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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable J. Michael Baxley, Circuit Court Judge

Indictment Nos. 2011-GS-32-0242, 2011-GS-32-0243 and 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 RESPONDENT STATE OF SOUTH CAROLINA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENTS

I. This matter was properly before the Circuit Court 8

a. Judge Baxley had subject matter jurisdiction to hear and dispose of matters pertaining to this case 8

b. The South Carolina Department of Disabilities and Special Needs had notice of the issues to be heard by the Circuit Court 12

II. The Circuit Court did not err in its interpretation of the term "intellectual disability" as set forth in S.C. Code Ann. § 44-23-220, the relevant definition for this matter, with the resulting commitment by judicial order in this criminal matter so as to keep Linkhorn in a controlled environment in compliance with mandatory South Carolina law, regardless of when the event giving rise to his disability arose 14

a. The Court did not err in its interpretation of the relevant statute 14

b. The Court did not err in exercising its authority to certify an expert in assisting the Court in interpreting the complex legislative framework for housing criminal defendants with mental disabilities 20

III. The injunctive relief ordered by the Circuit Court will not 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 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Dawkins v. Fields,
354 S.C. 58, 580 S.E.2d 433 (2003).

Fernanders v. State,
359 S.C. 130, 597 S.E.2d 787 (2004).

Florence County Democratic Party, et. al. vs Florence County Republican Party, et al.,
398 S.C. 124, 727 S.E.2d 418 (2012).

Georgia-Carolina Bail Bonds, Inc.,
354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003).

H.S. Chisholm, Inc. v. Klinger,
229 S.C. 8, 91 S.E.2d 538 (1956).

Jennings v. Jennings,
401 S.C. 1, 736 S.E.2d 242 (2012).

Olmstead v. L.C.,
527 U.S. 581 (1999).

O'Quinn v. Beach Associates,
272 S.C. 95, 249 S.E.2d 734 (1978).

Skinner v. Westinghouse Elec. Corp.,
380 S.C. 91, 668 S.E.2d 795 (2008).

State v. Archie,
322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996)

State v. Blackwell,
10 S.C. 35 (1878).

State v. Johnson,
249 S.C. 1, 152 S.E.2d 669 (1967).

State v. Nathans,
49 S.C. 199, 27 S.E. 52 (1897).

Toyota of Florence, Inc. v. Lynch,
314 S.C. 257, 443 S.E.2d 611 (1994).

Statutes and Rules

S.C. Code Ann. § 17-24-40.

S.C. Code Ann. §§ 44-17-510 through 44-17-610.

S.C. Code Ann. § 44-20-20.

S.C. Code Ann. § 44-20-30.

S.C. Code Ann. § 44-20-390.

S.C. Code Ann. § 44-20-430.

S.C. Code Ann. § 44-20-450.

S.C. Code Ann. § 44-23-10.

S.C. Code Ann. § 44-23-220.

S.C. Code Ann. § 44-23-410.

S.C. Code Ann. § 44-23-430.

S.C. Code Ann. § 44-30-30.

S.C. Const. art. I, § 8.

S.C. Const. art. V, § 4.

S.C. Const. art. 5, § 11.

S.C. Const. art. 5, § 12.

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court have subject matter jurisdiction to issue its order?

II. Did the Circuit Court err in its interpretation of the term "intellectual disability" as set forth in S.C. Code Ann. § 44-23-220?

III. Did the Circuit Court err in granting the injunctive relief set forth in its Order?

STATEMENT OF THE CASE

Rocky Linkhorn was arrested on July 14, 2010, and charged with Criminal Sexual Conduct with a Minor in the First Degree, Lewd Act on a Minor, and Disseminating Obscene Materials to a Minor. At the time of the hearing that gave rise to the Order appealed from in this matter, Linkhorn had been continuously incarcerated. (Tr. p. 6, l. 20 – p. 7, l. 6) (R. ____). These charges arise from the allegations that Linkhorn committed a sexual battery on a four-year-old female victim. (Tr. p. 7, ll. 17-18) (R. ___).

Prior to the alleged sexual battery and while incarcerated on another matter, Linkhorn attempted suicide at age 23 on March 13, 1998. The attempted suicide caused Linkhorn to suffer an anoxic brain injury. (Diagnostic Report signed August 2, 2012 (the "Diagnostic Report")) (R. ___). As a result of the brain injury, Linkhorn was diagnosed with a "dementia caused by an anoxic brain injury." (Tr. p. 50, ll. 20-22) (R.____). Linkhorn was evaluated for his fitness to stand trial and ultimately determined incompetent to stand trial and unlikely to obtain competency to stand trial in the foreseeable future for the reasons set forth in S.C. Code Ann. § 44-23-410. (Order of William P. Keesley Finding Lack of Competence to Stand Trial for the Foreseeable Future and Ordering Probated Commitment Proceedings dated November 2, 2011 ("First Judge Keesley Order")) (R. ___).

As a result of his finding of lack of competence, Judge Keesley ordered the Solicitor responsible for the prosecution of Linkhorn to initiate judicial proceedings pursuant to S.C. Code Ann. §§ 44-17-510 through 44-17-610. (R. ___). On December 12, 2011, the Probate Court dismissed the proceedings because the designated examiners found that Linkhorn was not mentally ill. However, there were indications that Linkhorn

suffered from a mental disability. (Amended Order of Judge Keesley filed February 28, 2012 ("Amended Order")). (R. ____). In the Amended Order, Judge Keesley ordered the solicitor to initiate judicial admission proceedings pursuant to §§ 44-17-510 through 44-17-610 and/or S.C. Code Ann. § 44-20-450.

Assistant Solicitor Rhonda Patterson initiated judicial commitment proceedings in the Probate Court of Lexington County, South Carolina. (Petition for Judicial Admission dated January 5, 2012 (the "Solicitor's Petition for Admission")). (R. ____). Appellant South Carolina Department of Disabilities and Special Needs ("DDSN") issued the Diagnostic Report which evaluated Linkhorn pursuant to S.C. Code Ann. § 44-20-390 (Supp. 2011) wherein its examiners found:

> Mr. Linkhorn clearly presents with significant cognitive impairment. A diagnosis of intellectual disability requires significant and concurrent deficits in intellectual and adaptive functioning prior to the age of 18. There is no available data to establish onset of Mr. Linkhorn's cognitive difficulties prior to the age of 18. Records seem to clearly correlate the onset of difficulties with an incident in 1998, when at the age of 23 Linkhorn attempted to hang himself and was subsequently given a diagnosis of encephalopathy secondary to anoxic brain injury. His current diagnosis of dementia includes the criterion of a significant decline from previous level of functioning. The DDSN Eligibility Determination Letter dated 7/30/2012 indicates that Mr. Linkhorn does not meet the criteria for a diagnosis of intellectual disability and he is therefore not eligible for DDSN services under that category. This examiner concurs with that decision.

Diagnostic Report, (R. __).

DDSN filed a Notice of Motion and Motion to Dismiss dated August 6, 2012 (the "DDSN Motion to Dismiss") (R. ___), to dismiss those proceedings on the grounds that:

1. The Diagnostic Evaluation found that Mr. Linkhorn does not have an intellectual disability and is not in need of services from the South Carolina Department of Disabilities and Special Needs.

2. The court has no jurisdiction to hear the case for commitment to the South Carolina Department of Disabilities and Special Needs as there is no indication of an intellectual disability (mental retardation).

(R. ___).

Thereafter, on January 2, 2013, Assistant Solicitor Rhonda Patterson filed a Motion for a Rule to Show Cause (the "Motion for Rule") in the Court of General Sessions of Lexington County, South Carolina. (R. ___). The Probate Court dismissed the pending action and transferred the matter to the Circuit Court. See notation at bottom of the Solicitor's Petition for Admission that states "[d]ismissed in Probate Court based upon Circuit Court jurisdiction of this matter as confirmed with Solicitor's office." (R. __). See also testimony of Associate Probate Judge Thompson with regard to the dismissal that "[i]t was dismissed in probate court based upon circuit court jurisdiction of this matter as confirmed with the Solicitor's office." (Tr. p. 15, ll. 8-11) (R. ___).

On March 12, 2013, The Honorable Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina, issued an Order vesting the Honorable J. Michael Baxley with exclusive jurisdiction to hear and dispose of all matters pertaining to the *State v. Rocky Linkhorn* case (the "Chief Justice's Order").[1] (R. ___).

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[1] By Order of Chief Justice Toal dated August 14, 2003, Judge Baxley was vested 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. Supreme Court Order 2003-08-14-01 *re: Hon. J. Michael Baxley vested with statewide jurisdiction over enforcement of all outstanding and future orders issued by the Courts of General Sessions committing defendants to the Department of Mental Health* (R. ___) (Superseded by Supreme Court Order 2014-05-07-01 *re Honorable Frank R. Addy, Jr., vested with statewide jurisdiction over enforcement of all outstanding and future orders issued by the Courts of General Sessions committing defendants to the Department of Mental Health and Dep't of Disabilities and Special Needs*). (R.___). The 2003 Order included jurisdiction over any current and pending enforcement actions. *Id.* The Order also provided that Judge Baxley "shall have jurisdiction to review and approve a statewide plan for the orderly and timely disposition of commitment orders and to monitor the status of all inmates currently in custody and awaiting admission pursuant to commitment orders." *Id.*

Prior to the Rule to Show Cause Hearing held on August 20, 2013 (the "Rule to Show Cause Hearing"), Judge Baxley sent a letter dated April 10, 2013, to Beattie I. Butler, Esquire (the "Butler Letter"), with copies to counsel for all parties involved in this case, wherein Judge Baxley asked Mr. Butler to appear as the court's expert on certain matters pertaining to statutory interpretation. (R. __). Judge Baxley also sent a letter dated April 12, 2013 (the "Letter to the Parties"), to Assistant Solicitor Rhonda Patterson and counsel for the other parties. The Letter to the Parties notified all parties of the Chief Justice's Order, outlined "the Rule to Show Cause issues," and set forth "a brief description of the anticipated evidence necessary for a decision on each issue." (R. ___).

As a result of the Rule to Show Cause Hearing, 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 (the "Order Granting Solicitor's Rule to Show Cause") (R. ___). Judge Baxley found, based on the evidence and testimony, that DDSN "currently denies involuntary commitment, care and treatment to those defendants whose cognitive impairments begin after the age of twenty-two, regardless of their treatment needs." (Order Granting Solicitor's Rule to Show Cause) (R. ___). He found that the "end result of this practice is that head, spinal cord, and/or brain-injured individuals [like Linkhorn] find themselves without care and treatment through involuntary commitment, potentially dangerous individuals are released to the general public, and potentially vulnerable individuals in need of care are warehoused in county jails in direct violation of § 44-23-220." (Order Granting Solicitor's Rule to Show Cause) (R. ___).

Judge Baxley granted the State's motion and ordered the Eleventh Circuit Solicitor's Office to re-initiate the judicial commitment proceedings against Linkhorn and ordered DDSN to take custody of Linkhorn and to secure him in an appropriate facility until the reinitiated judicial proceedings could be completed. (Order Granting Solicitor's Rule to Show Cause) (R. ___). Further, DDSN was enjoined and prohibited from raising a defense that Linkhorn cannot be denied treatment and services under § 44-23-430 through an involuntary commitment because he has a head, brain, and/or spinal injury rather than an "intellectual disability" or a "related disability" as defined by S.C. Code Ann. §§ 44-20-30(12) and (15). (R. ___).

In addition, Judge Baxley found that DDSN had "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" and that this practice "violates state law and infringes on the power of circuit courts." (R. ___). Therefore, Judge Baxley enjoined and prohibited DDSN from:

> . . . opposing petitions for involuntary commitment on the basis that a defendant is eligible for voluntary services in its head and spinal cord injury division. It is also enjoined from opposing petitions for involuntary commitment on the basis that a defendant does not have an 'intellectual disability' or 'related disability' as defined in S.C. Code Ann. § 44-30-30(12) and (15). The 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).

Order Granting Solicitor's Rule to Show Cause, (R. ____).

Finally, Judge Baxley ordered the development of "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), and further

shall provide for the development of secure facilities necessary thereto; or in the alternative, shall provide funds and necessary contractual arrangements to henceforth house such defendants in secure facilities operated by other entities." (Order Granting Solicitor's Rule to Show Cause) (R. ___).

DDSN appeals the Order Granting the Solicitor's Rule to Show Cause.

ARGUMENT I.

THIS MATTER WAS PROPERLY BEFORE THE CIRCUIT COURT.

As an initial matter, DDSN argues that this matter was not properly before Judge Baxley because (a) the Court did not have subject matter jurisdiction and (b) DDSN did not have notice of the issues to be heard by the Court. DDSN's arguments are without merit.

a. Judge Baxley had subject matter jurisdiction to hear and dispose of matters pertaining to this case.

DDSN argues that 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*" because § 44-20-450 conferred exclusive jurisdiction over this case to the Probate Court, and, therefore, the Chief Justice's Order is in "contravention" of § 44-20-450. In addition, DDSN argues the Chief Justice was not vesting jurisdiction of the commitment to Judge Baxley because the Chief Justice's Order vesting exclusive jurisdiction to hear and dispose of all matters pertaining to the *State v. Rocky Linkhorn* case does not reference the Petition for Judicial Admission for *In the Matter of Rocky A. Linkhorn*, 2012-MH-32-002.

Section 44-20-450 of the South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act (the "Act") provides that the solicitor may bring an action to admit a person with an "intellectual disability" or "related disability" to the services of DDSN by filing a petition with the probate or the family court. The Act also provides that an appeal under this section is *de novo* to the Circuit Court. *Id.* at § 44-20-450(G).

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (citations omitted). "The Circuit Court shall be a general trial court 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." S.C. Const. art. V, § 11.

The Act specifically sets forth the process for a solicitor to bring an action and states that the solicitor "may bring an action. . . with the probate or family court." § 44-20-450(G). On March 12, 2013, the Chief Justice's Order vested Judge Baxley with "exclusive jurisdiction to hear and dispose" of *The State of South Carolina v. Rocky Linkhorn*, 2011-GS-32-00242; -00243; and -00244, which included deciding "all matters pertaining to this case." (Chief Justice's Order) (R. __). The 2013 Chief Justice's Order is consistent with a longstanding Order of the Chief Justice dated August 14, 2003, vesting 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 §§ 44-23-430 or 17-24-40. (Supreme Court Order 2003-08-14-01 *re: Hon. J. Michael Baxley vested with statewide jurisdiction over enforcement of all outstanding and future orders issued by the Courts of General Sessions committing defendants to the Department of Mental Health*) (the "2003 Order") (R. ___).

The 2003 Order was in place at all times relevant to this matter as it was not superseded until May 7, 2014, when Chief Justice Toal vested the Honorable Frank R. Addy, Jr. statewide jurisdiction over enforcement of all outstanding and future orders

issued by the Courts of General Sessions committing defendants to the Department of Mental Health. (R. ___). The 2003 Order also provided that Judge Baxley "shall have jurisdiction to review and approve a statewide plan for the orderly and timely disposition of commitment orders and to monitor the status of all inmates currently in custody and awaiting admission pursuant to commitment orders." (R. ___).

This matter was commenced in the Probate Court by the Solicitor pursuant to the Petition for Judicial Admission. However, the Probate Court dismissed the matter. During the Rule to Show Cause Hearing, Judge Baxley questioned Associate Probate Judge Julie Hill Thompson regarding the status of the Petition for Judicial Admission. Judge Thompson confirmed for Judge Baxley that the probate matter had been dismissed. (R. ___). Specifically, Judge Baxley confirmed that the Petition for Judicial Admission was returned back to the General Sessions court when the Rule to Show Cause was filed. This is also memorialized in the record pursuant to notation on page 1 of the Petition for Judicial Admission. (R. ___).

The South Carolina Constitution confers authority on the Chief Justice to assign this case to any judge. "The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system." S.C. Const. art. V, § 4. Exercising her constitutional authority, Chief Justice Toal vested Judge Baxley with "exclusive jurisdiction to hear and dispose" of *The State of South Carolina v. Rocky Linkhorn*, 2011-GS-32-00242; -00243; and -00244, including the authority to decide "all matters pertaining to this case." The powers given Judge Baxley by the Chief Justice of "exclusive jurisdiction to hear and dispose" of *The State of South Carolina v. Rocky Linkhorn*, 2011-GS-32-00242; 00243; and 00244, and "all matters pertaining to

this case" were clearly within her powers under S.C. Const. art. V § 4. The South Carolina Constitution gives the Chief Justice authority to assign a judge to any court in the Unified Judicial System, including the Probate Court, and to hear any case. In this case, the Petition for Judicial Admission had been dismissed so there was no overlapping jurisdiction. Judge Baxley had jurisdiction pursuant to the powers granted to the Chief Justice in the South Carolina Constitution and exercised by the Chief Justice pursuant to the March 12, 2013 Chief Justice's Order.

Appellant also argues that Judge Baxley did not have subject matter jurisdiction over this case because the Chief Justice's Order assigning all matters pertaining to this case does not include the Petition for Judicial Admission in 2012-MH-32-002. However, the very reason the Petition for Judicial Admission (captioned *In the Matter of Rocky A. Linkhorn* 2012-MH-32-002) was filed was because Judge Keesley ordered the Solicitor to file a Petition for Judicial Admission in *South Carolina v. Rocky Linkhorn*, 2011-GS-32-00242; -00243; and -00244. (R. ___). There can be no doubt that 2012-MH-32-002 pertains to the case referenced in the Chief Justice's Order.

In summary, this matter was properly heard in the Circuit Court by Judge Baxley after the Solicitor initially filed it in Probate Court in January 2012. The matter was subsequently dismissed and heard by Judge Baxley pursuant to the Rule to Show Cause. Judge Baxley had jurisdiction over this matter on the basis of the Chief Justice's Order issued by the Chief Justice pursuant to her constitutional authority.

b. The South Carolina Department of Disabilities and Special Needs had notice of the issues to be heard by the Circuit Court.

DDSN argues the lower court erred in granting the Rule to Show Cause because proper procedures were not followed by the Solicitor and Circuit Court. Specifically, DDSN contends the Motion for Rule to Show Cause was not verified or supported by affidavits, which DDSN contends was "a fatal defect," citing *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 627 (1994).

Toyota of Florence is factually different and, in spite of its absolute language, really stands for the importance of notice of a reasonable basis for the litigation. *Toyota of Florence* was a constructive criminal contempt case for arranging pretrial publicity and depended on facts that occurred outside of the courtroom. The language from the opinion is:

> Constructive contempt, such as that alleged here, is that occurring outside the presence of the Court. *State v. Johnson,* 249 S.C. 1, 152 S.E.2d 669 (1967). Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition. *Id.* The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect. e.g., *State v. Blackwell,* 10 S.C. 35 (1878). Here, there was neither an affidavit nor a verified petition and S.E.T. timely objected. The contempt order must be reversed. *State v. Blackwell, supra.*

Toyota, 314 S.C. at 267, 442 S.E.2d at 617.

The absolute language comes from *State v. Blackwell*, 10 S.C. 35 (1878): "The rule to show cause appears to have been made without affidavits. This is a fatal objection." *Id.*, at 38. *Blackwell* makes it clear that parties charged "with offenses, other than contempts committed in the presence of the Court, are entitled to have the matters charged stated under oath, the penalties for false swearing being regarded as a safeguard to the liberties of the citizen." *Id.*, at 38. In *State v. Johnson*, 249 S.C. 1, 152 S.E.2d 669

(1967) (overruled on other grounds, *State v. Kennerly*, 337 S.C. 617, 524 S.E. 2d 837 (1999)) the importance of notice was discussed:

> Of course, as stated in 13 C.J. 68, 'before a person can be found guilty of contempt not committed in the presence of the Court, he must have due and reasonable notice of the proceeding. A rule to show cause, an attachment, or other process should issue.' And it is said in *State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 57, 58, that 'the almost universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential.' The verified petition of the party applying for a rule to show cause, however, is a substantial compliance with the principle of law above stated, when and if the petition alleges facts sufficient upon which to base the issuance of such order.

Johnson, 249 S.C. at 8, 152 S.E.2d at 672.

DDSN had sufficient notice given its participation in these matters. DDSN was a party/participant to these proceedings since at least October 21, 2011, performed some of the examinations, and it was given notice of the content of the proceedings by a Judge of the Court of General Sessions. Therefore, there was not a need for "the penalties for false swearing" to be a "safeguard to the liberties of the citizen." Even if there were technical deficiencies present, they have not resulted in any prejudice to DDSN. *See, H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (1956) ("[T]he appellants had actual notice of the issuance and contents of the rule [to show cause, which was improperly filed] by the personal service of it upon them, and in response to it they appeared by counsel."). Moreover, no sanctions have been levied against DDSN pursuant to a rule to show cause. There is no prejudice to DDSN and any technical errors should not have prevented this hearing from going forward.

ARGUMENT II.

THE CIRCUIT COURT PROPERLY ANALYZED THE STATUTORY AND LEGISLATIVE FRAMEWORK IN ORDER TO PROVIDE A MECHANISM TO KEEP LINKHORN IN A CONTROLLED ENVIRONMENT IN COMPLIANCE WITH MANDATORY SOUTH CAROLINA LAW.

a. The Court did not err in its interpretation of the relevant statute.

The Circuit Court did not err in determining that § 44-23-220 provides the appropriate resolution to this case. Judge Baxley determined that "DDSN's practice of defending probate commitments against criminal defendants on grounds that their cognitive impairments do not fall within the narrow definitions contained in §§ 44-20-30(12) and (15) is contrary to the language and intent of Chapter 23 of Title 44." (Order Granting Solicitor's Rule to Show Cause) (R.___). In addition, the Court found that Linkhorn "requires the same treatment as an individual who suffers from an intellectual disability or related disability, and such treatment should be provided by DDSN." (Order Granting Solicitor's Rule to Show Cause) (R.___)

DDSN disputes these conclusions, arguing that an involuntary admission is inappropriate because Linkhorn's disability falls outside of the definition of "intellectual disability." DDSN argues that because the brain trauma occurred outside of the 22-year developmental period (Linkhorn was rendered disabled when he was 23), he would only qualify for a *voluntary* admission in the head and spinal cord unit. Therefore, DDSN's contention is that *involuntary* judicial admission is simply not an option available to the Court.

Judge Baxley properly rejected DDSN's narrow reading of the statutory framework, which was clearly constructed to provide a remedy for what to do with those

suffering from these types of disabilities and cannot be imprisoned. Section 44-23-220 provides that "[n]o person who is mentally ill or who has an **intellectual disability** shall be confined for safekeeping in any jail." § 44-23-220 (emphasis added). And further, "If hospitalization is ordered, the person shall be discharged from the custody of the officer in charge of the jail and shall be admitted to an appropriate mental health or intellectual disability facility." *Id.* Section 44-23-10 provides definitions for "intellectual disability" that are specific to "this 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." Judge Baxley found that the proper definition for a "Person with intellectual disability" is:

> (21) "Person with intellectual disability" means 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.

§ 44-23-10(21).

The disability standard for § 44-23-220 does not contain a developmental period of 22 years, and there is not a separate reference to an origin of the intellectual disability as the result of brain injury. DDSN argues § 44-20-450 controls the involuntary admission to DDSN of a person with "intellectual disability." For admission under § 44-20-450, the definition of "intellectual disability" is "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." § 44-20-30(12). Note that the definition of "Person with intellectual disability" for purposes of § 44-23-220 makes no reference to a "developmental period."

DDSN also relies on the lack of a procedure for voluntary admission for persons with a "head injury" or a "spinal cord injury" in § 44-20-450. *See* App. Brief at 16.

The Court heard expert testimony from Dr. Richard Frierson.[2] Dr. Frierson testified on Linkhorn's condition. With regard to the appropriate placement of Linkhorn, Dr. Frierson testified:

> It is my opinion that Linkhorn needs to live in a supervised 24-hour — either a group home or a facility where he can be supervised in his activities of daily living. And it's also my opinion that he should be in a placement where he does not have access to young children, given the allegations that led to his arrest.

Tr. p. 46, l. 23 – p. 47, l. 3 (R.___)

With regard to Linkhorn's disability and the standards for § 44-23-10, made applicable to § 44-23-220 by § 44-23-10, Dr. Frierson testified:

> Q: Okay. Doctor, I'm going to hand you a printed copy of Section 44-23-10 of the Code of Laws of South Carolina and ask you to read into the record Subsection 21 where a person with an intellectual disability is defined. I've got it highlighted there for you.

THE COURT: Please remember our court reporter is taking down what you say as you read.

> THE WITNESS: Quote, A person with intellectual disability, end quote, means 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 of a 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.

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[2] Dr. Frierson is board certified by the American Board of Psychiatry and Neurology in general psychiatry and forensic psychiatry and is professor of clinical psychiatry at the University of South Carolina School of Medicine. Dr. Frierson was admitted as an expert without objection. (Tr. p. 41, ll. 13 – 19) (R. ____), (Tr. p. 42, l. 20 – p. 43, l. 6) (R. ____).

Q: Dr. Frierson, in your opinion, does Linkhorn's impairment and his clinical manifestation fall within that statutory definition?

A: Yes.

Q: Dr. Frierson, if Linkhorn came into your office and you had absolutely no idea that he had had a traumatic brain injury, what would your clinical impressions of him be?

A: It would be my clinical impression if I did not know that he had had the brain injury and was normal prior to that, I knew nothing about it, and I was asked my clinical impression, it would be that he likely has mild mental retardation or now as we call it, intellectual disability.

Tr. p. 47, l. 7 – p. 48, l. 13 (R. ___)

Based on the testimony of Dr. Frierson, Judge Baxley found:

> The Court finds Dr. Frierson's testimony credible. His diagnostic impressions are consistent with those of the DMH and DDSN examiners who evaluated the Defendant for competence to stand trial. Based on the testimony of Dr. Frierson, the Court makes the following findings: (1) the Defendant suffers from dementia that resulted from a 1998 anoxic brain injury that occurred when the Defendant was twenty-four years old;[3] (2) Dr. Frierson's conclusions about the Defendant's treatment needs are persuasive based on his experience in the care and treatment of incompetent persons in a forensic environment; (3) the Defendant should receive the type of treatment described by Dr. Frierson's testimony; and, (4) the Defendant requires the same treatment as an individual who suffers from an intellectual disability or related disability, and such treatment should be provided by DDSN.

Order Granting Solicitor's Rule to Show Cause (R. ___).

Linkhorn manifests the characteristics of someone with an "intellectual disability" under the definition applicable to § 44-23-220 which does not distinguish brain injury nor requires the manifestations to have surfaced during the "developmental period." He

[3] Note that the Diagnostic Report says Linkhorn was 23 when he attempted suicide. (R. ___)

cannot be held in "any jail" and, therefore, must be put in the custody of DDSN pursuant to §§ 44-23-220 and 44-23-10(21).

Judge Baxley properly determined that DDSN's narrow statutory interpretation was counter to the intent of the legislature that all criminal defendants with an "intellectual disability," as defined in § 44-23-10, be eligible for involuntary admission to the jurisdiction of the DDSN pursuant to § 44-20-450(E)." Judge Baxley determined that:

> Thus, the narrower definition favored by DDSN may well apply to the categories outlined in S.C. Code Ann. § 44-20-450(A)(1) through (7), where involuntary commitment does not arise in the context of a criminal case. But where a criminal defendant has been referred to Probate Court by the Circuit Court, the broader definition in S.C. Code Ann. § 44-23-10(21) applies. Incompetent criminal defendants must fall under the responsibility of some agency. Unless a defendant is mentally ill, an incompetent defendant falls within the responsibility of DDSN.

Order Granting Solicitor's Rule to Show Cause (R.).

Judge Baxley found that "[w]hile the statutory framework might be inelegant, the legislative intent is clear. After a circuit court order is issued pursuant to S.C. Code Ann. § 44-23-430(2), and commitment proceedings are commenced under § 44-20-450, the probate court and its designated examiners must use the statutory definition of 'intellectual disability' contained in § 44-23-10(21) to determine whether an individual should be committed to DDSN." (Order Granting Solicitor's Rule to Show Cause) (R. ___).

Judge Baxley properly reviewed the statutory construction and legislative intent to harmonize the provisions of Chapter 20, Articles 1 and 3, and Chapter 23, Articles 1 and 5, of Title 44. *See, Georgia–Carolina Bail Bonds, Inc.*, 354 S.C. 18, 25, 579 S.E.2d 334, 337-338 (Ct. App. 2003) ("If the language of an act gives rise to doubt or uncertainty as

to legislative intent, the construing court may search for that intent beyond the borders of the act itself.... In construing a statute, the court looks to the language as a whole in light of its manifest purpose."). The result was that Judge Baxley found that Chapter 20 was general and Chapter 23 was specific and then applied the rule of construction that the specific statute is considered an exception to the general statute. He found that Chapter 20 establishes and governs the operation of DDSN and that Chapter 23 "governs the detention, confinement, and transfer of confined persons; fitness to stand trial; and the treatment, rights, and expenses of patients generally." (Order Granting Solicitor's Rule to Show Cause) (R. ___). The definition of "intellectual disability" for Chapter 20 is set forth in Section 44-20-30. This definition requires the disability to be "manifested during the developmental period." Section 44-20-30(12).

Pursuant to § 44-23-430(2), the solicitor "shall initiate judicial admission proceedings pursuant to Sections 44-17-510 through 44-17-610 or Section 44-20-450[.]" Judge Baxley found that Chapter 20 is general in nature and that Article 5 of Chapter 3 "specifically addresses the concerns that rise when mentally ill or intellectually disabled persons are charged with the commission of a criminal offense in circuit or family court." (Order Granting Solicitor's Rule to Show Cause) (R. ___).

Judge Baxley considered *Florence County Democratic Party, et. al. vs. Florence County Republican Party, et al.*, 398 S.C. 124, 128, 727 S.E.2d 418, 420-421 (2012) and *Fernanders v. State*, 359 S.C. 130, 133, 597 S.E.2d 787, 789 (2004) for the proposition that "the specific statute is considered an exception to the general statue" and "[w]here a conflict arises, the specific statute prevails." Order Granting Solicitor's Rule to Show Cause) (R.___).

DDSN argues that its Executive Director has broad authority regarding eligibility for the services of its agency pursuant to S.C. Code Ann. § 44-20-430, which provides that "[t]he director or his designee has final authority over applicant eligibility, determination, or services and admission order, subject to policies adopted by the commission." Judge Baxley properly found that "§ 44-20-430 does not allow the Director of DDSN to refuse to provide treatment and services to criminal defendants involuntarily committed to its custody in a case that originated in the circuit court as a result of proceedings under § 44-23-430." (R. ___). Judge Baxley correctly concluded that this usurps the power of the courts by the executive branch and violates the separation of powers doctrine. He correctly bases this conclusion on S.C. Const. art. I, § 8 and cites *State v. Archie*, 322 S.C. 135, 137, 470 S.E.2d 380, 383-382 (Ct. App. 1996) (finding probation department invaded the power of the courts when it imposed additional conditions of probation). (Order Granting Solicitor's Rule to Show Cause) (R.___).

b. The Court did not err in exercising its authority to certify an expert in assisting the Court in interpreting the complex legislative framework for housing criminal defendants with mental disabilities.

DDSN complains that the Court's use of an attorney as a Court's Expert in interpreting the statute is reversible error. In the Letter to the Parties, Judge Baxley disclosed that "the Court intends to call an expert witness, who is hereby disclosed to be Beattie I. Butler. . ." (R.___). DDSN relies on *Jennings v. Jennings*, 401, S.C. 1, 5, 736 S.E.2d 242, 243 (2012). (App. Brief at 23). Per *Jennings*, "[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de*

novo." Regardless of whether the testimony was proper, the court "reviews questions of law *de novo*." *Id*. The Supreme Court in *Jennings* reversed a grant of summary judgment because the court below had misconstrued a statute. This error required reversal.

In *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), cited by DDSN at App. Brief p. 24, the Court of Appeals reversed a grant of summary judgment and held that the trial court erred in refusing to consider the affidavit of University of South Carolina School of Law Professor John Freeman despite the fact that it contained an opinion on the ultimate issue. Then, the South Carolina Supreme Court reversed and held that the trial court properly refused to consider the affidavit because it contained legal arguments and conclusions. DDSN also cites *O'Quinn v. Beach Associate*s, 272 S.C. 95, 249 S.E.2d 734 (1978). In *O'Quinn*, the South Carolina Supreme Court ruled that "[t]he testimony of Mr. McCarthy [expert] was offered to establish a conclusion of law within the exclusive province of the court and thus was properly excluded." *Id*., 272 S.C. at 107, 249 S.E.2d 740.

The cited cases stand for the proposition that it is proper to exclude expert testimony with regard to legal conclusions. They do not stand for the proposition that admission of such testimony is necessarily reversible error.

Regardless, this Court may review issues of law *de novo*. If Judge Baxley's interpretation of the applicable statutes was flawed in some way, which is not conceded here, the correct result pursuant to § 44-23-220 was still obtained and the testimony of Mr. Butler, is, at worst, harmless error under the facts and procedural posture of this matter.

The Order Granting Solicitor's Rule to Show Cause should be sustained.

ARGUMENT III.

THE INJUNCTIVE RELIEF ORDERED BY THE CIRCUIT COURT WILL NOT 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.

DDSN argues that the injunctive rulings were made without due process being afforded DDSN and the numerous persons potentially affected by these rulings. As to DDSN's due process rights, there is an extensive discussion about notice in Argument I. Furthermore, the Butler Letter, which was sent to counsel for all parties, states:

> Please note that DDSN has denied service based on a paperwork review, apparently taking the position that a brain-injured individual is automatically ineligible for services. This will be a core issue in this case for which your testimony is sought.

Butler Letter (R. __).

The Butler Letter also asks Mr. Butler to "discuss the impact of this decision upon the individual treatment and care of Linkhorn and similarly-situated persons; discuss whether this decision is consistent with the overall statutory mission of DDSN." (R. ____).

In the Letter to the Parties, Paragraph 3, Judge Baxley states:

> In the event the Court concludes that DDSN is an appropriate agency for Defendant's care either entirely or in part, the Court will then consider whether DDSN's interpretation of the statutory term 'intellectual disability or related disability' to exclude Defendant and others with brain injuries is permissible (See S.C. Code Ann. § 44-23-410, et. seq.).

Letter to the Parties (R. ___).

The Order Granting Solicitor's Rule to Show Cause is prospective and, as such, any argument that it impacts current placements is unsubstantiated. The Order Granting Solicitor's Rule to Show Cause includes language such as "DDSN is henceforth

enjoined," "[i]t is also enjoined and prohibited from opposing petitions for involuntary commitment on the basis that a defendant does not have an 'intellectual disability' or 'related disability' as defined by § 44-20-30(12) and (15)." (R. ____). These are forward looking Orders. There is no language of retroactivity in the Order Granting Solicitor's Rule to Show Cause. The bottom line, as set forth in the Order Granting Solicitor's Rule to Show Cause, is that:

> The 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).

Order Granting Solicitor's Rule to Show Cause (R. ___).

Further, the Order Granting Solicitor's Rule to Show Cause simply does not require the placement of Linkhorn or any other individuals found incompetent to stand trial in the future in the most restrictive placement possible. Rather, the Order Granting Solicitor's Rule to Show Cause orders:

> Either the Director of DDSN, or the South Carolina Commission on Disabilities and Special Needs pursuant to § 44-20-430, shall 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), and further shall provide for the development of secure facilities necessary thereto; or in the alternative, shall provide funds and necessary contractual arrangements to henceforth house such defendants in secure facilities operated by other entities.

Order Granting Solicitor's Rule to Show Cause (R. ____).

Judge Baxley only orders that DDSN "shall provide for the development of secure facilities necessary thereto." Other than that the facilities be secure, there is no further direction to DDSN.

In arguing to the contrary, DDSN relies on S.C. Code Ann. § 44-20-20 and *Olmstead v. L.C.*, 527 U.S. 581 (1999). Section 44-20-20 is the South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act. The Act provides in part:

> The State of South Carolina recognizes that a person with intellectual disability, a related disability, head injury, or spinal cord injury is a person who experiences the benefits of family, education, employment, and community as do all citizens. It is the purpose of this chapter to assist persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live with their families or in family settings in the community in the least restrictive environment available.
>
> When 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.

Id.

In its evaluation of Linkhorn, DDSN evaluators used the definitions applicable to § 44-20-20 and not the definition made applicable to § 44-23-220 by § 44-23-10. By taking this approach, DDSN has attempted to avoid § 44-23-220 which applies to an incarcerated person, as is Linkhorn, and improperly applies a definition of intellectual disability that distinguishes brain injuries and excludes treatment if the disability did not manifest during the "developmental period." The definition used by DDSN is not applicable under the facts of this case.

Reliance on *Olmstead* is also misplaced. *Olmstead* is a case under the Americans with Disabilities Act (the "ADA") and involves two mentally retarded women that were voluntarily admitted and confined for treatment in a psychiatric unit. The issue is

whether failure to place the women in a community based facility violates the ADA. *Olmstead* is factually very different from this appeal. *Olmstead* did not involve incarcerated persons charged with serious crimes and it also involved voluntary admissions.

Moreover, for more than ten years, Judge Baxley has been vested by the Supreme Court "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." (Supreme Court Order 2003-08-14-01 *re: Hon. J. Michael Baxley vested with statewide jurisdiction over enforcement of all outstanding and future orders issued by the Courts of General Sessions committing defendants to the Department of Mental Health*). It was only in May 2014 that the Supreme Court transferred the oversight of criminal commitments at the Department of Mental Health and DDSN to Circuit Court Judge Addy. (Supreme Court Order 2014-05-07-01 *re Honorable Frank R. Addy, Jr., vested with vested with statewide jurisdiction over enforcement of all outstanding and future orders issued by the Courts of General Sessions committing defendants to the Department of Mental Health and Dep't of Disabilities and Special Needs*). These Orders reflect the important role Circuit Court plays in ensuring that justice is served even as to those individuals with intellectual and other disabilities found incompetent to stand trial.

The Circuit Court did not err and Judge Baxley's Order should be affirmed.

CONCLUSION

In conclusion, DDSN's approach would allow Linkhorn, under indictment and incarcerated for serious crimes, to avoid being placed in DDSN because his disability manifested outside of the 22-year developmental period and was the result of an anoxic brain injury. It is important to note that the attempted suicide took place in 1998 and the alleged crimes took place in 2010. By DDSN's approach, failing to apply the standards required by § 44-23-220, DDSN avoids taking responsibility for Linkhorn and South Carolina violates § 44-23-220. The result is that an incarcerated person with disabilities who should be protected from remaining in a jail population is left behind simply because of his age at the time of attempted suicide that resulted in his intellectual disability.

The Order Granting Solicitor's Rule to Show Cause simply prohibits DDSN from outright denying involuntary commitment services to Linkhorn and all future individuals with intellectual and other disabilities found incompetent to stand trial. The Order Granting Solicitor's Rule to Show Cause does not mandate any specific restrictive placement other than that the placement be secure and it is only talking about criminal defendants. Its purpose is to require DDSN to apply the standards of § 44-23-220.

Judge Baxley's Order should be affirmed.

[Signatures on following page]

Respectfully submitted,

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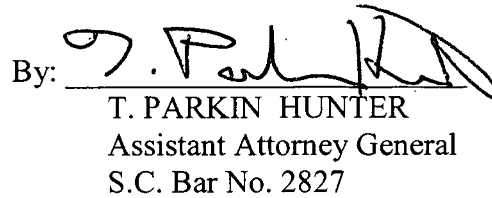
Attorney General

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

By: 
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable J. Michael Baxley, Circuit Court Judge

Indictment Nos. 2011-GS-32-0242, 2011-GS-32-0243 and 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 the Office of the South Carolina Attorney General, attorneys for the Respondent State of south Carolina, does hereby certify that service of the Initial Brief of Respondent State of South Carolina and Respondent State of South Carolina'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 postate prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of August 2014:

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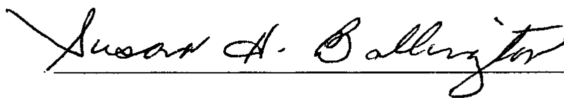

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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

August 22, 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 Carolina Department of Disabilities and Special Needs
In Re: State of South Carolina v. Rocky A. Linkhorn
Apellate Case Number: 2013-002208
Indictment Numbers: 2011-GS-32-0242; 2011-GS-32-0243; 2011-GS-32-0244

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondent State of South Carolina, Respondent State of South Carolina's Designation of Matter to be Included in the Record on Appeal**, and a **Certificate of Service** with regard to the above referenced matter. Please file the originals and return a clocked-in copy of each document 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,

T. Parkin Hunter
Assistant Attorney General
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cc: (w/ Enclosures)

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