

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Letitia H. Verdin, Circuit Court Judge**

THE STATE OF SOUTH CAROLINA

v.

MIGUEL A. CANO

RECEIVED
DEC 27 2018
Respondent
SC Court of Appeals

Petitioner

Appellate Case No. 2018-002077

REPLY TO RETURN TO DISMISS APPEAL AS INTERLOCUTORY

Respondent submits petitioner's appeal of circuit court orders denying his motions to review and remand a contested waiver of jurisdiction from Family Court and transfer his case back to Family Court remain interlocutory despite his arguments to the contrary.

In support, respondent would respectfully show this Court:

1. Petitioner's mode of trial argument is inconsistent with his position in the return to respondent's motion to dismiss the appeal that he is not appealing the underlying waiver hearing and order transferring jurisdiction of petitioner from Family Court to General Sessions. The nature of the argument makes clear petitioner is seeking the very mode of trial he insists he is not appealing—i.e. adjudication in Family Court rather than General Sessions. Accordingly, for the reasons set forth in the motion to dismiss, petitioner's appeal is interlocutory and should be dismissed.

2. Any reliance by petitioner on *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny is misplaced and further underscores respondent's reasoning as to why the appeal must be dismissed as interlocutory. Reliance on such cases is premature as the cases refer to a sentencing proceeding following conviction in adult court. Petitioner has not been convicted so that a consideration of the constitutionality of any sentence, petitioner's youth and its attendant circumstances, and other factors must be undertaken. *See Miller*, 567 U.S. at 477-78) (listing the factors a sentencing court must consider including: (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks;" (2) the family and home environment of the offender; (3) the circumstances of the homicide, including the extent of participation in the conduct and how peer pressure may have affected him; (4) ability to deal with police officers or prosecutors, or capacity to assist his own attorneys; and, (5) the "possibility of rehabilitation"). Accordingly, respondent submits there are no constitutionality concerns implicated here as petitioner has not been sentenced, the appeal is premature and interlocutory, and the appeal should be dismissed.

3. Finally, petitioner seeks briefing and argues this is a matter of first impression. As discussed, that is not the case. Jurisdiction of petitioner's case was transferred from Family Court to General Sessions. Petitioner appealed that decision in front of Judge Letitia H. Verdin and, following an adverse decision, he seeks another appeal in this Court. Simply, "a family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal." *State v. Lockhart*, 275 S.C. 160, 161, 267 S.E.2d 720, 720 (1980). Petitioner cites to *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016), to argue his case implicates substantial constitutional rights. However, as explained by the *Rearick* Court, while the appellate rules "may seem harsh, a defendant is neither denied a

future appeal nor other remedies" when the courts dismiss appeals as interlocutory. 417 S.C. at 405, 790 S.E.2d at 199. Accordingly, *Rearick* affords petitioner no relief as it establishes a rule which should likewise be followed in this case. Petitioner's appeal should be dismissed as premature and interlocutory.

WHEREFORE, for the reasons set forth in this response and in the motion to dismiss the appeal as interlocutory, respondent requests this Court dismiss the notice of appeal filed in this case based on clear precedent.

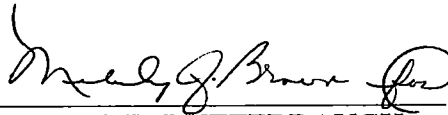
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
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Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

December 27, 2018.

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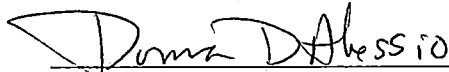
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PROOF OF SERVICE

I, Donna D'Alessio, an employee of Respondent, certify that I have served the within Reply to Return to Dismiss Appeal as Interlocutory on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Christopher D. Scalzo, Esq. and Michael G. Martinez, Esq., Greenville County Courthouse, 305 E. North Street, Suite 123, Greenville, South Carolina 29601, and to Robert Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

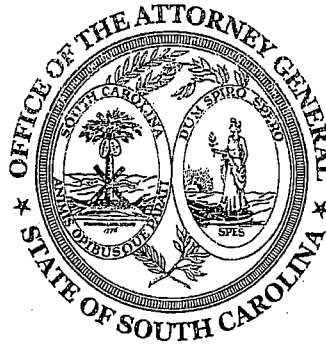
I further certify that all parties required by Rule to be served have been served.

This 27th day of December, 2018.



Donna D'Alessio, Legal Assistant to
SHERRIE BUTTERBAUGH
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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

December 27, 2018

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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Respondent's Reply to Return to Dismiss Appeal as Interlocutory, together with Proof of Service in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,

Sherrie Butterbaugh
Assistant Attorney General

SB:dmd
Enclosures

cc: Christopher D. Scalzo, Esq. (w/two copies of encls.)
Michael G. Martinez, Esq. (w/two copies of encls.)
Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor, 13th Judicial Circuit (w/copies of encls.)
Trisha Allen, Victim Advocacy Division (w/copies of encls.)