ALAN WILSON
ATTORNEY GENERAL

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Caroline F. Fox
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Dear Ms. Fox:

We have received your opinion request regarding suspended sentences in juvenile adjudications. Specifically, you state the following:

> [w]e respectfully request an Attorney General Opinion regarding suspended sentences on juvenile adjudications. We have encountered differing opinions among Family Court judges, DJJ officials and defense attorneys on whether suspended sentences are necessary and how they are to be applied.
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> If a Juvenile Court judge sentences a juvenile to straight probation, with no suspended sentence, what can another judge do on a probation violation? Some judges believe they can give any sentence they wish; others believe if there was no suspended sentence, the judge hearing the violation can do nothing other than continued probation, or a sentence of up to six months for being in contempt of the court order.
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> Likewise, if there is a sentence of Reception and Evaluation suspended to probation, some judges believe the only sentence they can give on a violation of probation is the evaluation, with only continued probation upon disposition (since the court would have already imposed the only suspended sentence).
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> We have judges who always give an indeterminate commitment to DJJ suspended to probation, which they feel gives the next judge the option of giving any sentence (up to the indeterminate commitment) upon a violation of probation. However, other judges will not give a suspended DJJ commitment because they believe the next judge is then required to impose that indeterminate commitment.

> In General Sessions, every defendant is put on notice of what sentence he faces if he violates probation; that is not happening on a consistent basis in Juvenile Court and we do not want to risk a case coming back on appeal if a juvenile with no suspended sentence was given an indeterminate commitment to DJJ on his probation violation.
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> We would like to have an opinion on this matter to help with uniformity of sentencing.

LAW/ANALYSIS:

You are correct that South Carolina law does not address whether suspended sentences are necessary in juvenile adjudications. And reviewing sentencing in adult criminal proceedings is not helpful because minors are treated differently than adults. The South Carolina Supreme Court in In re Stephen W., 409 S.C. 73, 761 S.E.2d 231 (2014), explains why juvenile proceedings differ from adult criminal prosecutions:

> [t]he very nature of the juvenile system makes clear the family court juvenile adjudication is an inherently different process than a typical criminal prosecution. Indeed, '[t]he primary purpose of the juvenile process is to exempt an infant from the stigma of a criminal conviction and its attendant detrimental consequences.' In re Skinner, 272 S.C. 135, 137, 249 S.E.2d 746, 746 (1978). 'South Carolina, as *parens patriae*, protects and safeguards the welfare of its children. Family Court is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration.' Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992) (citation omitted); see also State v. Cagle, 111 S.C. 548, 552, 96 S.E. 291, 292 (1918) ("The state is vitally interested in its youth, for in them is the hope of the future. It may therefore exercise large powers in providing for their protection and welfare.')

Courts in other jurisdictions agree that juvenile proceedings should be kept separate and distinct from adult proceedings. The Montana Supreme Court states that "'youths are to be given special treatment by the courts' because the [Montana] Youth Court Act is 'designed to promote individual rehabilitation' and because youths 'are not subject to the same criminal sanctions as are adults.'" In the Matter of S.M.K.-S.H., 367 Mont. 176, 290 P.3d 718 (2012) (quoting In re Appeal of Cascade Co. Dist. Ct., 2009 MT 355, 353 Mont. 194, 219 P.3d 1255). The Montana Supreme Court gives the following reasons for minors not being subject to the same criminal sanctions as adults:

> [w]here a youth in the youth court system faces a disposition different from an adult who has committed the same offenses, we have held that the youth and the adult 'are not similarly situated with respect to Montana's sentencing laws for three reasons.' In re C.S., 201 Mont. 144, 146, 687 P.2d 57, 59 (1984). Those reasons are: (1) juvenile commitment under the Youth Court Act is 'strictly for rehabilitation, not

> retribution'; (2) the 'liberty interest of a minor is subject to reasonable regulation by the state, to an extent not permissible with adults' under the doctrine of *parens patriae*; and (3) other jurisdictions persuasively have concluded that 'adults and juveniles are not similarly situated in these circumstances.' In re C.S., 201 Mont. At 146 – 147, 687 P.2d at 59.

Id.

The California Supreme Court concurs that juvenile adjudications serve a different purpose than adult criminal convictions:

> '[j]uvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved.' (*Derek L. v. Superior Court, supra,* 137 Cal.App.3d at p. 236, 186 Cal.Rptr. 870.)[1] 'Juvenile court action thus differs from adult criminal prosecutions where 'a major goal is corrective confinement of the defendant for the protection of society.' [Citation.] The protective goal of the juvenile proceeding is that 'the child [shall] not become a criminal in later years, but a useful member of society.' [Citation.]" (*In re Ricardo M.* (1975) 52 Cal.App.3d 744, 749, 125 Cal.Rptr. 291; see also *People v. Arias* (1996) 13 Cal.4th 92, 164, 51 Cal.Rptr.2d 770, 913 P.2d 980.) In contrast to the more punitive aims of the adult criminal justice system, 'the purpose of the juvenile justice system is '(1) to serve the "best interests" of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and "enable him or her to be a law-abiding and productive member of his or her family and community,' and (2) to 'provide for the protection and safety of the public....' (§ 202, subds. (a), (b) & (d); [citations].)' [Citation.]" (*In re R.O.* (2009) 176 Cal.App.4th 1493, 1500, 98 Cal.Rptr.3d 738.)

In re Greg F., 55 Cal.4th 393, 283 P.3d 1160 (2012).

Since South Carolina law does not answer your question, we reviewed the law of other jurisdictions. It appears that suspended sentences are not necessary in juvenile adjudications. In some states, courts have determined that upon a minor's violation of probation, a court may revoke his probation and impose any sentence that it could have imposed in the original case. In the Matter of Cordale R., No. E-96-019, 1997 WL 13022 (Ohio Ct. App. Jan. 10, 1997), the Ohio Court of Appeals explained that:

> [a]n initial sentence of probation is deemed to be conditional and not final. *In re Kelly* (Nov. 7, 1995), Franklin App.No. 95-APF05-613, unreported (Citations omitted). Thus, where probation is conditioned on certain terms, sentence can be modified for noncompliance with those terms. *Id.* Upon revocation of probation a court may impose any sentence that it could have originally imposed. *In re Herring* (July 10, 1996), Summit App.No. 17553, unreported.

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[1] (*Derek L. v. Superior Court* (1982) 137 Cal.App.3d 228, 232 [186 Cal.Rptr. 870].)

The California Supreme Court and the Illinois Appellate Court agree that when a minor's probation has been revoked, a court can make any disposition which it could have made in the original disposition of the case. The California court said:

> if a [probation] violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165, 14 Cal.Rptr.3d 261, 91 P.3d 205.)

In re Greg F., supra. The Illinois court provided:

> [i]n a probation revocation proceeding, the record must clearly show that the trial court considered the original offense and imposed a sentence that would have been appropriate for that offense. *People v. Hess*, 241 Ill.App.3d 276, 284 (1993).

In re T.C.S., 2015 IL App (3d) 140834-U.

In other states, the state legislatures have by statute granted courts the authority to impose any sentence on a juvenile that they could have imposed in the original case upon a probation violation. For example, the Virginia Legislature has enacted the following statute:

> A.A juvenile or person. . .who violates the conditions of his probation granted pursuant to § 16.1-278.5 or § 16.1-278.8. . .may be proceeded against for a revocation or modification of such order. . . .
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> B. If a juvenile or person is found to have violated a prior order of the court or the terms of probation or parole, the court may, in accordance with the provisions of §§ 16.1-278.2 through 16.1-278.10, upon a revocation or modification hearing, modify or extend the terms of the order of probation or parole, including termination of probation or parole. However, notwithstanding the contempt power of the court as provided in § 16.1-292, the court shall be limited in the actions it may take to those that the court may have taken at the time of the court's original disposition pursuant to §§ 16.1-278.2 through 16.1-278.10, except as hereinafter provided. . . .

VA Code Ann. § 16.1-291.

Based upon statute, the Georgia Court of Appeals in In re N.M., 316 Ga.App. 649, 730 S.E.2d 127 (2012), concluded that "a dispositional order imposed upon the revocation of probation relates to the original delinquent act." The court did the following analysis:

> [t]he juvenile code's probation revocation provision is found in the paragraph concerning the juvenile court's authority to modify its dispositions, implying that revocation results in the modification of the

> original order of disposition, not a new proceeding. . .OCGA § 15–11–40(b) provides in its entirety:
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> > [a]n order of the [juvenile] court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child, except an order committing a delinquent child to the Department of Juvenile Justice, after the child has been transferred to the physical custody of the Department of Juvenile Justice, or an order of dismissal. An order granting probation to a child found to be delinquent or unruly may be revoked on the ground that the conditions of probation have not been observed.

The New Mexico Court of Appeals provided a broad overview of the statutes in New Mexico in Matter of Lucio F.T., 1994-NMCA-144, 119 N.M. 76, 80, 888 P.2d 958, 962:
:

> [w]hen a child is placed on probation in New Mexico, all of the possible dispositions that are not imposed are withheld, but only conditionally. *See* § 32A–2–24(B). The child must obey his probation conditions, and, if the child violates them, any of the previously withheld dispositions may be imposed. *Id.* Section 32A–2–24(B) provides: "If a child is found to have violated a term of his probation the court may extend the period of probation or make any other judgment or disposition that would have been appropriate in the original disposition of the case." Accordingly, when a child's probation is revoked, the children's court is merely enforcing its previous sentence and is not imposing a new and separate sentence. *See In re B.N.D.*, 366 S.E.2d at 188. By express legislative provision, the children's court retains jurisdiction to extend the period of probation or to revoke an individual's probation during the period of such probation, even though the person has reached his eighteenth birthday. *See* NMSA 1978, § 32A–2–23(F) (Repl.Pamp.1993); *see also State v. Doe*, 92 N.M. 589, 590, 592 P.2d 189, 190 (Ct.App.1979) (discussing statutory language that grants this authority).

The New Jersey Code provides that when a juvenile violates probation, the family court retains jurisdiction to "substitute any other disposition which it might have made originally." *N.J.S.A.* 2A:4A–45(b). Based on this, in In re State ex rel. C.V., 201 N.J. 281, 297, 990 A.2d 640, 649 (2010), the New Jersey Supreme Court concluded that a court is not "stuck with its initial suspended sentence length when it came time for the court to enter its disposition" after a juvenile's probation violation because "[f]lexibility in sentencing is, as noted, a hallmark of the [New Jersey] Code." Id. The New Jersey Court said the ability to modify an original suspended sentence is important because "courts must have some means by which to encourage compliance with probationary conditions. or the entire process may become farcical and ineffective" (quoting State v. H.B., 259 N.J.Super 603, 614 A.2d 1081 (1992)). Id.

In Montana, the applicable statute provides that "[i]f a youth is found to have violated a term of probation, the youth court may make any judgment of disposition that could have been made in the original case." Section 41-5-1431(3), MCA. In In re S.M.K.-S.H., supra, the Montana Supreme Court explained that:

> [t]he language of § 41-5-1431(3), MCA, plainly allows a youth court, after a youth is found to have violated a term of his probation, to enter any dispositional order that originally could have been made, even if such an order extends the youth's probation or his commitment to the court's jurisdiction [from the original dispositional order].

The law in Arkansas differs slightly from the other state statutes we were able to find. Section 9-27-339 provides:

> (e) If the court finds by a preponderance of the evidence that the juvenile violated the terms and conditions of probation, the court may:
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> (1) Extend probation;
>
> (2) Impose additional conditions of probation; or
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> (3) Make any disposition that could have been made at the time probation was imposed under § 9-27-330.

Ark. Code Ann. § 9-27-339.

CONCLUSION:

Although persuasive authority, the case law and statutes of other states suggest that suspended sentences are not necessary in juvenile adjudications. Upon a juvenile's violation of probation, a court may revoke his probation and impose any sentence that it could have imposed in the original case. The fact that a court gave a suspended sentence during the original disposition is irrelevant since a subsequent court can modify a dispositional order for noncompliance with its terms of probation. The Legislature may wish to provide guidance on this matter, however.

Sincerely,

Elinor V. Lister

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REVIEWED AND APPROVED BY:

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Solicitor General