4,7,8,9 and 10 to Petition for Supersedeas. There has been no request in Circuit Court for Family Court to do anything.

So, when Judge Verdin issued her order on November 7th denying Appellant’s motions, it was a denial of Appellant’s request by a Circuit Court judge for the Circuit Court to review whether Appellant was properly transferred to Circuit Court and, since he was not, for the court to issue an order transferring the case back to Family Court. The November 7th order does nothing more than deny Appellant’s request for Circuit Court to take the specific action Appellant asked—and the law requires—it to take. Consequently, Appellant’s notice of appeal, which appeals only the November 7th order issued by Circuit Court, is not an appeal of the Family Court’s transfer order but an appeal of a Circuit Court order.

In light of Respondent’s mistaken claim that the appeal is of the Family Court’s transfer order, the motion to dismiss should be denied for this mistake alone. Nonetheless, Respondent’s motion should also be denied because the appeal is not interlocutory.

II.

The appeal is not interlocutory.

The order being appealed is the Circuit Court's November 7th order denying Appellant's motion for the Circuit Court to determine whether Appellant was properly transferred for adult prosecution by Family Court and whether, in light of new evidence, he should remain in adult court. Because the law entitles Appellant to adjudication in Family Court, the November 7th Circuit Court order denying him the ability to secure that right is an order affecting a mode of trial to which Appellant is lawfully entitled. Such orders are immediately appealable.

Appellant discussed the immediate appealability of the November 7th order at length in his Petition for Writ of Supersedeas. *See* Petition for Supersedeas at pp. 8-17. In short, adjudication in Family Court is a specific mode of trial to which Appellant is entitled by statute and constitutional provision because the law defines him as a child. *See* note 3 above; *see also* Petition for Supersedeas at pp.8-11 and Exhibits 2 and 10. The Circuit Court has issued a ruling that affects a mode of trial Appellant is entitled to by law and, therefore, the order denying that right is not only immediately appealable under § 14-3-330(2) but it must be immediately appealed in order to preserve review after final judgment. *See* Petition for Supersedeas at pp. 11-18.

Respondent has mistakenly claimed the appeal is interlocutory but has not established that it is interlocutory either in fact or by law. The motion to dismiss the appeal as interlocutory should be denied.

III.

The transfer of a child for prosecution as an adult for the offense of murder is a unique transfer order that (1) affects a substantial right that is immediately appealable under § 14-3-330 and (2) is part of a limited category of cases subject to review.

Appellant's motion for review and remand included a request for remand based on the inability of the Circuit Court to provide Appellant with the proportionate individualized sentencing that *Miller v. Alabama*, 567 U.S. 460, and *Aiken v. Byars*, 410 S.C. 534, both hold the Eighth Amendment requires. See Exhibit 1 to Petition for Supersedeas at pp. 1-2. Judge Verdin erroneously denied this motion on the basis that the Circuit Court, in her view, did not have the authority to transfer the case to Family Court. See Exhibits 3 and 11 to Petition for Supersedeas. That ruling will irreparably harm Appellant by denying him a substantial right that he is entitled to under the Eighth Amendment. Since the ruling affects a substantial right, it is immediately appealable pursuant to § 14-3-330(2).

This case, moreover, is part of a very limited category of cases subject to review. It is a murder case, and therefore there is a thirty year mandatory minimum sentence. Unlike what we have with other offenses, the mandatory minimum for murder represents such a significant amount of time in the life of a child⁴ that the concerns and protections set forth in both *Miller* and *Aiken* are uniquely triggered. Not every transfer case raises the same concern that a thirty year mandatory minimum does; so not every case necessitates this type of review. Appellant's case, however, does necessitate this type of review and since the Circuit Court has denied the request to conduct that review, this Court must correct that error in order to prevent irreparable

⁴ There is available evidence in the form of mortality charts establishing that the life expectancy for a child entering a South Carolina prison at the age of seventeen is 38.3 years.

harm from befalling Appellant.

(a).

The Circuit Court’s ruling that it does not have the authority to transfer the case to Family Court affects Appellant’s substantial right to proportionate and individualized sentencing under *Miller v. Alabama* and *Aiken v. Byars* because the 30 year mandatory minimum sentence for murder cannot account for all of the factors of youth required by the Eighth Amendment when sentencing a child.

The thirty year mandatory minimum sentence prevents Appellant from receiving what he is entitled to under the Eighth Amendment: proportionate and individualized sentencing as a child. The case, therefore, must be transferred to Family Court so that the constitutionally required proportionate and individualized sentencing can take place. The Circuit Court, however, ruled it does not have the authority to make the required transfer. This ruling prevents the case from being transferred and, thus, constitutes an order affecting a substantial right guaranteed by the Eighth Amendment and is immediately appealable under § 14-3-330(2).⁵

⁵ The immediate appealability of a substantial right—such as a mode of trial to which a party is entitled by law—was discussed in the Petition for Writ of Supersedeas at pp. 15-17. The petition importantly discussed two cases where the supreme court found rulings were immediately appealable as affecting a substantial right. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), held an order disqualifying a party’s lawyer from the case was immediately appealable. In *Neeltec Enters. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012), the supreme court held that an order requiring the substitution of a defendant in a civil case was immediately appealable. Like *Hagood* and *Neeltec*, “the impact of the Circuit Court’s denial of transfer is to discontinue the action as it relates to transfer to Family Court.” Petition for Writ of Supersedeas at p. 16. And further:

“[o]nce 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

The Eighth Amendment and Article 1, § 15 of the South Carolina Constitution prohibit imposing the same mandatory minimum sentence on a child as is mandated for an adult. *Miller*, 567 U.S. at 471; *Aiken*, 410 S.C. at 543. The mandatory nature of the imposition is the constitutional problem. *See id.* What is required is a meaningful hearing.

The sentencing hearing Appellant will receive as a result of the Circuit Court's erroneous ruling will not be meaningful because the thirty year mandatory minimum does not permit the Circuit Court to give full consideration of Appellant's individual youthful characteristics. And, in particular, would irreparably harm him by not allowing for a proportionate individualized sentence of less than the mandatory minimum of thirty years.

S.C. Code § 16-3-20(A) states that “[a] person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life.” S.C. Code § 16-3-20(A). Because it was enacted long before *Miller* and *Aiken*, the statute does not differentiate between adults and children. Therefore, it requires the same mandatory minimum sentence for both classes of offenders. Under the statute, just like an adult, a child may never, regardless of the circumstances, receive a sentence less than thirty years of imprisonment. This mandatory sentencing scheme has not been updated to conform to current Eighth Amendment jurisprudence and thus runs contrary to the established constitutional maxim that children are constitutionally-different than adults for sentencing purposes. *Miller*, 567 U.S. at 471; *Aiken*, 410 S.C. at 543.

The current mandatory sentencing scheme for the crime of murder is inconsistent with *Miller* and *Aiken* because it erroneously places children and adults on equal footing for

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.

Writ of Supersedeas at pp. 16-17.

sentencing purposes. This sentencing scheme ignores the firmly established scientific and constitutional differences between juveniles and adults. *See Miller* and *Aiken*. Denying a child's right to have a court recognize these differences is substantial and, if not corrected, will irreparably harm Appellant at sentencing.

The mandatory minimum sentence in S.C. Code § 16-3-20(A), as applied to children, also violates the Eighth Amendment's requirement of individualized sentencing established in *Miller*. There are two strands of Eighth Amendment precedent relevant when sentencing children. The first, as discussed above, applies the Court's concerns for proportionate punishment of children. Applying the Eighth Amendment's proportionality principle, the Court instituted a "categorical ban on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470. The second has addressed mandatory sentences for adult offenders on various occasions. *See id.* at 480 (discussing *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2780 (1991) (upholding a mandatory sentence of life without parole for possessing a large quantity of cocaine); *id.* at 504 (discussing *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179 (2003) (upholding a mandatory sentence of 25 years to life for theft under California's three-strikes recidivist statute). Taken together, these two lines of cases establish the proposition that mandatory sentencing schemes permitted for adults are not permissible for juveniles.

Additionally, *Miller* established that the protections of individualized sentencing jurisprudence apply to juveniles in non-capital cases. *Id.* at 480. The Court also made clear that individualized sentencing for juveniles in adult court should "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 483. Consistent with that mandate, a sentencing court may not impose mandatory

imprisonment on a child without first accounting for how children are different as a class, the particular circumstances of the child and the child's offense, and how those differences counsel against irrevocably sentencing a child to a lifetime in prison. *See id.* at 475-477. Thus, *Miller* requires that children convicted of murder receive an individualized sentencing hearing designed to take into consideration the factors attendant to youth and the circumstances of the offense before fashioning an adequate sentence. *See id.* at 414 (suggesting that mandatory schemes for children that eliminate the sentencing court's discretion to impose a lesser and more appropriate punishment "run[] afoul of our cases' requirement of individualized sentencing"). But the Eighth Amendment also requires an individualized sentence to be carried out.

Mandatory minimum sentences, by their very nature, do not permit a sentencing court to implement the type of individualized (or proportionate) sentencing contemplated in *Miller* and *Aiken*. The arbitrary thirty year minimum ties the sentencing court's hands by eliminating the exercise of discretion in determining the appropriate sentence. Under the sentencing scheme in § 16-3-20(A), Appellant will receive the same sentence of thirty years to life in prison as an adult, regardless of mitigating evidence and the application of the sentencing factors required by *Miller* and *Aiken*. The mandatory minimum sentencing provision vitiates the court's ability to craft a sentence less than the mandatory minimum if it deems such a sentence appropriate. While such a sentencing regime may have been permissible in the pre-*Miller* era, it cannot be squared with the Eighth Amendment rules now governing sentencing children.

VI.

In the alternative to granting this motion, the question of appealability should be briefed and argued in the appeal, as was done in *Rearick*.

Given the serious and substantial nature of the rights at risk for loss in this case by Appellant—who remains an autistic juvenile being prosecuted as an adult—this Court should

follow the procedure used in *Rearick* and deny Respondent's motion to dismiss the appeal and direct the parties to brief and argue the issue of appealability.

In *Rearick*, the State, as respondent, filed a motion to dismiss the criminal defendant's appeal as interlocutory. 417 S.C. at 395. The supreme court denied the motion to dismiss and ordered that "the parties shall argue the issue of appealability in their briefs." *State v. Rearick*, S.C. Sup. Ct. Order dated October 8, 2015.

This appeal raises issues of first impression that, like *Rearick*, affect substantial constitutional rights. The failure of the trial court to consider and issue proper rulings on such substantial issues is, itself, detrimental to the protection of Appellant's constitutional rights. More importantly, granting the motion to dismiss will, at this time, prevent full briefing, argument, and consideration of this substantial and important legal issue.

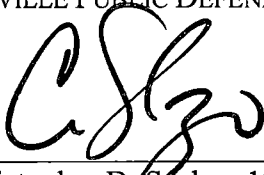
In light of this circumstance, a denial of the motion to dismiss with a firm but reasonably short deadline for briefing would be appropriate.

CONCLUSION

WHEREFORE, for the foregoing reasons this Court should deny Respondent's Motion to Dismiss the Notice of Appeal as Interlocutory.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: 

Christopher D. Scalzo, 13th Circuit Public Defender
S.C. Bar No. 70522
Greenville County Public Defender Office
Greenville County Courthouse
305 East North Street, Suite 123
Greenville, SC 29601

(864) 467-8522
cscalzo@greenvillecounty.org

Michael Martinez, Assistant Public Defender
S.C. Bar No. 101800
Greenville County Public Defender Office
Greenville County Courthouse
305 East North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
mmartinez@greenvillecounty.org

ATTORNEYS FOR APPELLANT

Date: December 17, 2018

THE STATE OF SOUTH CAROLINA
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DEC 21 2018

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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The State of South Carolina,..... Respondent.

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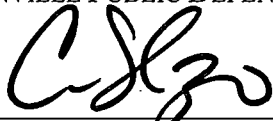
I certify that I have served the Appellant's Return to Respondent's Motion to Dismiss Notice of Appeal as Interlocutory on Respondent by depositing a copy of the same via U.S. mail, first class, postage prepaid to the counsel of record listed below on December 17, 2018.

Sherrie Butterbaugh, Esq.,
Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

W. Walter Wilkins, Esq.
13th Circuit Solicitor's Office
Greenville County Courthouse
305 East North Street, Suite 325
Greenville, SC 29601

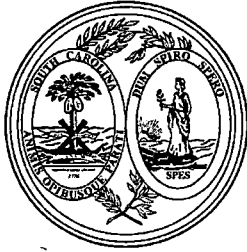
Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: 

Christopher D. Scalzo, Esq.
13th Circuit Public Defender's Office
305 East North Street
Greenville, SC 29601
(864) 467-8522
ATTORNEY FOR APPELLANT

Date: December 17, 2018



13TH JUDICIAL CIRCUIT PUBLIC DEFENDER

CHRISTOPHER D. SCALZO, CIRCUIT PUBLIC DEFENDER

**Greenville County
Public Defender Office**
Greenville County Courthouse
305 East North Street, Suite 123
Greenville, SC 29601
Tel. (864) 467-8522
Fax. (864) 467-8521

**Pickens County
Public Defender Office**
Pickens County Courthouse
214 East Main Street, B-240
Pickens, South Carolina 29671
Tel. (864) 898-5577
Fax (864) 898-5579

December 17, 2018

VIA REGULAR MAIL

The Honorable Jenny Abbott Kitchings
Clerk, The S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *State v. Miguel Angel Cano*
Appeal from Greenville County
Appellate Case No. 2018-002077

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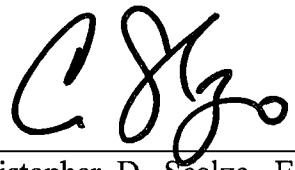
Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Appellant's Return to Respondent's Motion to Dismiss Notice of Appeal as Interlocutory in the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 
Christopher D. Scalzo, Esq.
Attorney for Defendant
305 E. North Street, Suite 123
Greenville, SC 29601

Enclosure(s)

cc: Sherrie Butterbaugh, Assistant Attorney General
W. Walter Wilkins, 13th Circuit Solicitor



13th Circuit Public Defender
Greenville County Courthouse
305 E. North Street, Suite 123
Greenville, SC 29601

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The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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