

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 13 2019

SC Court of Appeals

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

THE STATE,..... Respondent,

v.

MIGUEL ANGEL CANO,.....Petitioner.

Appellate Case No. 2018-002077

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 12, 2019.

QUESTION PRESENTED

This Court held in *State v. Lockhart*, 275 S.C. 160, 267 S.E.2d 720 (1980) that “a family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal to [the Supreme] Court.” *Id.* at 161. The questions presented are:

1. Did the Court of Appeals err in relying on *Lockhart* to dismiss Petitioner’s appeal as interlocutory?
2. Did the Circuit Court err in relying on *Lockhart* to deny Petitioner’s request for Circuit Court to review his transfer from and remand back to Family Court where case law, statute, and constitutional provision confer to Circuit Court the duty to review and the authority to remand?
3. Is the Circuit Court’s ruling immediately appealable?

STATEMENT OF THE CASE

Petitioner's case is procedurally uncommon. His efforts to properly and fully litigate a lawfully required review of a trial level issue—his erroneous transfer and continued prosecution as an adult in violation of the law—have been stopped. They were stopped first by the trial court and now by the Court of Appeals. The issue in this case is whether the holding in *Lockhart* can be extended to apply to review of a Family Court's transfer order by a trial court at the trial stage; and that this rule applies regardless of judicial error by the Family Court, insufficiency of evidence in the transfer order, or acquisition of new evidence establishing adult prosecution is no longer proper under the law.

Family Court Procedural History

Petitioner is alleged to have stabbed and killed his mother at their home in Greenville County on August 31, 2015. He was thirteen years old, and suffering the manifestations of an undiagnosed autism disorder and undiagnosed depression. He and his family did not learn of either diagnosis until after his evaluation for transfer to adult court.

On September 1, 2015, Petitioner was found by a Greenville County Sheriff's Deputy standing in a roadway staring up at a Sheriff's helicopter. He was arrested without incident and charged with murder.

A petition to waive jurisdiction to General Sessions was filed on September 18, 2015. Petitioner filed a written motion on September 22, 2016 seeking to dismiss the State's motion to waive jurisdiction to General Sessions.

On November 1 and 2, 2016, the Honorable Alex Kinlaw, Jr., held a hearing in Family Court on the State's motion to transfer jurisdiction. The parties presented evidence, testimony, and arguments on the issue of transferring jurisdiction to General Sessions.

Judge Kinlaw issued a written order on January 30, 2017 granting the State's motion and ordering Petitioner to be transferred 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.

Appellant filed a motion to stay the order transferring jurisdiction on February 3, 2017. A joint motion to stay and reconsider the waiver order was filed on February 9, 2017. Among other reasons cited in his motions, Petitioner discussed judicial error and insufficiency of evidence. Judge Kinlaw denied Petitioner's motions without a hearing on March 6, 2017.

Circuit Court Procedural History

On March 15, 2017, Petitioner filed a motion in Circuit Court asking for review of the transfer order and remand of the case back to Family Court; he also filed a Memorandum of Law in Support of His Motion for Review and Remand to Family Court.¹

The State filed a response on April 28, 2017, arguing that *Lockhart* stood for the proposition that a Family Court order transferring jurisdiction was an interlocutory order that could not be reviewed by any court until after sentencing in Circuit Court.

On May 24, 2017, the Honorable Letitia H. Verdin, Circuit Court Judge, issued an order denying Petitioner's motion for review and remand without a hearing. That order was included as Exhibit 3 to the Supersedeas Petition. Judge Verdin adopted the State's reasoning and ruled that, pursuant to *Lockhart*, the Circuit Court did not have the authority to review the transfer of jurisdiction.

¹ The motion for review and remand was included as Exhibit 1 to the Petition for Writ of Supersedeas to Stay Trial Pending Appeal (the "Supersedeas Petition") filed with Petitioner's notice of appeal to the Court of Appeals; the memorandum of law was included as Exhibit 2.

On June 5, 2017, Petitioner filed a Motion to Reconsider Order Denying Defendant's Motion for Review and Remand to Family Court.² Included in this motion was Petitioner's request for hearings on both his original motion and the motion to reconsider, arguing that both hearings had been denied to him in violation of his right to due process. The primary basis for reconsideration was that Petitioner 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.

On June 21, 2017, Judge Verdin issued an order denying Petitioner's request for a hearing on his motions.³ Judge Verdin, however, directed that "the parties are ordered to find a mutually agreeable time" for Petitioner to proffer evidence in support of his motions.

While waiting for the proffer hearing to be scheduled, Petitioner was arraigned by the Honorable W. Jeffrey Young, Circuit Court Judge, on July 25, 2017. Judge Young issued a written order ruling that, despite Petitioner's objection to being arraigned in General Sessions Court for the charge of murder, Petitioner had been properly arraigned.⁴

While continuing to wait for the proffer hearing to be scheduled, Petitioner underwent further psychological testing. The testing comprised of two separate psychological evaluations that were completed on July 19, 2018, and August 6, 2018. These tests were relevant to two areas of the on-going litigation. The results of the tests (1) further supported Petitioner's motions for review and remand back to Family Court and (2) provided an independent basis for transferring Petitioner back to Family Court.

² Exhibit 4 to the Supersedeas Petition.

³ Exhibit 5 to the Supersedeas Petition.

⁴ Exhibit 6 to the Supersedeas Petition.

On August 7, 2018, Petitioner provided the testing results to the State via letter and also filed a Motion to Transfer to Family Court.⁵ This motion was based on the new psychological testing evidence having created a separate basis for remand back to Family Court. Petitioner notified the Circuit Court that he had a constitutional right to be adjudicated in Family Court based on this new evidence and that he needed a hearing in Circuit Court to protect his rights.

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

On September 4, 2018, Petitioner filed a Motion to Reconsider Order Denying Defendant's Motion for Review and Remand to Family Court. He also filed a 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 of the trial via petition for supersedeas. Lastly, Petitioner filed his response to the August 24th proffer hearing in the form of a Memorandum In Support of Motion to Transfer to Family Court. These pleadings were included as Exhibits 8, 9, and 10 to the Supersedeas Petition.

On November 7, 2018, the Greenville County Clerk of Court filed an Order Denying Motion to Reconsider and Motion to Transfer. It was signed by Judge Verdin on November 5, 2018.⁶ A copy of the order was not provided directly to undersigned counsel. However,

⁵ Exhibit 7 to the Supersedeas Petition.

⁶ Exhibit 11 to the Supersedeas Petition.

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.

Court of Appeals Procedural History

Petitioner filed a Notice of Appeal and a Petition for Writ of Supersedeas to Stay Trial Pending Appeal on November 26, 2018, stating in the notice that the appeal had been filed pursuant to S.C. Code § 14-3-330.

The State filed a Return to Petition for Supersedeas on December 6, 2018, in which it argued that the writ could be held in abeyance or, in the alternative, it should be denied because the appeal was interlocutory under *Lockhart*.

On the same day, the State filed its Motion to Dismiss Notice of Appeal as Interlocutory. In this motion, the State's primary argument was that *Lockhart* stood for the proposition that no order related to transfer of jurisdiction could be reviewed until a sentence was imposed because it was interlocutory. *See* Respondent's Motion to Dismiss at p. 3. The State focused its analysis on the fact that there was "no final judgment or sentence to appeal" from in this case. *Id.* at p. 4. It concluded that Petitioner had appealed the "waiver hearing." *Id.* It, thus, characterized the order being appealed by Petitioner as the Family Court's transfer order.

On December 21, 2018, Petitioner filed a Return to Respondent's Motion to Dismiss. Petitioner reiterated that the order being appealed was not the Family Court's waiver order but the Circuit Court's order denying the statutory review required under § 63-19-1210 (1). *See* Petitioner's Return at pp. 4-9. Petitioner further clarified that the Circuit Court order denying review under § 63-19-1210 (1) was immediately appealable under § 14-3-330 (2) because it was an order affecting a substantial right, *i.e.*, a mode of trial to which Petitioner was entitled by law. *Id.* at 5.

The Court of Appeals issued an order on January 10, 2019 granting the State's motion to dismiss the appeal:

Although Appellant advances a compelling argument—that the family court's waiver of jurisdiction affects a mode of trial to which he is entitled—this court is bound by the supreme court's determination that the transfer of jurisdiction over a criminal matter from family court to the circuit court is not immediately appealable. [note omitted] See *State v. Lockhart*, 275 S.C. 160, 161, 267 S.E.2d 720, 720 (1980) (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 pp. 1-2.

Petitioner filed a petition for rehearing with the Court of Appeals on February 14, 2019, in which he argued:

[T]his 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.

A response to the petition for rehearing was not requested by the Court of Appeals.

On April 12, 2019, a three-judge panel of the Court of Appeals issued an order denying Petitioner's request for a rehearing. This petition for writ certiorari follows.

ARGUMENT

1.

THE COURT OF APPEALS ERRED IN RELYING ON LOCKHART TO DISMISS PETITIONER'S APPEAL AS INTERLOCUTORY.

The Court of Appeals abused its discretion by applying an overly-broad and unsound reading of *Lockhart* to Petitioner's appeal of the Circuit Court's order denying him review of his transfer to General Sessions and remand back to Family Court. Petitioner did not appeal the Family Court transfer order itself. Nonetheless, the Court of Appeals erroneously applied the appellate review standard in *Lockhart* to Petitioner's appeal. That error will do grievous harm to Petitioner's ability to fully defend his case, adequately litigate relevant legal issues at trial, and protect his rights. The expansive reading of *Lockhart* used to dismiss Petitioner's appeal is contrary to case law, statute, and constitutional provision. This Court should grant this petition for certiorari and correct the Court of Appeals' error.

The Court of Appeals has erroneously expanded *Lockhart* to stand for the proposition that any review of a child's transfer from Family Court to Circuit Court must be done after sentencing. In other words, the Court of Appeals has expanded *Lockhart* to bar not only appellate review of a direct appeal of a transfer order but also of a trial court's refusal to hold a hearing and rule on a pending interlocutory issue during the interlocutory stage of the case. That is not the holding in *Lockhart*. What has been done is the equivalent of a trial court ruling it does not have the authority to hear a motion to suppress evidence and the Court of Appeals following that erroneous ruling up with a ruling that the denial of a motion to suppress is interlocutory and therefore cannot be immediately appealed. That is a dizzying display of "who's on first?" logic.

The harm Petitioner asked the Court of Appeals to remedy was not getting a review he is entitled to by law; he did not ask the Court of Appeals to correct any specific errors by the Family Court. Had he made that request, *Lockhart* would have properly barred his appeal.

The Rule in Lockhart

This Court held in *Lockhart* that “a family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal to this Court.” 275 S.C. at 161 (emphasis added). This is a clear, unambiguous holding.

Lockhart holds only that a direct appeal from Family Court to this Court is interlocutory. That’s it. *See id.* The holding by extension would apply to the Court of Appeals; but only if the order being appealed was the “family court order transferring jurisdiction.” *Id.* The rule in *Lockhart* is an appellate rule concerning the direct appeal to an appellate court of a Family Court transfer order. *Id.*

Petitioner has never filed a direct appeal of the Family Court’s transfer order. He appealed the Circuit Court’s order ruling that Circuit Court did not have the authority to review his transfer to General Sessions and that it did not have the power to remand him to Family Court. Petitioner asked a provisional court to review a provisional ruling. Such a request can no more be turned into a request for appellate review than the request of a trial court to review any pre-trial order can be considered an appeal.

The Court of Appeals incorrectly used interlocutory. All that interlocutory means is that a decision is not final; that it is provisional; it is temporary.⁷ *See 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). There

⁷ Interlocutory, *Black’s Law Dictionary* (6th Edition, 1990): “Provisional; temporary; not final.”

is nothing about the interlocutory nature of the transfer order that makes it untouchable during the pendency of the case. In fact, it is the status of the transfer order as interlocutory that makes it reviewable by the trial court during the trial phase. The transfer order cannot be interlocutory (*i.e.*, provisional, temporary, not final) and at the same time not reviewable by the trial court. That would make it not interlocutory; that would make it final and therefore immediately appealable on its merits. That would be the opposite of what *Lockhart* held.

The Court of Appeals (and the Circuit Court and the Respondent) have tacked onto *Lockhart's* holding that a transfer order can only be reviewed by an appellate court. *Lockhart* says nothing about the limits of review by any court other than an appellate court.

And why would it have? *Lockhart* was a direct appeal from Family Court to the Supreme Court. 275 S.C. at 160. The question was not which courts have the authority to review a transfer order; the question was whether this Court did. That is why the interlocutory nature of the transfer order was relevant and dispositive in *Lockhart*; and that is why it is not dispositive here.

The Court of Appeals' logic is unsound. It makes no sense to say that the reason a trial court order is not reviewable by a trial court at trial is because it is interlocutory. Saying that is saying nothing. Again, interlocutory simply means provisional; 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 Court of Appeals' ruling turns the law of appellate review on its head.⁸ This Court should grant certiorari to correct that error.

⁸ Appellate review is a very specific request; requiring a notice of appeal to be filed. Specific, unique rules govern an appellate review as opposed to review by a trial court of an interlocutory order, as this Court well knows. No notice of appeal has been filed in this case concerning the actual transfer order. The order cited in the notice of appeal in this case and provided to the Court of Appeals with that notice was the Circuit Court's denial of review and remand.

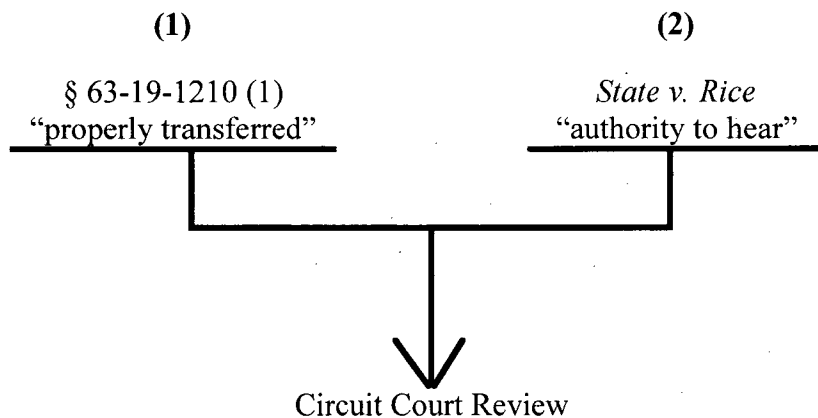
2.

THE CIRCUIT COURT ERRED IN RELYING ON LOCKHART TO DENY PETITIONER’S REQUEST FOR REVIEW OF HIS TRANSFER FROM AND REMAND BACK TO FAMILY COURT BECAUSE CASE LAW, STATUTE, AND CONSTITUTIONAL PROVISION CONFER TO CIRCUIT COURT THE DUTY TO REVIEW AND THE AUTHORITY TO REMAND.

The Circuit Court erroneously ruled that *Lockhart* bars review of the propriety of transfer and, therefore, the court lacks the authority to remand Petitioner back to Family Court. This was error because case law, statute, and constitutional provision all confer a duty on Circuit Court to conduct a review and grant the authority to remand.

To begin with, Circuit Court is a provisional court that has the inherent authority to review the transfer order, which, as discussed above, is a provisional order. How could it be otherwise? The transfer order is interlocutory per *Lockhart*. The Circuit Court is a trial court, whose rulings are interlocutory until final judgment.

Additionally, there are specific case law, statutory, and constitutional bases for review and remand. The case law and statutory bases, as outlined in the memorandum, are:



Under § 63-19-1210 (1) of the transfer statute, the trial court is required to determine 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 the

Circuit Court to conduct a substantive review of the transfer order and decide whether Family Court appropriately ordered Petitioner transferred to General Sessions for adult prosecution given the circumstances of his case and the provisions of § 63-19-1210. As Petitioner argued in his supersedeas petition:

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)...

According to Black’s Law Dictionary “proper” means “[t]hat which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient. ... See also Reasonable.”⁹ Black’s defines reasonable as “[f]air, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view.”¹⁰ 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*¹¹ 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.”¹²

⁹ Proper, *Black’s Law Dictionary* (6th Edition, 1990).

¹⁰ Reasonable, *Black’s Law Dictionary* (6th Edition, 1990).

¹¹ See *In the Interest of Kevin R.*, 409 S.C. 297, FN 14 (2014).

¹² Proper, *Black’s*, *supra*.

See Supersedeas Petition, Exhibit 2 at pp. 6-7.¹³

The case law basis for review and remand comes pursuant to *State v. Rice*, 401 S.C. 330, 386-387 (2013). *Rice* held “[j]udicial errors in the transfer from Family Court—such as insufficiencies in the evidence—are impediments to [Circuit] Court’s authority to hear [Petitioner’s] case.” Supersedeas Petition, Exhibit 2 at p. 12. In holding “[a]n erroneous order transferring a juvenile to general sessions court would be a judicial—not a jurisdictional error,” *Rice* at 333, this Court followed “a very specific line of reasoning from the Iowa Supreme Court in *State v. Yodprasit*, 564 N.W.2d 383 (Iowa 1997). [*Rice* at 333].” *Id.*

The reasoning the *Rice* court relied on comes from *Yodprasit*. *Rice* at 333.

- “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).

¹³ This issue is further discussed in the memorandum of law at pp. 3-12.

- “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).

See Supersedeas Petition, Exhibit 2 at p. 13.

Rice is the controlling law with regarding whether Circuit Court’s jurisdiction is not subject matter but jurisdiction based on the Circuit Court’s authority to hear a case. *Rice* at 386-387. Moreover, given *Rice*’s direct reliance on *Yodprasit*, any impediment to Circuit Court’s authority must be resolved by Circuit Court before a case may proceed. *Yodprasit* at 385.

This is consistent with how South Carolina case law. Again, from Petitioner’s Supersedeas Petition:

What these cases [*Austin v. State*, 352 SC 473 (2003), *Slocumb v. State*, 337 S.C. 46 (1999), and *State v. Graham*, 340 S.C. 352 (2000)] 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 cases 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.

See *id.* at p. 16.

Rice establishes that Circuit Court is required to review the transfer order and determine whether there are any judicial errors or other such “impediments” to its authority to hear Petitioner’s case.

There is also a constitutional basis for review and remand. 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.

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 Petitioner 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 Petitioner 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 Petitioner, 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 is described above 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).

The Circuit Court has a duty to protect this due process 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. Petitioner 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 Petitioner'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 deprived Petitioner of his constitutional and statutory liberty interest in being adjudicated as a child in Family Court without due process.

Given the case law, statutory, and constitutional bases for review and remand, the Circuit

clearly erred ruling it could neither review Petitioner's transfer not remand him. This Court should grant certiorari to correct this error and the Circuit Court's incorrect application of *Lockhart* to Petitioner's review and remand.

3.

THE CIRCUIT COURT'S RULING IS IMMEDIATELY APPEALABLE.

Adjudication in Family Court is the specific mode of trial to which Petitioner is entitled by statute and constitutional provision because the law defines him as a child. The Circuit Court's ruling erroneously denied Appellant his lawful right. Because that ruling affects a mode of trial to which the law entitles Petitioner, the ruling must be immediately appealed to prevent Petitioner from waiving review it after final judgment.

Petitioner was thirteen years old when he is alleged to have committed a murder. That means he is a child for purposes of criminal prosecution. S.C. Code Ann. § 63-19-20 (1). The Family Court is vested with exclusive original jurisdiction over a child. 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. *Id.*

To protect his right to be adjudicated as child, Petitioner twice moved the Circuit Court to transfer him back 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. 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. These requests were made to preserve a right he is entitled to by law.

As has already been discussed, the trial court denied both motions to transfer, ruling it did not have the authority to either review the transfer or remand Petitioner. The Circuit Court's ruling denied Appellant a specific mode of trial to which he is entitled by statute and constitutional provision, *i.e.*, adjudication in Family Court.

Denying a litigant a mode of trial to which the law entitles him is not an interlocutory order. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1983). However, it must be immediately appealed in order to preserve review 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)).

A Circuit Court order denying a statutory right to a mode of trial is immediately appealable because it is an order affecting a substantial right. *See* 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).

In ruling that it could neither review Petitioner's transfer nor remand him to Family Court, the Circuit Court denied Petitioner his statutory right to adjudication in Family Court. Clearly the Circuit Court's ruling affects a mode of trial to which he is lawfully entitled. But how is that different from Family Court's transfer order?

The Court of Appeals' answer was that it wasn't different:

[I]f the circuit court's order affected a mode of trial to which [Petitioner] was entitled...the family court's waiver of jurisdiction would also be immediately appealable because it also affected [Petitioner's] purported substantial right to be tried in the family court."

Court of Appeals' Order at note 2. This reasoning is not supported by the case law.

As Petitioner argued in his petition for rehearing to the Court of Appeals, "Timing is everything." Petition for Rehearing at p. 4.

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.

Id. at pp. 4-5.

This is an important point. It is not that the ruling affecting a mode of trial disposes of all issues in a case—the way a final judgment, *e.g.*, sentencing in a criminal case, does. The crucial event is the foreclosing of any other ability to obtain relief regarding the proper mode of trial from the trial court. This point was further developed in the Petition for Rehearing:

Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (2008), and *Salmonsens 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.

Petition for Rehearing at p. 5. Again, this is a crucial distinction made in the mode of trial cases.

Where the right is not "truly" (to use another word, "finally") in jeopardy like it was in *Fulmer*,

then the ruling cannot be immediately appealed. Why? Because as it pertains to the mode of trial, the ruling is provisional; not final; interlocutory.

However, when *Fulmer* is compared to the other mode of trial cases we see that:

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.

Petition for Rehearing at pp. 5.

The Circuit Court’s ruling finally decides—and abridges—Petitioner’s right to adjudication in Family Court because there is no other opportunity to seek relief at the trial level. When the Family Court transferred Petitioner, he could not immediately appeal based on the order affecting a mode of trial he was entitled to under the law because he was being sent to another trial court. Moreover, the transfer order was provisional and, thus, reviewable by the trial court he was being transferred to. Consequently, his right to adjudication in Family Court was not truly in jeopardy until the Circuit Court denied his request for review and remand.

Harm to Petitioner if Certiorari is Not Granted

If this Court does not grant certiorari and reinstitute Petitioner’s appeal, he will suffer tangible legal harm. To begin with, he will lose the ability to properly and fully preserve issues for appeal. Secondly, he will suffer real legal injury in the form of loss of his right to have the Circuit Court review his transfer and remand him for adjudication as child in Family Court.

An order affecting a mode of trial must immediately be appealed in order to preserve review after final judgment. *Foggie v. CSX Transp., Inc.*, 315 S.C. at 23; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. at 612; *Bateman v. Rouse*, 358 S.C. at 674; *Creed v. Stokes*, 285 S.C.

542; *Pelfrey v. Bank of Greer*, 270 S.C. at 693. This means Petitioner will have lost his right to review of the transfer order by Circuit Court before he is tried as an adult. Moreover, he will have had no ability to preserve that issue for review.

The actual loss of the review by Circuit Court is a real legal injury. Similarly, so is the loss of adjudication in Family Court. Both are similar to the circumstances of *Bateman v. Rouse*, *supra.*, where the appellant was denied her right to a jury trial and simultaneously prevented from filing an immediate appeal by the trial court. 358 S.C. at 667. This case was discussed by Petitioner in his rehearing petition:

In [*Bateman v. Rouse*] 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 [Rouse], the appellant, not been forced directly into trial, she would have been required to file an immediate appeal to preserve the issue for review.

This case is significant. It recognizes that despite an appellate court being able to provide some remedy after the suffering of the loss, that did not change the fact that the denial of a mode of trial was immediately appealable. *See id.* at 676. The law is not that a remedy could be fashioned, so there was no need to immediately appeal. To the contrary, the *Rouse* court recognized that the law still required an immediate appeal. *See id.*

Rouse recognized that the loss of the mode of trial suffered at the time was real and should have been immediately appealed; and that it was only the intervention of the trial court in preventing an immediate appeal that ultimately preserved the issue. *Id.* But unlike Helen Rouse, Petitioner has not been prevented from appealing. This only heightens the danger for him.

This is not a case in which the trial court substantively reviewed the transfer and then ruled against Petitioner. That would have constituted normal trial procedure; and would have made an immediate appeal truly interlocutory. The essence of the Court of Appeal's error—just like the trial court's error before it—was to use the interlocutory status of the transfer order as a barrier to completing the litigation while still in the interlocutory stage of the case.

The trial court did not allow Petitioner to litigate the issue of the constitutional propriety of continuing to try him as an adult despite there being new evidence calling into question Petitioner's prosecution as an adult and despite the fact that conviction as an adult of murder will result in the mandatory minimum sentence of thirty years preventing the trial judge from issuing a constitutionally required individualized sentence. This limitation on the ability to litigate relevant legal issues distorts the process of moving from trial to appeal, where the appellate review rules are being applied at the wrong stage of the litigation. The results will undermine the appellate stage of the litigation because Petitioner will have been prevented from fully presenting evidence and argument to the trial court and prevented from obtaining a ruling from which to appeal.

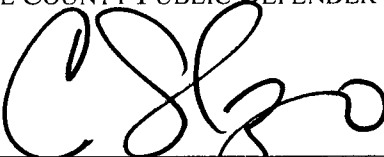
Similarly, the Court of Appeals has not given Petitioner the process he is due, which would have been hearing his appeal and granting or denying relief on the merits. Instead, the Court of Appeals has compounded the trial level error by denying Petitioner the ability to even seek a remedy for the trial court's error. Petitioner, without further relief by this Court, must go to trial without having the ability to fully litigate and preserve any errors on the issue of the propriety of him being tried as an adult when he is a child. He must do this even though case law, statute, and constitutional provision grant him the right to such a review at the trial level.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari. If this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the Court of Appeals, reinstitute the direct appeal, and remand for disposition of the direct appeal.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER OFFICE

By: 
Christopher D. Scalzo, 11th Circuit Public Defender
Michael Martinez, Assistant Public Defender

ATTORNEYS FOR PETITIONER

Date: May 12, 2019

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 13 2019

Certiorari to Greenville County

SC Court of Appeals

Letitia H. Verdin, Circuit Court Judge

THE STATE,..... Respondent,

v.

MIGUEL ANGEL CANO,.....Petitioner.

Appellate Case No. 2018-002077

PROOF OF SERVICE


I certify that I have served the Appellant's Petition for Rehearing 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 May 12, 2019.

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

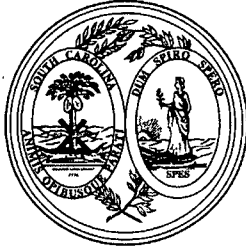
W. Walter Wilkins, Esq.
13th Circuit Solicitor's Office
Greenville County Courthouse
305 East North Street, Suite 325
Greenville, SC 29601

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: 
Christopher D. Scalzo, 13th Circuit Public Defender
Michael Martinez, Assistant Public Defender
Attorneys for Petitioner

Date: May 12, 2019



13TH JUDICIAL CIRCUIT PUBLIC DEFENDER

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May 12, 2019

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

RECEIVED

MAY 13 2019

SC Court of Appeals

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

Dear Ms. Kitchings:

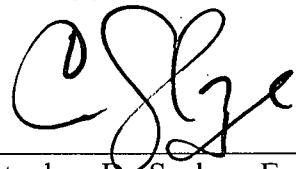
Enclosed please find a copy of the Petition for Writ of Certiorari to the Court of Appeals filed with the Supreme Court in the above-referenced matter and proof of service on the respondent.

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