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FILED IN OFFICE

MAY 09 2005

CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS OF GEORGIA

IN THE INTEREST OF R.T.,

)

A CHILD.

)

CASE NO. A05A1584

)

BRIEF OF APPELLANT

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PART I

COURSE OF PROCEEDINGS

On December 17, 2003, a delinquency petition was filed in the Juvenile Court of Chatham County alleging R.T. had committed two counts of Aggravated Child Molestation on July 11, 1993, and two counts of Child Molestation on July 11 and 12, 1993, respectively.¹ (R-6).

On February 24, 2004, the State filed a Motion to Transfer to Superior Court, alleging "[t]he interest of the child and community require that the [sic] Robert Tavormina be placed under legal restraint and the transfer be made." (R-8).

The hearing on the State's Motion to Transfer to Superior Court was heard on July 15, 2004.

The Order of Transfer to Superior Court was entered on March 11, 2005. (R-44).

¹ R.T. was born on July 13, 1976, such that all of the allegations are alleged to have occurred before his seventeenth birthday -- when he was a "child". O.C.G.A. § 15-11-2(2) (A) (1993; Ga. Pub. L. 1992, 1983).

The Notice of Appeal was timely filed on April 5, 2005. (R-1).

SUMMARY OF FACTS

R.T. was born on July 13, 1976. (R-6). R.T. is a 1994 high school graduate of Benedictine Military School (perhaps the most a prestigious private school in the Savannah area) and received his Bachelor of Arts degree in finance from Georgia Southern University in 1999. (T-82).

On January 28, 2000, R.T. enlisted in the United States Army and has reached the rank of Specialist E-4; R.T. is currently stationed at Fort Dietrick, Maryland. (T-82-83).

R.T. married on May 5, 2001, and he and his wife have a little girl. (T-82).

T.T., the daughter of Wendy Tavormina and adopted daughter of Chris Tavormina, R.T.'s brother (T-9-10), is the alleged victim. (R-4-5).

During the fifth grade T.T. began having problems, which "got worse and worse". (T-15-16; see also T-33). According to Wendy Tavormina, T.T. began showing "bad behavior, defiant behavior. It just elevated and got worse and worse . . ." (T-16). The behavior is "just severely bad" and T.T. has twice even tried to commit suicide. (T-16). Things had gotten so out of control to where T.T. no longer lives with her mother and adopted father. (T-16-17).

When asked about the difficulties that led to T.T. leaving home, Wendy Tavormina responded, "Tantrums -- tantrums, outbursts,

out of control, ran away from home." (T-17). Wendy Tavormina also described T.T. as "a very angry child," (T-19; see also T-37).

Chris Tavormina testified that "[t]here had been a number of instances that we had problems with [T.T.]. This particular one [that she was on probation for] was terroristic threats" in which T.T. threatened to kill both of her parents. (T-68).

Even though T.T. was placed in counselling that did not help. In fact, during one counselling session, "she had an outburst in [the counselor's] office and she had to be taken out of [the] office, in handcuffs." (T-19).

While T.T.'s parents took her to a number of counselors and doctors over the years, there were never any disclosures regarding the allegations against R.T. (T-34).

Rather, the allegations only arose after Wendy Tavormina had confronted T.T., when T.T. was hospitalized at Georgia Regional at age fifteen, about some photographs which showed T.T. and a friend being around alcohol and tobacco at R.T.'s home. (T-19-21). This confrontation between T.T. and her mother at Georgia Regional took place after a confrontation between T.T.'s parents and R.T. and his wife, which was magnified by Wendy Tavormina's discovery of the photographs. (T-39-41; see also, 73-76).

While Wendy Tavormina tried to lessen the severity of the strain of the relationship between her and her husband and R.T. and his wife by calling it a "small confrontation" or "a disagreement,"

(T-39-40), Chris Tavormina confirmed that there had been a "falling out" between the two couples. (T-73).

While Wendy Tavormina testified that the "falling out" was due to some matters involving their accountant (T-39), Chris Tavormina testified that the "falling out" resulted from R.T. and his wife calling he and his wife questioning their parenting skills in a conversation that "turned very ugly." (T-73). This incident was the first "bad blood" between the couples and was aggravated when Wendy Tavormina found the photographs. (T-76).

Wendy Tavormina was "very mad" when she discovered the photos. (T-39). She is certain that T.T. was aware that she and her husband were angry at R.T. about the photographs. (T-40-41).

In May of 2002, on the day that T.T. first made allegations against R.T., it had been "a bad day and it was -- [T.T.] had had a tantrum, completely out of control." (T-22).

While Wendy Tavormina was sitting on the sofa, T.T., who had now calmed down, came downstairs and laid curled on the sofa with her head in her mother's lap. Wendy Tavormina thought this would be a good opportunity to try to bring up the conversation she had with T.T. at Georgia Regional about the photographs. (T-24).

Because of the way T.T. had been behaving, Wendy Tavormina told her, "'This has got to stop. I don't understand why you do this. This has got to stop. We've got to fix this situation.'" (T-23).

Wendy Tavormina then testified, "And I was remembering the conversation at Georgia Regional, when I showed her the pictures, because I had asked her at Georgia Regional, you know, why she made that comment, that he was not what everybody thought, I was like, 'Why? What do you mean.?' " (T-23).

Wendy Tavormina testified that "this would be an opportunity to try to bring up the conversation we had had then, and I had asked her, you know, 'Why was he -- was he doing drugs?' And she said, 'No, worse than that.'" (T-24).

According to Wendy Tavormina, "That's when it really had my mind going. So, at that point, when I was talking to her, I tried to bring up that situation again and I asked her, you know, what she meant when she had said that. And then finally, I just said -- I said, 'Did he ever touch You?' "(T-24).

Wendy Tavormina was the first one to bring up the subject of touching. (T-35).

T.T. had not been allowed to be around R.T. since her mother discovered the photographs. (T-35). T.T. was aware her parents were angry at R.T. about the photographs. (T-40-41).

T.T. then told her mother some information that is the basis for the allegations in the petition. (T-24-25).

Wendy Tavormina did not report the allegations to the police, but only told her husband, R.T.'s brother. (T-25).

After the "initial outcry" in May of 2002, it was another several weeks, sometime during the Summer of 2002, before T.T. provided additional details. (T-26). This was even though Wendy Tavormina tried a few times to talk to T.T. about it, explaining, "'It's not your fault. You were young.'" (T-26). But T.T. would just say, "'Okay, Mom,'" and she would change the subject.'" (T-27).

Finally Wendy Tavormina told T.T., "'I know this is hard for you to talk about . . . but . . . if you want to, if it's easier for you . . . just write it down on paper.'" (T-27).

One morning at approximately 3:30 a.m., T.T. woke up her mother and they went into the bathroom where T.T. "had written, on paper, everything that had happened that she could remember." (T-27). These written allegations serve as the basis for the charges against R.T. (See, T-28). The dates of the alleged incident were based on Chris and Wendy Tavormina having been on a cruise and having left T.T. with Chris Tavormina's and R.T.'s mother, with whom R.T. also lived. (T-11-12).

Additional facts will be included in the argument as needed.

PRESERVATION OF ERRORS

Appellant preserved the issue by filing a brief, reply brief, and supplemental brief in opposition to the State's Motion for Transfer to Superior Court. (See, R-10; R-30).

PART II

ENUMERATION OF ERRORS

The Juvenile Court erred by entering an Order of Transfer to Superior Court, rather than retaining jurisdiction of the matter for final disposition, thus denying R.T. the due process guarantee of fundamental fairness and equal protection as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraphs I and II of the 1983 Georgia Constitution.

JURISDICTIONAL STATEMENT

Pursuant to Article VI, Section V, Paragraph III of the 1983 Georgia Constitution, appellate jurisdiction properly rests with this Court as jurisdiction is not reserved to the Supreme Court of Georgia nor conferred on any other court by law.

PART III

STANDARD OF REVIEW

While review of a juvenile court's determination as to whether the child committed the delinquent act alleged will be upheld if there is any evidence to support the finding, In the Interest of L.L., 165 Ga.App. 49, 299 S.E.2d 53 (1983), its determination to transfer is reviewed under the abuse of discretion standard. In the Interest of B.Y., 257 Ga.App. 253, 570 S.E.2d 889, 890 (2002).

ARGUMENT AND CITATION OF AUTHORITIES

The Juvenile Court erred by entering an Order of Transfer to Superior Court, rather than retaining jurisdiction of the matter for final disposition, thus denying R.T. the due process guarantee of fundamental fairness and equal protection as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraphs I and II of the 1983 Georgia Constitution.

Pursuant to O.C.G.A. § 15-11-30.2(a)(3), formerly O.C.G.A. § 15-11-39(a) (3) (1993; Ga. Pub. L. 1991, p. 959), transfer of a matter within the "exclusive original jurisdiction" of juvenile court to superior court is appropriate when "[t]he court in its discretion determines there are reasonable grounds to believe that:

- "(A) The child committed the delinquent act alleged;
- "(B) The child is not committable to an institution for the mentally retarded or mentally ill; and
- "(C) The interests of the child and the community require

that the child be placed under legal restraint and the transfer be made."

While the standard for transfer is the same now as it was at the time the offenses were alleged to have been committed, it must be noted that there are now a number of crimes for which exclusive jurisdiction is within the superior court, even when the alleged perpetrator is less than seventeen years of age. O.C.G.A. § 15-11-28(b)(2) (A).

Although R.T. denies committing the delinquent acts alleged, the juvenile court found there were reasonable grounds to believe he committed the delinquent acts alleged. See, In Re K.S.J., 258 Ga. 52, 365 S.E.2d 820, 821 (1988); In Re R.J., 191 Ga.App. 712, 382 S.E.2d 671, 673 (1989); In Re J.B.H., 241 Ga.App. 736, 527 S.E.2d 18, 20 (1999).

This is even though the charges against R.T. are alleged to have occurred on July 11 and 12, 1993, when T.T. was seven years of age, but there was no "outcry" by T.T. until May of 2002. Moreover, the "outcry" occurred not only years after T.T.'s behavior got worse and worse and things had gotten so out of control to where she no longer lives with her mother and adopted father, but only after there had been a "falling out" between T.T.'s parents and R.T., which was aggravated when Wendy Tavormina found photographs which showed T.T. and a friend being around alcohol and tobacco at R.T.'s home.

Chris Tavormina testified, "We had some problems with [T.T.], up to that point, and it was -- it was not an excuse, but it was -- it justified some of the problems that we were having . . ." (T-69). Wehdy Tavormina had testified, "We couldn't put a finger on it. It was just completely out of control." (T-17-18). Thus, T.T.'s parents see her allegations against R.T. as an explanation of her being out of control, rather than T.T.'s conduct being an explanation for her allegations against R.T.

Thus, assuming, in arguendo, there was evidence from which the Juvenile Court could find there were reasonable grounds to believe R.T. had committed the delinquent acts alleged, the Juvenile Court would still have to find that "[t]he interests of the child and the community require that the child be placed under legal restraint and the transfer be made."²

Thus, the matter to be decided by this Court is whether the juvenile court abused its discretion in ruling that the interests of R.T. and the community require that he be placed under legal restraint and the transfer be made. O.C.G.A. § 15-11-30.2(a)(3)(C).

The Juvenile Court erroneously ruled, "The State does not argue that the child is not amenable to treatment in this case . . .

² R.T. stipulated that he is not committable to an institution for the mentally retarded or mentally ill. (T-3).

. " (R-44). However, the State argued, "[I]t is precisely because Defendant [sic] is NOT amenable to court ordered treatment in the juvenile system or otherwise that makes transfer necessary." (R-28).

In its "Brief in Support of Transfer to Superior Court: Amenability to Treatment," the State argued, "Although [R.T.] *may* be amenable to treatment somewhere, he is NOT amenable to treatment within the juvenile justice system, a system that mandates segregation between child and adult offenders. See e.g., O.C.G.A. § 15-11-48(c)³." (R-38).

"A juvenile's amenability to treatment in the juvenile system is subsumed under the concept, 'the interest of the child' as set forth in the statute." In Re E.M., 198 Ga.App. 729, 402 S.E.2d 751, 752 (1991), citing In Re J.J.S., 246 Ga. 617(1), 272 S.E.2d 294 (1980). This Court continued,

³ It is respectfully submitted that O.C.G.A. § 15-11-48 has nothing to do with whether a juvenile is amenable to treatment within the juvenile justice system, but rather simply requires that when a juvenile has been transferred to superior court to be tried as an adult, if incarcerated, such incarceration must be "in such a way that there can be no physical contact between [the] child and [any] adult offender." O.C.G.A. § 15-11-48(c).

"If the state seeks a transfer based at least in part on the child's non-amenability to treatment in the juvenile system, the state has the burden of proving the child is not amenable to treatment. Moreover, if the juvenile court relies in part on the child's non-amenability to treatment in ordering the transfer, the transfer order, in performing the balancing test required by [O.C.G.A. § 15-11-30.2(a)(3)(C)], must reflect why the child is not amenable to treatment. [Cit.] . . . In the instant case, the State did base its transfer request, at least in part, on the appellant's non-amenability to treatment in the juvenile system by arguing that appellant would not be satisfactorily rehabilitated due to the probationary features of the juvenile system as opposed to those in the adult system.

In Re E.M., 198 Ga.App. 729, 402 S.E.2d at 752, quoting State v. M.M., 259 Ga. 637, 386 S.E.2d 35 (1989).

This Court found that because E.M. had no prior record and had no previous experience with the juvenile system, as well as that the psychological report did not indicate that the juvenile system would be inappropriate or ineffective for his treatment and rehabilitation, the Juvenile Court erred in finding he was not amenable to treatment and in transferring the case to superior court. In Re E.M., 198 Ga.App. 729, 402 S.E.2d at 753.

Based upon R.T.'s educational and military history since the time of the alleged acts, along with the lack of any criminal history, there is nothing to demonstrate that he is not amenable to treatment through the juvenile system.

Moreover, while the psychological evaluation confirms that R.T. is not committable to an institution for the mentally retarded or mentally ill, it also demonstrates he is amenable to treatment in the juvenile system, as it includes nothing to indicate R.T. is a pedophile or displayed any signs of impulsivity or cognitive distortions. (R-41).

In fact, "[t]he psychological report does not indicate that the juvenile system would be inappropriate or ineffective for [the child's] treatment and rehabilitation." In Re E.M., 198 Ga.App. 729, 402 S.E.2d at 753.

This is in stark contrast to In Re D.L., 228 Ga.App. 503, 492 S.E.2d 273, 275-276 (1997), where D.L. was in prison for adult charges when the transfer hearing was held, but the primary basis for granting the transfer was not D.L.'s adult record, but rather his lengthy juvenile history and the escalating violence of his offenses.

The Juvenile Court found,
that even assuming that the child is amenable to treatment, the overwhelming interests of the community require that the transfer be made, and the child be placed under

legal restraint. Although [R.T.] does not have a Juvenile Court record, the seriousness of the offenses demands a high level of supervision. The interests of the public and the community are compelling. The facts are shocking and severe. Because of the heinous nature of the offenses, the community's interest in treating the child as an adult outweighs his interest in remaining in the juvenile system.

(R-44-45).

First, R.T. not only does not have a "Juvenile Court record," he has no criminal record, even though he is now twenty-eight years of age (and will be twenty-nine years of age, if not older, when this appeal is decided).

Second, the crimes for which R.T. has been accused are Child Molestation and Aggravated Child Molestation. The very nature of those crimes, particularly since they are crimes against children, would make them not only "shocking and severe," but also show a "heinous nature." This, of course, assumes that the allegations made by the very troubled T.T. about something that is alleged to have occurred in July of 1993 is true.

This is in stark contrast to the various cases the State had cited in the Juvenile Court. Each of the cases cited by the State involved a juvenile who was charged with murder. (See, R-28). In In the Interest of J.D., 264 Ga. 836, 452 S.E.2d 105 (1995), the Child

"was charged with burglary and felony murder in connection with the shooting death of eighty-six-year-old Ida Dodson." The juvenile court had "found that it would be in the best interest of the public for J.D. to be dealt with as an adult based on the severity of the offense and the community's interest in public prosecution." Id., 264 Ga. 836, 452 S.E.2d 105.

While child molestation and aggravated child molestation are certainly serious offenses, in the present case there are only allegations of same, while in In the Interest of J.D. there was definitely an 86 year-old woman who had been shot to death. It is respectfully submitted that any community interest in a public prosecution of alleged sexual experimentation by a sixteen year old boy more than eleven years after the alleged incidents is greatly outweighed by R.T.'s interest in being treated in the juvenile system.

In the Interest of J.H., 260 Ga. 447, 396 S.E.2d 885 (1990), involved a sixteen-year-old girl charged with shooting her mother in the head. While two court-ordered psychiatrist testified that J.H.'s needs would best be met by treatment in the juvenile system, the court ruled that even though she was amenable to treatment in the juvenile system, "due to the heinous nature of the crime the public's interest in treating J.H. as an adult outweighed J.H.'s interest in being treated as a juvenile. Id. 260 Ga. 447, 396 S.E.2d at 887. J.H. was arrested either the same day of the killing

or the next and the transfer hearing was completed six months after the killing. Id. 260 Ga. 447, 396 S.E.2d at 887.

In contrast, the allegations in the present case involve two incidents that are claimed to have occurred over eleven years ago on July 11 and 12, 1993. Thus, notwithstanding the serious nature of the allegations, any community interest in a public prosecution of a R.T. some twelve years after the alleged incidents is significantly outweighed by **his** interest in being treated in the juvenile system.

The State relied on In re K.S.J., 258 Ga. 52, 365 S.E.2d 820 (1988), another juvenile murder case, in which the thirteen-year-old had stabbed his grammar school principal to death with a nail file following a heated discussion in the child's presence between the principal and the child's mother concerning a spanking the victim had administered to the child. In ordering the transfer, the juvenile court relied on expert testimony that even with the most appropriate treatment available the prognosis for the defendant's successful rehabilitation was guarded, at best, and at worst, very poor. Id., 258 Ga. 52, 365 S.E.2d at 822.

In the Interest of J.N.B., 263 Ga. 600, 436 S.E.2d 202 (1993), involved a thirteen year old charged with the murder of his nine-year-old stepbrother. Several experts testified there was a high probability that J.N.B. would repeat his violent behavior without intensive therapy lasting four to five years and that he should be

incarcerated during such time to avoid the risk of another violent outburst. The Supreme Court held, "Based on the evidence before the juvenile court, we find there were reasonable grounds for the court to conclude that appellant could not receive appropriate treatment in a secure facility for the necessary length of time in the juvenile system." Id., 263 Ga. 600, 436 S.E.2d at 203.

However, in J.G.B. v. State, 136 Ga.App. 75, 220 S.E.2d 79, 82 (1976), this Court stated,

We do not believe that the number and severity of the offenses, standing alone, can establish the absence of amenability to rehabilitation. One juvenile who commits armed robbery and several counts of burglary may be more readily capable of rehabilitation through existing facilities than another juvenile who has committed assault and battery on one occasion.

See also, C.L.A. v. State, 137 Ga.App. 511, 224 S.E.2d 491, 493 (1976) (juveniles submitted without objection evidence which showed their amenability to treatment and rehabilitation, which was un-rebutted, such that it was error to transfer to superior court).

R.T. has never been in trouble and, other than the current allegations, has never been charged with any crimes. There are absolutely no allegations of any similar conduct by R.T. during the twelve years since the allegations of just before he turned seventeen years of age. As such, the Juvenile Court's finding that "the

seriousness of the offenses demands a high level of supervision" is most questionable.

Rather, not only is **R.T.** amenable to treatment, any treatment required would not include incarceration and, in most likelihood, would not even include in-patient treatment. As such, any treatment ordered could be monitored by either a juvenile court caseworker or a juvenile court probation officer.⁴

In considering the "interests of the community," it must be remembered that at the time the acts were alleged to have occurred, **R.T.** faced being put under a juvenile court order of no more than two years (which under certain conditions could have been extended for two years). O.C.G.A. § 15-11-70 (formerly O.C.G.A. § 15-11-41(a) (1993)). Since none of the acts alleged came within the "designated felony" statute in effect at the time (O.C.G.A. § 15-11-37 (1993); Ga. Pub.L. 1992, p. 1983), **R.T.** did not face being

⁴ If adjudicated delinquent for any of the acts alleged, since each would be a felony if committed by an adult, **R.T.** would be considered to be a "felony offender", and as such, if due to his age he could not be supervised by an officer of this Court, he would be subject to being supervised by a State probation officer. See, O.C.G.A. § 42-8-22 (creation of a state-wide probation system for felony offenders).

placed in the custody **of** the Department of Children and Youth Services **for** an initial period of five years, with confinement of not less than **12** nor more than **18** months.

Today, while R.T. does not face the minimum mandatory sentence of ten years without parole on the Aggravated Child Molestation allegations as a "serious violent felony" under O.C.G.A. § 17-10-6.1, he does face one to **20** years for each **of** the two allegations of Child Molestation and two to **30** years for each of the two Aggravated Child Molestation allegations. O.C.G.A. § 16-6-4(b) and (d) (1993; Ga. Pub. L. 1993, p. 715) if the transfer to superior court is upheld.⁵

Thus, if the transfer order is allowed to stand, the severity of the sentence R.T. is facing could result in him accepting a plea

⁵ "'"It is the settled law **of** this State that where a crime is committed on a certain date, the penalty which attached to the crime on that date is the penalty exacted by our law. . . It was mandatory for the trial court to impose the sentence provided for **by** the law in force at the time of the commission of the crime.'" "Holtapp v. City of Fayetteville, 208 Ga.App. 606, 431 S.E.2d 403, 405 (1993), quoting Hahn v. State, 166 Ga.App. 71, 74, 303 S.E.2d 299 (1983), quoting Barton v. State, 81 Ga.App. 810, 814, 60 S.E.2d 173 (1950).

offer of probation⁶ to avoid a possible lengthy prison term, if erroneously convicted after a jury trial.

Moreover, if R.T. is required to answer these charges in superior court, if found guilty, he would be subject to additional adverse consequences than he would not suffer if the matter is resolved in the Juvenile Court.

First, R.T. would have to register as a sex offender based on the "conviction", while a juvenile court adjudication of delinquency does not constitute such a conviction. O.C.G.A. § 42-1-12(a)(3). Moreover, based upon the amendment to O.C.G.A. § 42-1-12(a)(3), which became effective on July 1, 2004 (see H.B. 1093), this would apply during the period of any first offender sentence. See, Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164

⁶ When an accused has no prior record, it is the routine practice of the assigned Assistant District Attorney to make a plea offer of a lengthy period of probation (usually under the provisions of the First Offender Act) with numerous conditions to ensure no further improper sexual conduct by the accused. However, in the present case more than eleven years have passed and there is not a single hint of any improper sexual conduct, or any improper conduct of any kind, by R.T. other than the allegations by T.T. (See, R-10-20).

(2003) (wherein Alaska's retroactive sexual registry requirements were held not to be punitive, such that same did not violate the ex post facto clause). Assuming, in arguendo, that R.T. would be allowed to remain in the Army, with such a first offender sentence, one can only imagine the difficulties he would have in stopping his registering after his first offender discharge (much less, getting his name removed from any registry he was required to register on during the period of the first offender sentence).

Second, even if R.T. was sentenced under the First Offender Act in superior court, he would have to resign from the military, as during the period of that first offender sentence, it would be a violation of Georgia law for him to possess a firearm. O.C.G.A. § 16-11-131(b).

It is respectfully submitted the community has no positive interest in seeing R.T. (or anyone similarly situated) be required to register as a sex offender and be barred from possessing a firearm (and, be forced from the military) based on incidents that allegedly occurred when he was a child, almost twelve years ago.

It is most respectfully submitted that any interests of the community in having R.T. face prosecution as an adult in superior court for these alleged acts, which are alleged to have occurred more than eleven years ago when he was sixteen years of age, and, has demonstrated he is amenable to treatment, will never outweigh the interest of the child.

As such, the interests of the child and community do not require that R.T. be placed under legal restraint and the transfer be made, but rather the interests of the child in having this matter remain in the Juvenile Court clearly outweigh any interest of the community in having R.T. face prosecution as an adult in superior court.

The Juvenile Court further stated,

The Juvenile Court is not equipped to supervise or rehabilitate a man in his mid to late twenties. Without concluding whether he would be amenable to treatment altogether, this Court finds that he could not receive the appropriate treatment in the juvenile system. Should [R.T.] be convicted of the offenses, the supervision to which he is subject should be proportional to the severity and offenses committed. The jurisdiction of the Juvenile Court over children ends when they reach the age of twenty-one. [R.T.] is well passed the age, and would not be subject to this Court's jurisdiction any longer. The community would suffer should he be adjudicated delinquent of such heinous crimes, and not be subject to any supervision. Furthermore, should [R.T.] be found to have committed the crimes alleged, he would be in need of intensive rehabilitation. The juvenile court system is not equipped to offer rehabilitation to offenders over

the age of twenty-one. At this juncture, [R.T.] would not benefit from any of the programs offered by the Juvenile Court or the Department of Juvenile Justice. He was 16 years old when the offenses occurred, but he is now a twenty-eight year old man.

(R-44-45).

First, it should be noted, that contrary to the ruling by the Juvenile Court, a child cannot be "convicted" in a juvenile court, but can only be found to be delinquent. O.C.G.A. § 15-11-65.

The Juvenile Court opined it was not equipped to supervise or rehabilitate R.T. due to his age. It is respectfully submitted that assuming, in arguendo, after a hearing on the merits of the State's petition, the Juvenile Court finds beyond a reasonable doubt that R.T. committed any (or all) of the acts alleged, there is no reason to believe that he "would not be satisfactorily rehabilitated due to the probationary features of the juvenile system as opposed to those in the adult system." In Re E.M., 198 Ga.App. 729, 402 S.E.2d at 752, quoting State v. M.M., 259 Ga. 637, 386 S.E.2d 35.

While R.T. may not be able to be suitably supervised by a probation officer of the court or a juvenile court of another state, see O.C.G.A. § 15-11-66(a)(2)(A), that subsection also allows for supervision by "[a]ny public agency authorized by law to receive and provide care for the child" or any community rehabilitation center which will agree in writing to accept supervision. O.C.G.A.

§ 15-11-66(a) (2)(B) and (C). There is nothing in either subparagraph which would prohibit the Juvenile Court from having this "child", who is now an adult, from being supervised by a public agency or community rehabilitation center that does not limit itself to children.

In W.F. v. State, 144 Ga.App. 523, 241 S.E.2d 631, 632 (1978), this Court reversed the juvenile court order of transfer to superior court when the only evidence of the then nineteen years old's unamenability to treatment in the juvenile system was that "'we are not equipped to handle a 19-year-old through our available facilities.'" The Court of Appeals found that the child's current age as a basis for transfer standing alone was insufficient.

The Juvenile Court also opined that if R.T. were convicted of the offenses, the supervision to which he is subject should be proportional to the severity of the offenses committed and that he would be in need of intensive rehabilitation.

However, because R.T. has never been in trouble before and has never been charged with any crimes, other than the current allegations, and there are no allegations of any similar conduct during the twelve years since the allegations of 1993, this opinion of the Juvenile Court is just as questionable as its finding that "the seriousness of the offenses demands a high level of supervision."

Again, not only is R.T. amenable to treatment, any treatment required would not include incarceration and, in most likelihood,

would not even include in-patient treatment. As such, any treatment ordered could be monitored by either a juvenile court caseworker or a juvenile court probation officer.

It is respectfully submitted that the fact that R.T. was 27 years of age (and is now 28 years of age) when these allegations were made is not a legitimate basis for transferring his case to superior court for a final resolution, rather than the Juvenile Court retaining jurisdiction of this matter for final disposition.

The Juvenile Court further stated,

The delay in [R.T.] being charged with the offenses does not automatically waive him into the adult system. However, the Court finds that programs geared toward those in the juvenile justice system would be ineffective because they are not suited for his needs. He would not be a juvenile, nor under the age of 21, while he undergoes treatment and rehabilitation. The Court also notes that if [R.T.] had been charged under the law at the time of the offenses, he would still have been subject to criminal prosecution for his conduct in Superior Court.

(R-44-45).

Although O.C.G.A. § 15-11-70(d) states, "Unless otherwise provided by law, when a child who has been adjudicated as delinquent or unruly reaches 21 years of age all orders affecting him or her then in force terminate and he or she is discharged from further

obligation or control," there is nothing in the language of that subsection that requires, under the facts of the present case, that the Juvenile Court must simply act as a conduit and automatically transfer this matter to superior court, because R.T. is now twenty-eight years old.

Since there has not been any adjudication with regard to R.T., much less an adjudication prior to his twenty-first birthday, there is no order to terminate or for him to be discharged from. Rather, any order adjudicating R.T. delinquent, assuming he is found to have committed the delinquent acts alleged, will be entered long after his twenty-first birthday, such that O.C.G.A. § 15-11-70(d) is not applicable.

O.C.G.A. § 15-11-70(d) does not hold that the Juvenile Court cannot enter an order regarding R.T. (or any person who was a child at the time of the acts alleged, but over the age of twenty-one when the petition is filed in the juvenile court), such that if the Juvenile Court retained jurisdiction and thereafter R.T. was adjudicated delinquent, the Juvenile Court would not be powerless to issue an enforceable order. The Juvenile Court has the "inherent powers to enforce its lawful orders," O.C.G.A. § 15-11-5(a), and "may exercise such powers as necessary in aid of its jurisdiction or to protect or effectuate its judgments." Article VI, Section I, Paragraph IV of the 1983 Georgia Constitution.

Moreover, since the acts alleged set forth felony offenses, if adjudicated delinquent for any of those acts, **R.T.** would be considered to be a "felony offender," and as such, if **R.T.** because of his age, could not be supervised by a probation officer of juvenile court, he would be subject to being supervised by a State probation officer. See, O.C.G.A. § 42-8-22 (creation of a state-wide probation system for felony offenders).

The Juvenile Court also stated, "The Court also notes that if [R.T.] had been charged under the law at the time of the offenses, he would still have been subject to criminal prosecution for his conduct in Superior Court." (**R-44-45**).

While the matter could have been transferred to Superior Court, if the petition were brought near the time of the alleged offenses, it is respectfully submitted that transfer would have been very unlikely. If the allegations had been made within a year of the alleged acts, such would have occurred during **R.T.**'s senior year at Benedictine Military School or within two months of his graduation. It is respectfully submitted that as **R.T.** did not have a criminal record at that time and had no previous experience with the juvenile system there would probably have never been a motion to transfer to superior court by the State. This would also be the case if the allegations were made within two or even three years of the alleged acts (as **R.T.** would not have reached his twentieth birthday).

The Juvenile Court's primary basis for the transfer is that due to **R.T.'s** age now, the "Juvenile Court is not equipped to supervise or rehabilitate" him and the "juvenile court system is not equipped to offer rehabilitation to offenders over the age of twenty-one. At this juncture, [R.T.] would not benefit from any of the programs offered by the Juvenile Court or the Department of Juvenile Justice. He was 16 years old when the offenses occurred, but he is now a twenty-eight year old man." (**R-44-45**).

Of course, those problems would not have been present if a petition had been brought against **R.T.** when he was still a teenager or twenty years of age.

While the Juvenile Court undoubtedly deliberated for a lengthy period of time before rendering its Order of Transfer to Superior Court, it is respectfully submitted that it failed to recognize that even under the most unique facts of the case sub judice that disposition in the juvenile court was proper.

It must be remembered that

[t]he creative premise for the juvenile justice system is treatment and rehabilitation rather than punishment or societal retribution which, to a large degree, justifies the imposition of sanctions in the adult criminal system. In constitutional terms, due process may be violated when the state fails to provide adequate treatment for any citizen who is confined or otherwise deprived of his

liberty for "humane therapeutic reasons." Furthermore, the Georgia juvenile procedure statutes are replete with references to the duty of the state to secure care and treatment for a child who adjudicated delinquent, unruly, or deprived." Thus, a statutory basis can also be asserted on behalf of a juvenile who is, for example, committed to the state for treatment and rehabilitation and yet, instead, is only warehouses for some indefinite period of time. One federal district court flatly asserted: "[E]ffective treatment may be the quid pro quo for society's right to exercise its parens patriae controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirement of due process, the right of treatment exists.

Murphy, Ga. Juvenile Practice & Procedure (4th ed.), § 7-22.

It is respectfully submitted that this "creative premise" will require the judges (and others who work within the juvenile justice system) to "think outside the box" when confronted with unique factual situations.

Assuming, in arguendo, the Juvenile Court lacks jurisdiction to enter an adjudicatory order with regard to R.T. because he is now twenty-eight years of age, the Juvenile Court has the authority and jurisdiction to enter a protective order in this matter under

which it may order R.T. "to cooperate in good faith with an agency to which custody of a child is entrusted by the court or with an agency or associated to which the child is referred to by the court." O.C.G.A. § 15-11-11(a) (5) (as well as any of the other provisions of O.C.G.A. § 15-11-11(a), which the Court deems just and proper).

There is nothing in the language of O.C.G.A. § 15-11-11 which prohibits a juvenile court from entering a protective order which directs the child, himself or herself, to abide by the requirements of the order. Certainly, in the situation before a juvenile court where the Child is now twenty-eight years old, that court could enter a protective order which directs the child to abide by the requirements of the order.

Moreover, assuming, in arguendo, that an adjudicatory order in the case sub judice would not be enforceable due to R.T.'s age, a protective order would be as O.C.G.A. § 15-11-11(c) states, "Protective orders may be enforced by citation to show cause for contempt of court by reason of any violation thereof and, where protections of the welfare of the child so requires, by the issuance of a warrant to take the alleged violation into custody and bring him or her before the court."

It is respectfully submitted that the Juvenile Court has the authority and jurisdiction to enter a protective order under terms agreed to by the parties (similar to a negotiated plea) or if the

parties are unable to reach an agreement, under the terms and conditions the Juvenile Court deems just and proper. Once the terms and conditions have been satisfactorily completed, the Juvenile Court would direct the State to dismiss its petition (similar to a discharge under the First Offender Act). Certainly in a matter where the allegations involve acts which were alleged to have occurred some twelve years earlier when the child was clearly within the jurisdiction of the juvenile court, such is all that justice actually demands.

Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor lenity." Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). "This policy embodies 'the instinctive distaste against men languishing in prison unless the law-maker has clearly said they should.'" United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), quoting H. Friendly, Mr. Justice Frankfurter and the Readings of Statutes in Benchmarks 196, 209 (1967). It is respectfully submitted the Juvenile Court failed to apply the rule of lenity in exercising its discretion in weighing "the interests of the child and the community require that the child be placed under legal restraint and the transfer be made," and thereby abused its discretion.

Finally, due process of law, at the very minimum, guarantees fundamental fairness. In Re Winship, 397 U.S. 358, 369, 90 S.Ct.

1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring) ("the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment[®]"); California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (Under the due process clause of the Fourteenth Amendment "criminal prosecutions must comport with prevailing notions of fundamental fairness."); Ake v. Oklahoma, 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) ("This elementary principle, governed in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness . . ."). It is respectfully submitted to transfer R.T.'s case to superior court because he is now twenty-eight years of age, based on allegations (and they are nothing more than allegations) about him when he was sixteen years of age would violate the due process guarantee of fundamental fairness, as well as equal protection under the law, of the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraphs I and II of the 1983 Georgia Constitution.

CONCLUSION

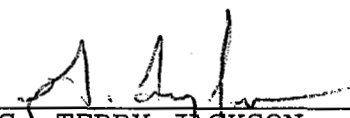
Appellant respectfully prays that this Court for the reasons set out above reverse the court below as to each error presented as to the grant **of** the State's motion to transfer to superior court.

(Signature on Next Page)

RESPECTFULLY SUBMITTED, this 7th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify I have this day served SPENCER LAWTON, JR., District Attorney, or his representative, at the Chatham County Courthouse, 133 Montgomery Street, Savannah, Georgia, 31401, with a true and correct copy of the within and foregoing Brief of Appellant by:

_____ depositing a copy in the U.S. Mail in a properly addressed envelope with adequate postage affixed thereto to insure delivery:

_____ via telecopier; or

 6 by hand delivery.

This the 9th day of May, 2005

JACKSON AND SCHIAVONE

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