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SC Court of Appeals

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.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in failing to give proper notice to DDSN and in failing to follow proper procedures in adjudicating the Motion for Rule to Show Cause?

II. Did the Circuit Court have subject matter jurisdiction to issue the Order on appeal?

III. Did the Circuit Court err in its interpretation of the term "intellectual disability" and in its construction of S.C. Code Ann. § 44-20-450 so as to allow for the involuntary commitment to DDSN of persons, like Rocky Linkhorn, having a brain injury or spinal cord injury but no "intellectual disability" (formerly referred to as "mental retardation")?

IV. Did the Circuit Court err in calling another attorney as the Court's expert witness on the issue of statutory interpretation which was the ultimate issue in the litigation and which was the Court's responsibility to decide as the arbiter of the law?

V. Did the Circuit Court err in granting such broad injunctive relief which 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?

STATEMENT OF THE CASE

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. (R. ___). Linkhorn was ultimately evaluated by examiners from both DMH and the Appellant Department of Disabilities and Special Needs (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." (R. ___). 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." (R. ___).

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. (R. ___).

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. (R. ___). 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. (R. ___). 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). (R. ___). 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. (R. ___).

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." (R. ___). 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.

According to Richard Frierson, M.D., a psychiatrist who testified at the August 20, 2013 hearing, Rocky Linkhorn is diagnosed with "dementia caused by an anoxic brain injury." (Tr. 50). Linkhorn's cognitive deficits resulted from an anoxic brain injury sustained as an adult when he tried to hang himself while he was incarcerated in 1998. Dr. Frierson testified that he believes that Linkhorn is intellectually disabled as a result, but he conceded that he used a different definition of "intellectual disability" from that provided by statute. He testified that the "intellectual disability" for which he diagnosed Linkhorn is not the prior definition of "mental retardation." (Tr. 50-51). Dr. Frierson explained: "Whether it is the same intellectual disability that has been prior referred to as mental

retardation, the answer would be no because it didn't have its onset before age 18." (Tr. 51).

Judge Baxley issued oral rulings immediately at the close of the August 20, 2013 hearing. Thereafter, 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"). (R. ___). That Order required DDSN to take Rocky Linkhorn into custody within five days of the hearing 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, who satisfy his construction of "intellectually disabled," in a "secured facility."

The Appellant DDSN has filed an appeal from that Order. This Court has previously issued a Writ of Supersedeas as to three of the four rulings contained in Judge Baxley's Order.

ARGUMENTS

I. 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.

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.*" (R. ___). (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." (R. ___). 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." (R. ___). In then setting out DDSN's defenses asserted in its return, Judge Baxley not surprisingly omits that first defense. (R. ___). Likewise, during the hearing Judge Baxley could not identify any order that DDSN had violated. (Tr. 37-38). 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 should be found to be null and void.

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

The Appellant DDSN contends that the Circuit Court lacked subject matter jurisdiction to issue the Order Granting Solicitor's Rule to Show Cause. 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 Lexington County Probate Court. A Motion

to Dismiss filed by DDSN on August 8, 2012, had not been heard nor adjudicated. DDSN was never given notice that the proceedings in the Probate Court had been discontinued.

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." (R. ___). 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 Linkhorn to DDSN. Quite simply, 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, and

Judge Baxley specifically stated at the hearing that "this is not an appeal from the probate court." (Tr. 36).[1] Consequently, even 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 jurisdiction over the Petition for Judicial Admission filed in Probate Court was an abuse of authority and his Order should be ruled null and void *ab initio*.[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

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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.*

[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." (R. ___). 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 written 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.

typed notation that read: "Dismissed in Probate Court based upon Circuit Court jurisdiction of this matter as confirmed with Solicitor's office." (R. ___). The document containing that notation was neither signed by a probate judge nor filed, and hence, is not a proper order binding on the parties. It is, nonetheless, unclear whether Judge Baxley was in possession of this document at the hearing, but the procedural irregularity was obviously recognized by him, given that he agreed to the unorthodox, if not improper, measure of allowing Associate Probate Judge Julie H. Thompson to testify on this jurisdictional issue at the August 20, 2013 hearing. In 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." (R. ___). 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, even if Judge Thompson's testimony is accurately reflected in Judge Baxley's Order, 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. [3] The notation on the Petition for Judicial Admission, however, indicated that the dismissal

[3] While the Judge Baxley found in his Order that Judge Thompson testified that the Petition for Judicial Admission was dismissed on January 3, 2013, there is no testimony to that precise date. Judge Thompson testified the petition was dismissed in January 2013. (Tr. 15). She also testified that the dismissal was not based on the merits but "based upon circuit court jurisdiction of this matter as confirmed with the Solicitor's office." (Tr. 15). No signed and filed Order of the Probate Court was ever submitted into the record. Consequently, there is no record evidence that the petition pending in Probate Court was indeed dismissed.

was "based upon Circuit Court jurisdiction of this matter as confirmed with Solicitor's office." (R. ___). 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, the Circuit Court lacked subject matter jurisdiction to order the involuntary admission of Linkhorn to DDSN. Statutory law vests exclusive jurisdiction over involuntary admission proceedings pursuant to S.C. Code Ann. § 44-20-450 in the probate and family courts. Circuit courts may only exercise appellate jurisdiction. The Order of the Chief Justice on which Judge Baxley based his authority did not purport to nor could it override the exclusive jurisdiction as established by statute. That Order allowed for Judge Baxley to adjudicate the criminal case but did not authorize the any assumption of jurisdiction over the involuntary admission proceeding properly commenced in the Lexington County Probate Court. That is particularly true where Judge Baxley could not identify any court order that DDSN was violating which thereby would have warranted the issuance of a Rule to Show Cause. Simply put, there was no order being violated, no Rule to Show Cause that was ever issued, and no jurisdiction in the Circuit Court for the involuntary admission of Linkhorn to DDSN.

Furthermore, Judge Baxley lacked subject matter jurisdiction to enter the broad injunctive rulings which enjoin DDSN from raising certain defenses in

subsequent probate proceedings involving persons not parties to this litigation. The same is true for Judge Baxley's injunctive ruling directing that all criminal defendants found unfit to stand trial as a result of an "intellectual disability" as defined in S.C. Code Ann. § 44-23-10(21) to be housed in "secure facilities." In his Order, Judge Baxley claims to be "vested with broad enforcement jurisdiction over criminal defendants with mental health or related issues." (Order, p. 16). Judge Baxley cited to a different Order issued by Chief Justice Toal dated August 14, 2003, for his broad authority and jurisdiction. Again, that Order does not purport to nor could it override the exclusive jurisdiction as established by statute in the probate courts. Nonetheless, that Order only vested Judge Baxley "with statewide jurisdiction over enforcement of all outstanding and future orders issued by Courts of General Sessions committing defendants to the Department of Mental Health pursuant to S.C. Code Ann. Sections 44-23-430 or 17-24-40." (Order). That Order makes no reference to DDSN specifically nor even cites to S.C. Code Ann. § 44-20-450 or any statute providing for an involuntary commitment to DDSN. In short, the Chief Justice's Order dated August 14, 2003 provides no jurisdictional basis for the broad injunctive relief awarded by Judge Baxley.

III. The Circuit Court erred in its interpretation of the term "intellectual disability" and in its construction of S.C. Code Ann. § 44-20-450 so as to allow for the involuntary commitment to DDSN of persons, like Rocky Linkhorn, having a brain injury or spinal cord injury but no "intellectual disability" (formerly referred to as "mental retardation").

The ultimate issue as decided by Judge Baxley revolves around the meaning of the term "intellectual disability." The term "intellectual disability" was added to the Code of Laws as a result of amendments adopted by the General Assembly in 2011. In 2011 Act No. 47, the General Assembly specifically stated that "[i]n Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded.'" 2011 Act No. 47, § 13.[4]

Following the 2011 amendments, there is a definition for "intellectual disability" and a separate definition for "person with intellectual disability." One definition is contained in S.C. Code Ann. § 44-20-30(12), and the other is contained in S.C. Code Ann. § 44-23-10(21).

S.C. Code Ann. § 44-20-30(12) provides that "intellectual disability" means "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C.

[4] Dr. Richard Frierson admitted that Linkhorn did not have "the same intellectual disability that has been prior referred to as mental retardation." (Tr. 51).

Code Ann. § 44-20-30(12).[5] That definition is part of S.C. Code Ann. § 44-20-30, which provides the definition applicable to "this chapter" meaning Chapter 20 of Title 44. Chapter 20 is referred to as the "South Carolina Intellectual Disability, Related Disability, Head Injuries and Spinal Cord Injuries Act." S.C. Code Ann. § 44-20-10. This is the Act that governs the services to be provided by DDSN. The legislative intent for the Act is set forth in S.C. Code Ann. § 44-20-20. Moreover, S.C. Code Ann. § 44-20-450 is part of that Act and provides the process for an involuntary admission to DDSN which is by statute limited to persons with an "intellectual disability" or a "related disability." The definition of "intellectual disability" as used in S.C. Code Ann. § 44-20-450, which is part of Chapter 20, is the definition set forth in S.C. Code Ann. § 44-20-30(12). The definition of "related disability" is contained in S.C. Code Ann. § 44-20-30(15) and provides as follows:

> (15) "Related disability" is a severe, chronic condition found to be closely related to intellectual disability or to require treatment similar to that required for persons with intellectual disability and must meet the following conditions:
>
> (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to intellectual disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with intellectual disability and requires

[5] The "developmental period" is considered the age of conception through age 22. Linkhorn was not found to have an "intellectual disability" under the applicable definition because his cognitive deficits resulted from an anoxic brain injury sustained as an adult when he tried to hang himself while he was incarcerated in 1998. (Tr. 50-51).

> treatment or services similar to those required for these persons.
>
> (b) It is manifested before twenty-two years of age.
>
> (c) It is likely to continue indefinitely.
>
> (d) It results in substantial functional limitations in three or more of the following areas of major life activity: self–care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

S.C. Code Ann. § 44-20-30(15).

Importantly, the "South Carolina Intellectual Disability, Related Disability, Head Injuries and Spinal Cord Injuries Act" as contained in Chapter 20 treats the concepts of intellectual disability, related disability, head injuries and spinal cord injuries as distinct concepts. They are not lumped together under one term. The legislative intent as expressed in S.C. Code Ann. § 44-20-20 likewise treats those concepts separately. The General Assembly refers to a "person with intellectual disability, a related disability, head injury, *or* spinal cord injury." S.C. Code Ann. § 44-20-20. (Emphasis added). Note the use of the disjunctive "or" which indicates alternatives. *See*, *Brewer v. Brewer*, 242 S.C. 9, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute is a disjunctive particle that marks an alternative. The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both"). "Intellectual

disability" therefore is not inclusive of the other terms. They are separate, distinct, alternative terms or concepts.[6]

To reiterate, S.C. Code Ann. § 44-20-450 is part of Chapter 20 and provides the process for an involuntary admission to DDSN which is by statute limited to persons with an "intellectual disability" or a "related disability." S.C. Code Ann. § 44-20-450 makes no mention of an involuntary admission for persons with a "head injury" or a "spinal cord injury." It only makes mention of persons with an "intellectual disability" or a "related disability." If the General Assembly had intended to allow an involuntary admission for persons with a "head injury" or a "spinal cord injury," it certainly would have so included those persons in S.C. Code Ann. § 44-20-450. It did not. "[W]hen determining the effect of statutory language, the canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53, 55 (2011). Thus, in applying that rule of construction, it is clear that the exclusion of persons with a "head injury" or a "spinal cord injury" from S.C. Code Ann. § 44-20-450 demonstrates that the General Assembly did not intend to provide for the involuntary admission of such persons to DDSN. There is no reference to persons with a "head injury" or a "spinal cord injury" in S.C. Code Ann.

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[6] The General Assembly has even provided for separate "divisions" within DDSN for "Intellectual Disability" and "Head and Spinal Cord Injury." *See*, S.C. Code Ann. § 1-30-35.

§ 44-20-450. In contrast, the statute includes repeated references to persons with an "intellectual disability" or a "related disability."

Nonetheless, despite this clear legislative intent not to provide for the involuntary admission of persons with a "head injury" or a "spinal cord injury" to DDSN, Judge Baxley focused on the definition of "person with intellectual disability" as contained in S.C. Code Ann. § 44-23-10(21) and forced its application on S.C. Code Ann. § 44-20-450, which is in contravention of clear legislative directives. S.C. Code Ann. § 44-23-10(21) defines "person with intellectual disability" to mean "a person, other than a person with a mental illness primarily in need of mental health services, whose inadequately developed or impaired intelligence and adaptive level of behavior require for the person's benefit, or that of the public, special training, education, supervision, treatment, care, or control in the person's home or community or in a service facility or program under the control and management of the Department of Disabilities and Special Needs." S.C. Code Ann. § 44-23-10(21). The definitions contained in S.C. Code Ann. § 44-23-10, however, are only to be applied "[w]hen used in [Chapter 23], Chapter 9, Chapter 11, Chapter 13, Articles 3, 5, 7, and 9 of Chapter 17, Chapter 24, Chapter 27, Chapter 48, and Chapter 52, unless the context clearly indicates a different

meaning." S.C. Code Ann. § 44-23-10. Notably absent from that list is Chapter 20.[7]

Consequently, pursuant to the directive from the General Assembly, the definitions contained in S.C. Code Ann. § 44-23-10, which includes the definition of "person with intellectual disability," has no application to any statutory provision contained in Chapter 20. Yet, that is precisely what Judge Baxley has ordered. He applied his own reading of the definition of "person with intellectual disability" as set forth in S.C. Code Ann. § 44-23-10(21) to S.C. Code Ann. § 44-20-450, and thus erroneously concluded that a person with a "head injury" or a "spinal cord injury," such as Rocky Linkhorn, may be involuntarily committed to DDSN.

DDSN disputes the conclusion that the definition of "person with intellectual disability" as contained in S.C. Code Ann. § 44-23-10(21) was intended by the General Assembly to have a meaning different from the definition of "intellectual disability" set forth in S.C. Code Ann. § 44-20-30(12); however, even if that were the case, the General Assembly clearly reflected its intent that the definition of "person with intellectual disability" as contained in S.C. Code Ann. § 44-23-10(21) has no application to S.C. Code Ann. § 44-20-450. Furthermore, there is no evidence that the General Assembly intended "person with intellectual disability" to include persons with a "brain injury" or a "spinal cord injury," when such terms are distinct

[7] It is worth noting that the qualifying language, "unless the context clearly indicates a different meaning," is not included in the definitional section for Chapter 20. *See*, S.C. Code Ann. § 44-23-30.

alternatives and not included in the concept of "intellectual disability" or its predecessor term "mental retardation."

Judge Baxley's forced construction relies on his finding that Chapter 20 is a general statute and Chapter 23 is a specific statute. That conclusion is in error. The only statutory provision that provides for an involuntary admission to DDSN is contained in S.C. Code Ann. § 44-20-450, which is part of Chapter 20. Chapter 23 does not conflict with S.C. Code Ann. § 44-20-450. In fact, S.C. Code Ann. § 44-23-430 requires the solicitor to initiate judicial admission proceedings pursuant to S.C. Code Ann. § 44-20-450. *See*, S.C. Code Ann. § 44-23-430. Moreover, neither S.C. Code Ann. § 44-23-430 nor any provision of Chapter 23 specifically refers to persons with a "brain injury" or a "spinal cord injury." Those terms do not appear in Chapter 23. Likewise, there is no provision in Chapter 23 that addresses what type of person is subject to an involuntary admission to DDSN. Judge Baxley therefore erred in finding that Chapter 23 is the specific statute when determining who may be involuntarily committed to DDSN.

Likewise, Judge Baxley erred in relying on the fact that S.C. Code Ann. § 44-20-450 and S.C. Code Ann. § 44-23-430 each cite to the other statute. That does not change the meaning of either statute nor does it mandate that the court judicially engraft a different, more expansive definition of "intellectual disability" on S.C. Code Ann. § 44-20-450. S.C. Code Ann. § 44-20-450 simply allows the solicitor to initiate the involuntary admission of a person with an "intellectual disability" or a "related

disability" as is permitted by S.C. Code Ann. § 44-23-430(2). Likewise, S.C. Code Ann. § 44-23-430 allows for the same – the solicitor may initiate judicial admission proceedings under S.C. Code Ann. § 44-20-450. There is quite simply no conflict between the two statutes. More importantly, the fact that the statutes cite each other provides no basis for expanding the meaning of "intellectual disability" as used in S.C. Code Ann. § 44-20-450 beyond how that term was specifically defined by the General Assembly in S.C. Code Ann. § 44-20-30(12). Interestingly, the statutes that govern a criminal defendant's fitness to stand trial do not even include the term "person with intellectual disability." *See*, S.C. Code Ann. § 44-23-410 to -460. In fact, of those statutes which make up Article 5 of Chapter 23, the term "intellectual disability" is used only in S.C. Code Ann. § 44-23-410, but in that statute the term is actually used in each instance together with a reference to "related disability." In other words, S.C. Code Ann. § 44-23-410 includes several references to "intellectual disability or related disability" and uses the disjunctive "or." This further demonstrates that the definition of "person with intellectual disability" as set forth in S.C. Code Ann. § 44-23-10(21) was not intended by the General Assembly to be an all-inclusive term that includes "intellectual disability, related disability, head injury *and* spinal cord injury," as Judge Baxley ultimately treated it. Instead, even in Chapter 23, the concepts of "intellectual disability," "related disability," "head injury" and "spinal cord injury" are still separate, distinct and alternative terms -- just as they are in Chapter 20.

In sum, it is clear that Judge Baxley set out to judicially amend S.C. Code Ann. § 44-20-450 to allow for a judicial admission to DDSN for persons with brain injuries or spinal cord injuries. He did this in spite of the exclusion of those persons from S.C. Code Ann. § 44-20-450 and in spite of the definition of "intellectual disability" contained in S.C. Code Ann. § 44-20-30(12) and in spite of the General Assembly's treatment of "intellectual disability," "related disability," "head injury" and "spinal cord injury" as separate, distinct and alternative concepts. If the General Assembly intended to allow the involuntary admission of persons with brain injuries or spinal cord injuries, it would have done so. If the General Assembly believes that it is now necessary to allow for the involuntary admission of persons with brain injuries or spinal cord injuries, such as Rocky Linkhorn, it remains the General Assembly's prerogative to amend S.C. Code Ann. § 44-20-450 accordingly and to also provide the necessary funding to DDSN to carry out that change in the law. Simply put, it is not the prerogative of the courts to make that amendment to S.C. Code Ann. § 44-20-450. *See, Amisub of South Carolina, Inc. v. South Carolina Department. of Health and Environmental Control*, ___ S.C. ___, 757 S.E.2d 408 (2014) ("it is the General Assembly's prerogative to modify or repeal legislation and to make policy decisions"). Courts cannot re-write statutes, and courts cannot provide the required funding when a statute is amended to enlarge the duties of a governmental agency. Those remain the prerogatives of the legislature.[8]

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[8] That would include the development of "secure facilities" as also ordered by

Therefore, for the foregoing reasons, Judge Baxley's statutory interpretation of S.C. Code Ann. § 44-20-450 and his injunctive rulings based thereon are in error and should be reversed. On the merits, Judge Baxley had no statutory basis to order the involuntary admission of Rocky Linkhorn to DDSN. Likewise, he had no authority to enjoin DDSN from opposing the involuntary admissions of others who sustained brain injuries or spinal cord injuries when such involuntary commitments are in contravention of S.C. Code Ann. § 44-20-450.

IV. The Circuit Court erred in calling another attorney as the Court's expert witness on the issue of statutory interpretation which was the ultimate issue in the litigation and which was the Court's responsibility to decide as the arbiter of the law.

Judge Baxley also erred in calling Beattie Butler as the court's expert witness over the objection of DDSN's counsel. Judge Baxley qualified Butler "as an expert on the criminal substantive and procedural laws of South Carolina that pertain to mentally ill and are intellectually disabled defendants and their competency to stand trial." (Tr. 64). Ultimately, Judge Baxley, through his own questioning as well as

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Judge Baxley. (R. ___). If the General Assembly intends for DDSN to develop, build, staff and operate a forensics unit, that needs to be directed by the General Assembly with the appropriation of necessary funding. Likewise, if the General Assembly intends for DDSN to house criminal defendants found unfit to stand trial and involuntarily committed in a "secure facility" such as GeoCare, that needs to be directed by the General Assembly with the appropriation of necessary funding. With all due respect, those are not policy decisions that should not come from the courts.

through the questioning of the Respondents' counsel, allowed Butler to offer legal opinions on the ultimate issues of statutory construction.

Not surprisingly, Butler testified that he was "no more of an expert than any lawyer or any judge." (Tr. 61). Butler's concession underlies the very error committed by Judge Baxley in calling another lawyer as an expert on the law. As discussed at length above, the ultimate issue is one of statutory construction which is undeniably a question of law. *See*, *Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law"). The interpretation of various statutes is the ultimate responsibility of the judge. He or she is presumably the expert on the law, and as a result, it is entirely inappropriate for a judge to allow a party to call another lawyer as an expert witness on an issue of statutory construction. It is certainly error for the judge to call his own expert on the law.

Remarkably, Judge Baxley included Butler's opinions on legal issues in the "Findings of Fact" section of his Order, and he concluded that "Butler's expertise and experience in this area of law is ... entitled to great weight." (R. ___). Judge Baxley clearly confused what were issues of fact and what were issues of law. Judge Baxley also allowed Butler to testify as to whether DDSN's positions violated such legal precepts as the separation of powers doctrine and equal protection, and ultimately Judge Baxley relied on those opinions. (R. ___). Finally, Judge Baxley allowed Butler to offer testimony on matters of legislative intent.

South Carolina case law clearly demonstrates the reversible error that was committed. In *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), the Supreme Court held that "[i]n general, expert testimony on issues of law is inadmissible." 580 S.E.2d at 437. The Supreme Court held that an affidavit of a law professor was properly excluded where it "inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." *Id.* Similarly, in *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978), the Supreme Court found that an expert witness was "offered to establish a conclusion of law" and that such testimony was properly excluded because it was "within the exclusive province of the court." 249 S.E.2d at 740. *See also*, *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002).

In sum, Judge Baxley committed reversible error in calling Beattie Butler as the court's expert witness to offer an opinion on the issue of statutory construction which was the ultimate issue of the case. In the event that this Court does not reverse Judge Baxley's rulings on the ultimate issue, the Court should at least vacate his Order and remand for a new hearing.

V. 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." (R. ___). 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. Moreover, DDSN was never placed on proper notice that the Court was entertaining the issuance of such broad-based 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.

Thereafter, 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." (R. ___). 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." (R. ___). 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)." (R. ___). 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)." (R. ___). And for those criminal 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." (R. ___). 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 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 U.S. 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 was 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 did not oppose his placement in a "secure facility" per Judge Baxley's Order. However, Judge Baxley's Order implicates certainly all future placements and likely 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 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 be required 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. That would also result in an exorbitant expenditure of DDSN's funding which currently does not exist. To pay for the transfer of such clients into a "secure facility," that would detrimentally affect thousands of other clients whose services would need to be cut or delayed. As a result, Judge Baxley's broad injunctive rulings should be overturned, and any prospective relief granted should be limited only to the parties to this case, namely Rocky Linkhorn.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Disabilities and Special Needs respectfully requests that this Court reverse the Order of former Circuit Court Judge J. Michael Baxley filed September 26, 2013, and vacate the prospective relief ordered therein. In the alternative, the Appellant requests that the Court vacate the Order and remand for a new hearing that is conducted with proper notice and with the exclusion of an expert witness opining on issues of law.

Respectfully submitted,

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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.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

The Appellant South Carolina Department of Disabilities and Special Needs proposes that the following be included in the Record on Appeal:

1. 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

2. Order for Criminal Responsibility and Capacity to Conform Evaluation (M'Naughten), filed February 8, 2011

3. Order for Competency to Stand Trial Evaluation Pursuant to *State v. Blair*, filed February 8, 2011

4. Finding of Present Lack of Competence to Stand Trial but Likely to Become Competent with Treatment, filed June 21, 2011

5. Finding of Lack of Competence to Stand Trial for the Foreseeable Future and Ordering Probate Commitment Proceedings, filed November 2, 2011

6. Amended Order Finding of Lack of Competence to Stand Trial for the Foreseeable Future and Ordering Probate Commitment Proceedings, filed February 28, 2012

7. Order of Chief Justice Jean Hoefer Toal, filed March 12, 2013

8. Finding of Lack of Competence to Stand Trial for the Foreseeable Future and Ordering Probate Commitment Proceedings, filed August 22, 2013

9. Petition for Judicial Admission, filed January 5, 2012

10. Motion for Rule to Show Cause, filed January 2, 2013

11. Return to Rule on Behalf of South Carolina Department of Mental Health, filed August 19, 2013

12. Return to Rule on Behalf of South Carolina Department of Disabilities and Special Needs, filed July 30, 2013

13. Letter dated April 12, 2013, from Judge J. Michael Baxley to Counsel

14. Letter dated April 10, 2013, from Judge J. Michael Baxley to Beattie I. Butler, Esquire

15. Court Exhibit #1

16. Court Exhibit #2

17. Court Exhibit #3

18. Court Exhibit #4

19. Court Exhibit #5

20. Court Exhibit #6

21. Court Exhibit #7

22. Transcript of Hearing, August 20, 2013
pp. 1-107

23. Affidavit of David A. Goodell

24. Affidavit of Steve von Hollen

We certify that this designation contains no matter which is irrelevant to this appeal.

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May 23, 2014

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.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant, South Carolina Department of Disabilities and Special Needs, does hereby certify that service of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first

class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 23rd day of May 2014:

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May 23, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Ex Parte: South Department of Disabilities and Special Needs
In Re: State of South Carolina v. Rocky A. Linkhorn
Appellate Case Number: 2013-002208
Indictment Numbers: 2011-GS-32-0242; 2011-GS-32-0243; 2011-GS-32-0244
Our File Number: 79.9313

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** with regard to the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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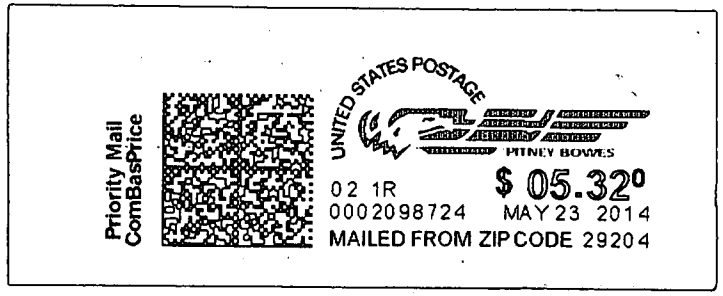

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