THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
J. Michael Baxley, Circuit Court Judge

Indictment Nos. 2011-GS-32-0242
2011-GS-32-0243
2011-GS-32-0244

EX PARTE:

South Carolina Department of Disabilities
and Special Needs, ... Appellant.

IN RE:

State of South Carolina, ... Respondent,

v.

Rocky A. Linkhorn, ... Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS OR STAY PENDING APPEAL

The Appellant South Carolina Department of Disabilities and Special Needs (DDSN) hereby petitions this Court for a writ of supersedeas or alternatively a stay

pending appeal of the Order Granting Solicitor's Rule to Show Cause Requiring DDSN to Accept Involuntary Commitment and Prohibiting Future Refusal by DDSN in Similar Cases filed September 26, 2013.

FACTUAL AND PROCEDURAL BACKGROUND

The Respondent Rocky A. Linkhorn was arrested on July 14, 2010, on warrants charging him with Criminal Sexual Conduct with a Minor in the First Degree, Lewd Act on a Minor, and Disseminating Obscene Material to a Minor. Linkhorn is alleged to have committed a sexual battery on his four-year-old niece.

On February 8, 2011, Circuit Court Judge R. Knox McMahon ordered the South Carolina Department of Mental Health (DMH) to examine Linkhorn to determine his competency to stand trial pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981) and S.C. Code Ann. § 44-23-430. (App. 25-32). Linkhorn was ultimately evaluated by examiners from both DMH and DDSN, who found him incompetent to stand trial but likely to attain competency in the foreseeable future.

A *Blair* hearing was held pursuant to S.C. Code Ann. § 44-23-430 on June 21, 2013, before Circuit Judge Edward B. Cottingham, Jr. Judge Cottingham concluded that Linkhorn "is currently incompetent to stand trial for the reasons set

forth in S.C. Code Ann. § 44-23-410, but likely to become competent in the foreseeable future." (App. 33). Judge Cottingham further ordered Linkhorn to be committed to DMH for up to sixty days "for observation and treatment in an effort to restore Defendant's competence to stand trial." (App. 33-34).

At the expiration of the sixty day period, the examiners for DMH and DDSN concluded that Linkhorn remained incompetent to stand trial and would not attain competency to stand trial in the foreseeable future. A subsequent *Blair* hearing was held before Circuit Court Judge William P. Keesley on November 2, 2011. Judge Keesley concluded that Linkhorn was not competent to stand trial and was not likely to become competent in the foreseeable future. He ordered the Eleventh Circuit Solicitor to initiate proceedings in the Probate Court pursuant to S.C. Code Ann. §§ 44-17-510 through 44-17-610. (App. 35-36).

On November 7, 2011, the Solicitor initiated proceedings in Lexington County Probate Court. The Probate Court dismissed the proceedings on the basis that Linkhorn was not mentally ill. On January 5, 2012, the Solicitor filed a second Petition for Judicial Admission seeking an involuntary commitment to DDSN on the basis that Linkhorn may be intellectually disabled. (App. 43-44). Judge Keesley issued an Amended Order on February 27, 2012, allowing for the Solicitor to initiate judicial proceedings in Probate Court pursuant to S.C. Code Ann. §§ 44-17-510 through 44-17-610 and/or S.C. Code Ann. § 44-20-450. (App.

37-38). On August 6, 2012, DDSN moved for a dismissal of the Petition for Judicial Admission on the basis that the evaluation of Linkhorn showed that he did not have an intellectual disability (mental retardation). (App. 81-82). Allegedly, the Petition for Judicial Admission was dismissed by the Probate Court on January 3, 2013, although no signed, written order was ever issued and counsel for DDSN was never so advised. (App. 9).

On January 2, 2013, the Eleventh Circuit Solicitor filed a Motion for Rule to Show Cause which requested that DDSN "be ruled into this Court to show just cause for services being denied to this defendant as previously ordered by this Court." (App. 46). The Motion for Rule to Show Cause, which was not verified nor supported by any affidavits, did not even identify the alleged order that DDSN was allegedly violating and which could be subject of a Rule to Show Cause. Subsequently, no Rule to Show Cause was actually issued. Instead, on August 20, 2013, a Rule to Show Cause hearing was held before Circuit Court Judge J. Michael Baxley.

On September 17, 2013, Judge Baxley issued his "Order Granting Solicitor's Rule to Show Cause Requiring DDSN to Accept Involuntary Commitment and Prohibiting Future Refusal by DDSN in Similar Cases," which was filed September 26, 2013 (hereinafter referred to as "Judge Baxley's Order"). (App. 1-18). That Order required DDSN to take Rocky Linkhorn into custody and house

him in a "secure facility." Judge Baxley's Order also included broad injunctive relief which enjoins DDSN from taking certain legal positions in all future proceedings involving involuntary admissions and which requires DDSN to house other criminal defendants unfit to stand trial, present and future, that satisfy his construction of "intellectually disabled" in a "secured facility."

The Appellant DDSN has filed an appeal from that Order.

REASONS FOR THE WRIT OF SUPERSEDEAS OR STAY PENDING APPEAL

The Appellant DDSN submits that a writ of supersedeas or a stay pending appeal is warranted in this matter for the following reasons:

1. The Circuit Court failed to give proper notice to DDSN and failed to follow proper procedures in adjudicating the Motion for Rule to Show Cause.

The Circuit Court failed to follow proper procedure in the issuance of the Order Granting Solicitor's Rule to Show Cause. Judge Baxley's Order was issued based upon a Motion for Rule to Show Cause that was filed by the Eleventh Circuit Solicitor's Office and that was not verified nor supported by any affidavits. South Carolina law holds that "[t]he failure to support the rule to show cause by an affidavit

nor a verified complaint is a fatal defect." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257. 442 S.E.2d 611, 627 (1994).

In addition, the Circuit Court never issued a Rule to Show Cause but rather held a hearing based solely on the unverified motion. The Circuit Court failed to issue a Rule to Show Cause prior to the hearing that placed DDSN on proper notice of the subject matter of the Rule to Show Cause hearing or the broad nature of the relief that the Court was contemplating.

Without a Rule to Show Cause being issued prior to the hearing, the only notice for DDSN was contained in the motion itself. The Motion for Rule to Show Cause requested that DDSN "be ruled into this Court to show just cause for services being denied to this defendant *as previously ordered by this Court.*" (App. 46). (Emphasis added). There was no reference given in the Motion for Rule to Show Cause to any court order that DDSN was allegedly violating. Judge Baxley obviously recognized that procedural deficiency because in his Order he wrote: "The Solicitor asked that DDSN be required to show cause for its failure to provide services to the Defendant." (App. 3). Judge Baxley omits reference to any court order that DDSN had allegedly violated – *obviously because there was no such order*. Furthermore, in its return, DDSN stated as its first defense that DDSN "was never ordered to provide services to the defendant by any court order." (App. 49). In then setting out DDSN's defenses asserted in its return, Judge Baxley not surprisingly

omits that first defense. (App. 3). In short, there was no prior order violated by DDSN for which a Rule to Show Cause could properly be issued. Because DDSN was not found to be in violation of any prior court order, the Order Granting Solicitor's Rule to Show Cause will most likely be found to be null and void.

2. The Circuit Court did not have subject matter jurisdiction to issue the Order on appeal.

The existence of subject matter jurisdiction is highly questionable, and if it exists, DDSN was never given notice of the jurisdiction of the Circuit Court over Linkhorn's judicial admission or that the proceedings in the Lexington County Probate Court had been discontinued. At the time of the Rule to Show Cause hearing held on August 20, 2013, DDSN was under the reasonable belief that the Petition for Judicial Admission filed January 5, 2012, by the Solicitor was still pending before the Probate Court. A Motion to Dismiss filed by DDSN on August 8, 2012, had not been heard nor adjudicated.

Chief Justice Jean Hoefer Toal issued an Order dated March 12, 2013, in the case of *State of South Carolina v. Rocky Linkhorn* which ordered that "the Honorable J. Michael Baxley be vested with exclusive jurisdiction to hear and dispose of the above case." (App. 39). However, that Order makes no reference to nor removes jurisdiction from the Probate Court over the Petition for Judicial Admission filed January 5, 2012. The Petition for Judicial Admission was captioned *In the Matter of*

Rocky A. Linkhorn and was assigned case number 2012-MH-32-002. Neither that caption nor case number is referenced in the Chief Justice's Order nor is there any reference to matters related to the Petition for Judicial Admission or any proceedings regarding the involuntary admission of the Respondent to DDSN. DDSN contends that the Circuit Court did not have subject matter jurisdiction to issue the Order on appeal.

Furthermore, the Petition for Judicial Admission was filed in Probate Court pursuant to S.C. Code Ann. § 44-20-450, which vests the jurisdiction for "[p]roceedings for the involuntary admission of a person with intellectual disability or related disability to the services of the department" specifically in the probate court or the family court. *See*, S.C. Code Ann. § 44-20-450(A). The statute does not provide for concurrent jurisdiction in the circuit court. Instead, S.C. Code Ann. § 44-20-450(G) specifically provides for *appellate* jurisdiction in the circuit court.[1] Consequently, assuming that the Chief Justice's Order intended to vest exclusive jurisdiction over the pending Probate Court matter in the Circuit Court and to Judge Baxley, which the Order does not expressly do, then that Order would be in contravention of S.C. Code Ann. § 44-20-450. In sum, Judge Baxley's assumption of

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[1] In *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), the Supreme Court explained that "South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." 745 S.E.2d at 83, *citing* S.C. Const. art V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Id.*

jurisdiction over the Petition for Judicial Admission filed in Probate Court was an abuse of authority and should be ruled null and void.[2]

Moreover, counsel for DDSN was never advised prior to the Rule to Show Cause hearing that the matter pending in Probate Court had been dismissed. No order was ever issued by the Probate Court. Subsequent to the hearing, counsel for DDSN obtained a copy of the Petition for Judicial Admission, on which there was a typed notation that read: "Dismissed in Probate Court based upon Circuit Court jurisdiction of this matter as confirmed with Solicitor's office." (App. 43). The document containing that notation was neither signed by a probate judge nor filed, and hence, is not a proper order. It also appears that the notation may have been made as a result of an improper *ex parte* communication. It is, nonetheless, unclear whether Judge Baxley was in possession of this document at the hearing, but the procedural irregularity was likely recognized by him, given that he agreed to the unorthodox, if not improper, measure of allowing the Associate Probate Judge Julie H. Thompson to testify on this jurisdictional issue at the August 20, 2013 hearing. In

[2] It appears that Judge Baxley recognized that only the Probate Court had the authority to judicially commit Linkhorn to DDSN. He therefore ordered the Solicitor to "file involuntary proceedings against the Defendant, pursuant to S.C. Code Ann. § 44-20-450, in the Lexington County Probate Court." (App. 17). However, before allowing the Probate Court to then adjudicate any such petition, Judge Baxley ordered that Linkhorn be committed to DDSN within five days of August 20, 2013 (which was before his Order was even signed or filed) and ordered that he be housed in a "secure facility." He also enjoined DDSN from opposing the involuntary admission proceedings. In effect, Judge Baxley bypassed S.C. Code Ann. § 44-20-450 completely and ordered the judicial commitment of Linkhorn to DDSN and to a particular housing placement, i.e. the most restrictive placement available.

his Order, Judge Baxley writes: "Associate Probate Judge Julie H. Thompson testified at the hearing that the Solicitor's second involuntary commitment proceeding was dismissed on January 3, 2013." (App. 9). Consequently, the evidence presented of the dismissal of the Petition for Judicial Admission was the testimony of the Probate Judge rather than a court order, which is inappropriate. Moreover, if Judge Thompson's testimony is accurately reflected in Judge Baxley's Order,[3] her testimony was clearly mistaken. According to Judge Baxley's Order, Judge Thompson testified that the Petition for Judicial Admission was dismissed on January 3, 2013. The notation on the Petition for Judicial Admission, however, indicated that the dismissal was "based upon Circuit Court jurisdiction of this matter as confirmed with Solicitor's office." (App. 43). Yet, Chief Justice Toal's Order was not issued until March 12, 2013. Therefore, if the dismissal occurred on January 3, 2013, it could not have been based on any assumption of jurisdiction by the Circuit Court per the Chief Justice's Order.

In sum, there are significant issues of subject matter jurisdiction that will need to be addressed in this appeal. Given that the jurisdiction underlying Judge Baxley's Order is, at the very least, highly questionable, that serves as a compelling basis for a writ of supersedeas or stay of the Order pending appeal.

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[3] Counsel for DDSN ordered a transcript of Rule to Show Cause hearing immediately after filing the Notice of Appeal and had hoped to use that transcript in support of this petition; however, the transcript request is still pending. DDSN reserves the right to supplement the record with relevant portions of the transcript upon receipt.

3. The broad injunctive relief ordered by the Circuit Court will have the effect of violating the state and federal statutory and constitutional rights of current and future DDSN clients who are not parties to this litigation and who have not been afforded due process before being ordered into more restrictive placements as required by the Order on appeal.

Even if Judge Baxley possessed subject matter jurisdiction based upon the Chief Justice's Order to issue rulings regarding the involuntary admission of Rocky Linkhorn to DDSN, his rulings went far beyond that limited subject matter. In his Order filed September 26, 2013, Judge Baxley ordered that Rocky Linkhorn be involuntarily committed to DDSN within five days of August 20, 2013, and that he be housed in a "secure facility." (App. 17). However, Judge Baxley also proceeded to issue prospective injunctive relief that effects persons other than Linkhorn and that was not relief sought in the Motion for Rule to Show Cause. Those broad injunctive rulings were made without due process being afforded to DDSN and without due process being afforded to the numerous persons affected by those rulings, as to be addressed further below.

As for DDSN, no Rule to Show Cause was ever issued by the Court. Instead, Judge Baxley ruled based upon a Motion for Rule to Show Cause that was filed by the Solicitor. That Motion for Rule to Show Cause never sought the broad prospective relief that was issued by Judge Baxley. Therefore, DDSN was never placed on proper notice before the hearing that the Court was entertaining the

issuance of such relief and accordingly DDSN did not have a meaningful opportunity to be heard before such extensive and arguably unlawful injunctive relief was issued by the Court.

Without a sufficient evidentiary record, Judge Baxley concluded that "DDSN has engaged in a pervasive pattern and practice of denying involuntary services to otherwise eligible criminal defendants found incompetent to stand trial by a circuit court of competent jurisdiction." (App. 17). Based thereon, he issued broad injunctive relief applicable to "criminal defendants" found incompetent to stand trial *including but not limited to* defendants, like Linkhorn, who have suffered head, brain, and/or spinal cord injuries." (App. 17-18). He thereafter ruled that "[t]he applicable threshold for involuntary commitment to DDSN services for criminal defendants who are unfit to stand trial is whether that defendant suffers from an 'intellectual disability' as defined in S.C. Code Ann. § 44-23-10(21)." (App. 18). He then ordered DDSN to "develop admission and intake procedures consistent with this Order for all criminal defendants found to be suffering from an 'intellectual disability' as defined in S.C. Code Ann. § 44-23-10(21)." (App. 18).[4] And for those criminal

[4] Although not relevant to the issues pertinent to this Petition for Writ of Supersedeas or Stay Pending Appeal, DDSN is appealing Judge Baxley's statutory construction. The term "intellectual disability" was intended by the General Assembly as a replacement of the term "mental retardation" and is not inclusive of persons who sustained a change in their general intellectual functioning beyond the "developmental period" which is defined as the age of conception through age 22. *See*, S.C. Code Ann. § 44-20-30(12). Linkhorn was not found to have an "intellectual disability" under the applicable definition because his cognitive deficits

defendants, DDSN has been ordered to "provide for the development of secure facilities necessary thereto, or in the alternative, [DDSN] shall provide funds and necessary contractual arrangements to henceforth house such defendants in secure facilities operated by other entities." (App. 18). The net result of Judge Baxley's prospective injunctive rulings is that he has ordered DDSN to house all criminal defendants found incompetent to stand trial in a "secure facility."

However, South Carolina law provides specifically that "[w]hen persons with intellectual disability, related disabilities, head injuries or spinal cord injuries cannot live in communities or with their families, the State shall provide quality care and treatment *in the least restrictive environment practical.*" S.C. Code Ann. § 44-20-20. (Emphasis added). That statement of public policy by the General Assembly is consistent with Federal statutory and constitutional law. In the landmark case of *Olmstead v. L.C.*, 527 U.S. 581 (1999), two mental health patients alleged that the State of Georgia violated the Americans with Disabilities Act (ADA) integration mandate by unnecessarily segregating them in mental health institutions and failing to place them in community-based treatment programs. The Supreme Court, in a plurality opinion, found that the ADA reflects a congressional finding that unjustified institutionalization perpetuates prejudice against the mentally disabled and severely diminishes their quality of life. The Supreme Court concluded that unnecessary

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resulted from an anoxic brain injury sustained as an adult when he tried to hang himself while he was incarcerated in 1998.

institutionalization and segregation may be discriminatory under certain circumstances. The Supreme Court thus concluded that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." 527 U.S. at 607.

Based upon the Supreme Court's decision in *Olmstead* as well as state law, DDSN places clients, including individuals who are judicially committed because they are incompetent to stand trial, "in the least restrictive, most community integrated setting as appropriate." *See*, Von Hollen Affidavit, para. 4. In his affidavit, Steve Von Hollen, who is the DDSN Director for Clinical Services, explains in detail the various placements available, from the least restrictive and most community-integrated to the most restrictive. The housing in which Rocky Linkhorn has been placed in order to comply with Judge Baxley's requirement of a "secure facility" is GeoCare, which is described by Von Hollen as follows:

> GeoCare is a private correctional facility that provides medical, mental health and behavioral treatment in a secure, highly restrictive locked setting. GeoCare is reserved for individuals who otherwise present a significant risk of harm to self or others if not placed in such a secure facility. This facility is considered the

> most restrictive and least community integrated of any of the placement options.

See, Von Hollen Affidavit, para. 7. Von Hollen explains the process that DDSN goes through to determine the appropriate placement and provides examples of persons who were found to be unfit to stand trial but can be and have been served by DDSN at home or in community-based treatment programs rather than a "secure facility" or lock-up facility such as GeoCare. *See*, Von Hollen Affidavit, para. 8. Von Hollen further observes:

> I have personally found based upon my own knowledge and experience that the majority of individuals who have been found unfit to stand trial and who have been judicially committed to DDSN do not require the most restrictive placement in GeoCare. It is further my opinion that placement of most such individuals in GeoCare or a similar lock-up facility would violate those individuals' rights under federal law and specifically the *Olmstead* decision.

See, Von Hollen Affidavit, para. 9.

Von Hollen, in fact, cites Rocky Linkhorn as an example of an individual who is judicially committed to DDSN because he is unfit to stand trial but likely does not require the most restrictive placement in GeoCare. *See*, Von Hollen Affidavit, para. 10. For Linkhorn, no assessment was made by Judge Baxley or the Probate Court to determine if GeoCare is the appropriate and least restrictive setting for him. Von Hollen opines that, if an appropriate assessment had been undertaken, he "would have most likely recommended placement for him in a

Community Training Home II rather than in GeoCare." *See*, Von Hollen Affidavit, para. 10. Thus, it appears that Judge Baxley's Order has had the effect of violating Linkhorn's statutory and constitutional rights under *Olmstead.*

But, Linkhorn is at least represented in this action, and his counsel to date has not opposed his placement in a "secure facility" per Judge Baxley's Order. However, Judge Baxley's Order implicates certainly all future placements and potentially can be construed as impacting current placements of DDSN clients who are judicial commitments that are unfit to stand trial. DDSN is particularly concerned that those individuals' rights will be greatly impacted if not violated by Judge Baxley's broad injunctive rulings. Currently, DDSN provides care for 159 persons who have been found unfit to stand trial and have been judicially committed to DDSN, and of that number only seven (Linkhorn being one) are placed at GeoCare. The remainder are housed in less restrictive placements as described in the Von Hollen affidavit or are provided services or service coordination in a home setting. *See*, Von Hollen Affidavit, para. 12; Goodell Affidavit, para. 8. If Judge Baxley's Order is construed to apply to those individuals because they meet the definition of "intellectually disabled" established in his Order, those 159 clients individuals may need to be transferred to a "secure facility" such as GeoCare. That will result in a clear violation of those individuals' state law and federal statutory and constitutional rights per *Olmstead* and the ADA;

yet those individuals (unlike Linkhorn) were not parties to this case and did not have an opportunity to be heard per due process on the lawfulness of Judge Baxley's broad injunctive rulings.

The vast implications of Judge Baxley's injunctive rulings to persons who are not parties to this litigation clearly warrant a writ of supersedeas or stay of Judge Baxley's Order pending appeal. Before DDSN is required to place existing clients and future clients who are unfit to stand trial in the most restrictive environment, regardless of their needs, the merits of this appeal should be heard. This is obviously an appropriate case for maintaining the status quo until this Court has the opportunity to review the lawfulness of Judge Baxley's rulings and to allow the persons implicated by those rulings to have an opportunity to he heard. DDSN has tremendous concern that its compliance with Judge Baxley's Order will result in the violation of many individuals' state and federal statutory and constitutional rights. A writ of supersedeas or stay pending appeal will prevent that from occurring.

4. The financial implications on DDSN and the loss of services to its current clients and those on its waiting list are staggering should DDSN be forced to pay for the placement of all persons covered by the Circuit Court's Order in a "secured facility" such as GeoCare.

The due process implications and the likely violation of statutory and constitutional rights of unrepresented persons are sufficient bases for the issuance of a writ of supersedeas or stay, in addition to the highly questionable jurisdictional and procedural issues to be litigated by DDSN on appeal. However, from a practical standpoint, the effect of Judge Baxley's broad injunctive rulings on DDSN's budget and resources must also be considered, as does the effect on other clients of DDSN should DDSN be required to use its existing appropriations to place all persons covered by Judge Baxley's Order in a "secured facility."

David Goodell is the DDSN Associate State Director of Operations. In his affidavit, Goodell provides testimony regarding the potential fiscal impact of Judge Baxley's broad injunctive rulings. Goodell explains that "DDSN does not currently operate a forensics unit or secured lock-up facility that can house criminal defendants as required by the *Linkhorn* Order. DDSN has never been provided the initial funding or recurring appropriations by the South Carolina General Assembly to build or operate a forensics unit or secured lock-up facility." *See*, Goodell Affidavit, para. 9. Instead, GeoCare, as described in the Von Hollen affidavit, is the only secure facility to which DDSN has access. *See*, Goodell Affidavit, para.

5. Goodell explains that "[a] placement in GeoCare currently costs DDSN an average of $350.00 per day or approximately $127,750.00 per year for each client placed in that facility. The costs for placement in GeoCare must be paid solely with state funds. Medicaid provides no reimbursement for any placements in GeoCare. Virtually all other DDSN placements generate Medicaid revenue which covers approximately 70% of the placement cost." *See*, Goodell Affidavit, para. 5.

Goodell then provides estimates of the potential financial impact of Judge Baxley's Order. Using an annual average of 49 judicial admissions, which was based on the last three fiscal years, Goodell estimates that "DDSN would have incurred approximately $5.9 million on an annual basis in additional costs" which takes into account and includes a deduction for "the costs of using residential facilities as an alternative to GeoCare that DDSN would have reasonably been expected to incur in the absence of the *Linkhorn* Order." *See*, Goodell Affidavit, para. 6. Goodell further explains that "[t]his additional cost could increase incrementally for as many years as the *Linkhorn* Order remained in effect (e.g., 1st year - $5.9 million, 2nd year - $11.8 million, 3rd year - $17.7 million)." *See*, Goodell Affidavit, para. 6. Goodell testifies that "DDSN does not have sufficient funding in its budget to accommodate this cost increase" and that "[s]ervices to hundreds of vulnerable individuals currently served by DDSN would have to be discontinued to accommodate this cost increase." *See*, Goodell Affidavit, para. 6.

Moreover, if Judge Baxley's broad injunctive rulings are construed as requiring the current 159 clients who have been judicially admitted based upon a court finding them unfit to stand trial to be placed in a "secure facility" such as GeoCare, Goodell estimates an *annual* cost *in state dollars* (because there would be no Medicaid reimbursement) of approximately $17 million. *See*, Goodell Affidavit, para. 8. Again, he explains that "DDSN also does not have sufficient funding to accommodate this additional cost" and that "[t]o place all current judicially admitted individuals in GeoCare would require DDSN to discontinue services to thousands of vulnerable individuals." *See*, Goodell Affidavit, para. 8.

In his affidavit, Goodell explains that DDSN currently has a waiting list of 8,000 persons seeking services. To put the sums of money implicated by Judge Baxley's Order into proper perspective, Goodell has determined that the annual sum of $5.9 million in state dollars could serve approximately 1,479 persons currently on the waiting list. *See*, Goodell Affidavit, para. 7. Likewise, the approximately $17 million that would be required to place all existing clients into a "secure facility" per Judge Baxley's Order "could be used to serve approximately 5,100 potential clients currently on waiting lists awaiting DDSN services." *See*, Goodell Affidavit, para. 8.

In short, the financial implications to DDSN and the State warrant the issuance of a writ of supersedeas or a stay pending appeal. That is certainly true

when the Court also considers the enormous impact that these financial implications will have on persons currently receiving services and whose services would likely need to be reduced or eliminated should DDSN be forced to pay for the placement of all persons covered by Judge Baxley's Order in a "secured facility" such as GeoCare.

SCOPE OF RELIEF SOUGHT

DDSN respectfully requests that the Court issue a writ of supersedeas or stay of Judge Baxley's Order in toto pending appeal. While DDSN is concerned that Rocky Linkhorn's statutory and constitutional rights are violated by his court-ordered placement in a "secure facility" such as GeoCare, DDSN also recognizes that Linkhorn is represented by counsel who presumably is protecting his rights. DDSN believes that it should not be compelled to pay approximately $127,750.00 annually for Linkhorn to be placed in GeoCare during the pendency of this appeal; however, as an alternative basis and in order to obtain a writ of supersedeas or stay of Judge Baxley's Order that effects all others than Linkhorn, DDSN is willing to pay for the placement of Linkhorn in GeoCare during the pendency of the appeal as a compromise position.

EXTRAORDINARY CIRCUMSTANCES EXIST ALLOWING FOR IMMEDIATE APPLICATION TO THIS COURT

Rule 241(d)(1), SCACR, provides that "[e]xcept where extraordinary circumstances make it impracticable, an application for an order ... for supersedeas must first be made to the lower court ... which entered the order or decision on appeal." Rule 241(d)(1), SCACR. As described at length above, DDSN submits that extraordinary circumstances allow for this Court's immediate consideration of this request for a writ of supersedeas or stay pending appeal. Two factors are particularly important in determining whether such "extraordinary circumstances" exist. First, if Judge Baxley's Order only impacted DDSN and Linkhorn, and had no impact on countless others due to the broad injunctive rulings, then extraordinary circumstances likely would not exist. However, the broad implications upon persons who are not parties to this litigation warrant an immediate review by an appeals court. The broad injunctive rulings will impact not only DDSN but also the statutory and constitutional rights of persons currently committed to DDSN and those who are admitted in the future, as well as countless persons for whom DDSN provides services under its current appropriations who will likely lose those services if current funding must be expended to place persons other than Linkhorn in a "secured facility."

The second factor is less critical but equally relevant. DDSN contends that the jurisdiction of the Circuit Court to have issued the Order on appeal is, at the very least, highly questionable given the discussion set forth above. The fact that the Circuit Court likely lacks jurisdiction also impacts whether the Court would have jurisdiction to hear this Petition for Supersedeas or Stay Pending Appeal.

For these reasons, this Court is respectfully requested to exercise its discretion and find that extraordinary circumstances warrant this Court's immediate consideration of this petition.

CONCLUSION

Based on the foregoing discussion, the Appellant South Carolina Department of Disabilities and Special Needs respectfully requests that this Court grant this Petition for Supersedeas or Stay Pending Appeal.

Respectfully submitted,

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