THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

HONORABLE LETITIA H. VERDIN, CIRCUIT COURT JUDGE

Appellate Case No(s).: 2018-002077

The State, ...Respondent,

v.

Miguel Angel Cano, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions for rehearing of the January 20, 2019 order dismissing his appeal (the "Order") because this Court has overlooked the full implications of the fact that the lower court order being appealed is not the Family Court's preliminary order transferring jurisdiction but the Circuit Court's final order denying Appellant his right to be transferred back to Family Court if he was not properly transferred by Family Court in the first place. Further, this Court has overlooked that the transfer statute, section 63-19-1210 of the South Carolina Code (Supp. 2018), defines these orders as separate and distinct from each other. Consequently, this Court misapprehended the fact that section 1210(1) makes the required ruling from Circuit Court on whether a juvenile was properly transferred for adult criminal prosecution the final order affecting a mode of trial from which

Appellant has properly filed an appeal. Lastly, this Court misapprehended the holding in *State v. Lockhart*, 275 S.C. 160, 267 S.E.2d 720 (1980), as being a broad holding that restricts the appeal of all rulings regarding the transfer of a child for criminal prosecution from Family Court to Circuit Court. Instead, *Lockhart* is a narrow ruling concerning only the direct appeal of the Family Court's transfer order to an appellate court. It does not hold that a Circuit Court order (or anything other than the Family Court's transfer order) is interlocutory. This misapprehension creates an untenable conflict between sections 63-19-1210 (1) and (6) that is neither logical nor intended by the plain meaning of the statute.

The Order states that Appellant appealed the Circuit Court order. This Court, however, did not rule on the substance of the Circuit Court order. Instead, it issued a ruling based on the Family Court's order. The Order states that Appellant asserts the basis for the Circuit Court order being immediately appealable is that "the family court's waiver of jurisdiction affects a mode of trial to which he is entitled." Order at 1 (emphasis added). That is not the basis Appellant asserts made the Circuit Court order immediately appealable. Neither is it what he asserted in his Notice of Appeal nor what he asserted in his supersedeas motion, where he states that the "Circuit Court's ruling erroneously denies Appellant" the lawful mode of trial to which he is entitled. Motion for Supersedeas at 6 (emphasis added). In ruling this way, this Court misapprehended relationship between the two orders. They are not functionally equivalent to each other but separate and distinct orders as defined by statute.

Appellant did not argue in his supersedeas motion that the order affecting a mode of trial is the Family Court's transfer order, as the Order incorrectly states. Order at 1. Consequently, the Order mistakenly equalizes separate and distinct rulings issued by different courts. Appellant has only appealed one order: the Circuit Court's. The full implication of that fact to this appeal is that

the immediate appealability of the Circuit Court order is not determined by the affect the Family Court's order has on a mode of trial, which is what the Order concluded. *See* Order at 1 and note 2. The Circuit Court order itself affects a mode of trial to which Appellant is entitled by statute, and that is why that order is immediately appealable. The Family Court's transfer order is not the basis for the immediate appealability of the Circuit Court order because they are different orders issued at different stages in the litigation as required by the transfer statute.

The distinct nature of these orders, as well as their timing in the transfer procedure, is statutorily defined. The transfer statute creates a specific procedure for transferring children between courts for criminal prosecution. Section 1210(6) creates a process for transferring a child charged with murder. It requires a petition be filed and then a transfer hearing held before the Family Court. *See* S.C. Code § 63-19-1210(6) (Supp. 2018). After this statutorily prescribed procedure takes place in Family Court, section 1210(1) is triggered and the Circuit Court becomes the next court to take action on the transfer issue. Subsection (1) directs that the Circuit Court has a "duty" to determine whether the child was "properly" transferred; if the child was not properly transferred, Circuit Court must transfer the child back to Family Court. *Id.* at (1). Subsection 1210(1), therefore, renders the Family Court transfer order issued under section 1210(6) a preliminary order regarding transfer. Circuit Court is directed under section 1210(1) to issue the final ruling on the juvenile's transfer. That is what Appellant moved Circuit Court to do.

Circuit Court erroneously denied Appellant's motion and thus its order became the final order actually abridging Appellant's mode of trial right. Accordingly, the Family Court order, while affecting a mode of trial, is not the order abridging Appellant's mode of trial right because

it is by definition the preliminary ruling on transfer. That is why it is not an immediately appealable order and not the order Appellant appealed.

The Circuit Court order, however, is immediately appealable because section 1210(1) sets the timing of the order to come after transfer from Family Court and thus defines the Circuit Court order as the final, ultimate trial level ruling on mode of trial. Because the order actually abridging Appellant's mode of trial right is not the Family Court transfer order but the Circuit Court's order denying him the review and relief he is entitled to under section 1210(1)—the Circuit Court order is immediately appealable.

Remove section 1210(1) from the transfer statute and the Family Court transfer order would be the final ruling affecting a mode of trial. Since section 1210(1) is clearly included in the transfer statute, it cannot be ignored and must be followed. This means that the reasoning in footnote 2 of the Order is flawed. The fact that the Circuit Court's order is immediately appealable because it affects a mode of trial does not make the Family Court's transfer order also immediately appealable. *See* Order at note 2. And the interlocutory nature of the Family Court order also does not affect the immediate appealability of the Circuit Court order. They are two different orders with two different sets of legal requirements to be issued at two distinct time periods in the litigation. The Family Court order is a preliminary order concerning transfer of jurisdiction pursuant to subsection (6); that order is not the same as the final order issued pursuant to subsection (1) by Circuit Court.

Timing is everything. The law does not permit all orders affecting a mode of trial to be immediately appealed. Orders affecting a mode of trial to which a party is entitled by statute must be the final, actual order abridging the right before they can be immediately appealed. In the cases cited in Appellant's supersedeas motion, the orders affecting a mode of trial were the

final rulings on that issue. *See* Motion for Supersedeas at 11-17 (discussing the case law concerning mode of trial). If those orders were not final, then they would neither have effectively terminated the actions (one of the rationales provided in the cases and in § 14-3-330 (2)) nor would they truly have abridged the right to a specific mode of trial, since it would have taken a subsequent ruling by those trial courts to complete the actual denial of the mode of trial. This was discussed in Appellant's supersedeas motion where he showed that *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), and *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), both require there to be a real threat to abridge a mode of trial right. *See* Motion for Supersedeas at 13-15. The facts of *Fulmer* are instructive. In *Fulmer*, the claimed loss of the right to a mode of trial was not truly in jeopardy because the statutory right to a trial in probate court "mooted" the issue of whether the order being appealed denied appellant a jury trial. 380 S.C. at 466.

Compare *Fulmer* to the other cases cited in that discussion. In those cases, the trial judges ruled on specific modes of trial either in the midst of trial or just before trial began, thereby leaving no doubt that no other rulings as to mode of trial would be coming. *See* Motion for Supersedeas at 11-17. This is why the Family Court transfer order is not immediately appealable; it does not discontinue the action nor does it finally decide—and therefore actually abridge—the mode of trial right. But the Circuit Court order does in fact finally decide and actually abridge Appellant's right to adjudication in Family Court, which is why it is immediately appealable.

As was discussed above, this Court overlooked the fact that, under the law, Circuit Court review of the Family Court's order transferring jurisdiction is not the equivalent (functional or otherwise) of an appeal of the Family Court's transfer order. That error is related to an additional misapprehension of the scope of the holding in *Lockhart,* which led to the mistaken conclusion that the immediate appealability of the Circuit Court's ruling is affected or controlled by the

interlocutory nature of the Family Court's order waiving jurisdiction so held by *Lockhart*. *See* Order at 1 and note 2. But *Lockhart* is not the controlling law for all rulings concerning or related to transfer from Family Court. Despite the limited holding in *Lockhart*, this Court applied it in an overly broad manner.

In support of the conclusion that "the transfer of jurisdiction over a criminal matter from the family court to the circuit is not immediately appealable," the Order quotes *Lockhart* as holding:

> a family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal.

Order at 1 (citing *Lockhart*, 275 S.C. at 161). But this quote is incomplete; it overlooks the full holding of *Lockhart* by leaving out three additional words: "to this Court." 275 S.C. at 161. Those three words are crucial to the full holding of the case because they make all the difference in determining whether (and to what degree) *Lockhart* controls the immediate appealablity of the Circuit Court's order.

Adding the phrase "to this Court" narrows the ruling in *Lockhart*. Rather than being the overly broad ruling that appeal of any ruling related to a Family Court order transferring jurisdiction in a criminal matter is interlocutory—as this Court used it in the Order—this phrase in *Lockhart* limits as interlocutory a direct appeal of the merits of a transfer order issued by Family Court when that appeal is made to an appellate court. *Id. Lockhart* says nothing about review by any other court; it is concerned only with a direct appeal from Family Court to an appellate court.

This distinction is neither minor nor inconsequential. The Circuit Court ruling in this case denied Appellant his right to litigate whether he was properly transferred by Family Court, and

that denial of a statutory right is all that he has appealed. *See* Notice of Appeal and Motion for Supersedeas. In denying Appellant the ability to litigate that issue, the Circuit Court ruling further denied him two indispensable things. First, it denied him his statutory right under section 1210(1) to be adjudicated in Family Court if he was not properly transferred to Circuit Court in the first place. This, as discussed above, is the order actually abridging Appellant's mode of trial right because of the requirements of § 1210 (1). That alone requires an immediate appeal to secure a remedy. *See* Motion for Supersedeas at 11-17 (discussing the need to immediately appeal an order affecting a mode of trial right or the issue is not preserved for appellate review after final judgment). A second and equally important consequence of the Circuit Court's erroneous ruling is that when no hearing takes place there is no ruling to appeal. The Circuit Court's ruling denied Appellant his mode of trial right and it denied him the ability to preserve that denial for appellate review.

Additionally, if he does not immediately appeal, Appellant will have lost his right to be adjudicated in Family Court now as opposed to after final judgment and appeal. This is a crucial and legally significant loss similar to what happened in *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). In that case the appellant was denied her right to a jury trial and also prevented from immediately appealing because the trial court denied the appellant's request for a continuance so she could immediately appeal. *Id.* In holding that appellant had preserved what would have otherwise been an unpreserved issue for appeal, the court relied on appellant's inability to immediately file the appeal. *Id.* 676. The court also highlighted that the injury she suffered as a result of her inability to immediately appeal was real and legally relevant to the consideration of the appealability of the order. *Id.* The court noted that once the case was tried non-jury with no opportunity to immediately appeal, appellant's jury trial right "had already been

forfeited." *Id.* Had Helen, the appellant, not been forced directly into trial, she would have been required to file an immediate appeal to preserve the issue for review. Appellant is not quite in Helen's predicament but he is close. Although he has not yet been forced to trial, he can still be forced to proceed to trial before appellate relief can be granted. So, his appeal must immediately be heard and his motion for supersedeas granted to protect his rights and preserve the issue for later review.

In addition to what was overlooked by this Court concerning the immediate appealability of the Circuit Court's order, the Court's misapprehending of the holding in *Lockhart* as restricting any decision concerning transfer of a child for criminal prosecution creates an unresolvable tension between subsections (1) and (6) of the transfer statute. First, and most obvious, *Lockhart* could not stand for that broad of a rule given that subsection (6) specifically allows for appellate review by Circuit Court if the Family Court denies the petition for transfer.[1] *See* S.C. Code § 63-19-1210 (6). But more importantly, such a broad rule is at odds with the direct language of subsection (1), which contains an explicit directive that the Circuit Court determine whether transfer was properly made by Family Court. *Id.* at (6). A rule that hermetically seals a waiver order issued under section 1210(6) from the review required under section 1210(1) creates an internal inconsistency in the transfer statute that is neither logical nor intended by the plain language of the statute. The transfer statute compels a specific procedure. The Circuit Court order prematurely stopped that procedure and thereby injured Appellant in a legal sense that can only be remedied through an immediate appeal.

[1] This also highlights another inconsistency in the Court's analysis. Allowing the petitioner in Family Court to have the Circuit Court review the denial of a petition pursuant to section 1210(6) but not allowing the review pursuant to section 1210(1) creates a process of selective enforcement of the transfer statute. That too is neither logical nor intended by the plain meaning of the statute.

In light of these overlooked facts and misapprehensions of the law, Appellant respectfully submits that this Court should grant this Petition for Rehearing and deny Respondent's motion to dismiss the appeal.

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: February 14, 2019

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

February 4, 2019

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

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Appellant's Petition for Rehearing 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