THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Indictments 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.

BRIEF OF RESPONDENT ROCKY A. LINKHORN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

S.C. Code Ann. §44-23-130

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. §44-23-460

S.C. Code Ann. §44-38-390

Rule 7(b)(1), SCRCP

Rule 4, SCRCrimP

Other Authorities

S.C. Const. art. V, §11

STATEMENT OF ISSUES ON APPEAL

I. Did Appellant preserve the issue of notice in the lower court, and if so, did it have notice of the issues to be heard?

II. Did the circuit court have subject matter jurisdiction to issue the appealed order?

III. Can an individual found unfit to stand trial due to an "intellectual disability" as defined in S.C. Code Ann. §44-23-10(21) be involuntarily committed by a solicitor to the care and treatment of DDSN?

IV. Did the Appellant preserve the issue of the court's expert witness, and, if so, was admission of the testimony either permissible or harmless error?

V. Does the relief ordered by the circuit court violate the state or federal rights of any present or future clients of DDSN, or does it order more restrictive placements?

STATEMENT OF FACTS

Respondent Rocky A. Linkhorn was arrested on July 14, 2014, and charged with criminal sexual conduct with a minor in the first degree, lewd act on a minor, and disseminating obscene material to a minor. On February 8, 2011, the Honorable R. Knox McMahon ordered that he be examined for competency to stand trial by the South Carolina Department of Mental Health (DMH). (R. 25-32). He was ultimately examined in a joint evaluation conducted by DMH and the South Carolina Department of Disabilities and Special Needs (DDSN), and was found incompetent to stand trial but likely to attain competency in the foreseeable future.

A hearing was held before the Honorable Edward B. Cottingham, Jr., on June 21, 2011. Judge Cottingham committed Mr. Linkhorn to DMH for up to sixth days' observation and treatment. (R. 33-34). At the expiration of that period, examiners from DMH and DDSN concluded that Mr. Linkhorn remained incompetent to stand trial and unlikely to attain competence in the foreseeable future.

A hearing was held before the Honorable William P. Keesley on November 2, 2011. Judge Keesley found that Mr. Linkhorn was incompetent to stand trial and unlikely to become competent in the foreseeable future. He ordered the Eleventh

Circuit Solicitor's Office to initiate probate court proceedings pursuant to S.C. Code Ann. §§44-17-510 through -620.

The solicitor filed a probate petition in the Lexington County Probate Court on November 7, 2011. That petition was dismissed because Mr. Linkhorn was not mentally ill. On January 5, 2012, a second petition was filed in the probate court seeking involuntary commitment to DDSN. (R. 45-46). Judge Keesley issued an amended order on February 27, 2012, allowing the solicitor to initiate judicial proceedings in probate court pursuant to S.C. Code Ann. §§44-17-510 through -610 and/or S.C. Code Ann. §44-20-450. (R. 37-38). On August 6, 2012, DDSN moved to dismiss the petition on grounds that Mr. Linkhorn did not have an intellectual disability as defined in S.C. Code Ann. §44-20-20(12). (R. 83-84). This petition was dismissed *sua sponte* by the probate court on January 3, 2013.

On January 2, 2013, the Eleventh Circuit Solicitor's office filed a Motion for Rule to Show Cause that sought to have DDSN brought before the court of explain why Mr. Linkhorn was denied its services. (R. 47-48). Respondent made its return to the motion on July 30, 2013. (R. 51-52). The Honorable Jean H. Toal assigned this case for disposition to the Honorable J. Michael Baxley by order dated March 12, 2013.

A hearing was held in this matter on August 20, 2013. Present at the hearing were Rocky A. Linkhorn, accompanied by his attorney Elizabeth C. Fullwood;

Rhonda W. Patterson and C. Dayton Riddle of the Eleventh Circuit Solicitor's Office; Tana Vanderbilt, General Counsel for DDSN, and Monique Montgomery, counsel for DMH.

Judge Baxley issued oral rulings at the close of the hearing. A written order was filed on September 26, 2013. DDSN filed a timely notice of intention to appeal. This appeal follows.

ARGUMENTS

I. Appellant did not raise the issue of notice in the circuit court and has thus not preserved this question for review. Even if preserved, DDSN had notice of the issues to be heard.

The appellant argues that the lower court did not give "proper notice" or follow "proper procedures" in bringing it into court for the hearing that is under appeal. It argues, in essence, that the rule to show cause filed by the solicitor was procedurally defective and failed to give it "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." (Brief of Appellant at 6).

This issue is not preserved for review. The appellant filed a return to the Rule. (R. 51-52). It alleged that respondent Linkhorn's case was still pending in probate court, that it had not been ordered to provide services to Linkhorn, and that it was not statutorily required to provide involuntary commitment services to Linkhorn. (R. 51-52). DDSN raised the same defenses at the hearing. It did not raise technical procedural bars to the trial court's jurisdiction, nor did it object to the sufficiency of the rule to show cause or complain of lack of notice. Objections

not raised in the court below cannot be raised for the first time on appeal. *MBNA America Bank, N A v. Christianson*, 377 S.C. 219, 659 S.E.2d 209 (Ct.App. 2008).

Even if these issues are sufficiently preserved for review, the appellant is not entitled to a reversal on this basis. The crux of the appellant's argument is that the state's motion, captioned Motion for Rule to Show Cause, was procedurally insufficient because it was not accompanied by an affidavit or verified complaint. It cites *Toyota of Florence, Inc v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) as authority for its position. That case is distinguishable from this one. *Toyota of Florence* concerned the sufficiency of notice necessary for a finding of constructive criminal contempt. It held that a party seeking this remedy must file a rule to show cause accompanied by an affidavit or complaint. This has long been the rule in South Carolina. *State v. Blackwell*, 10 S.C. 35 (1878).

But the state did not seek to have DDSN held in contempt in this case. It sought to have DDSN "be ruled into this Court to show just cause for services being denied to this defendant as previously ordered by this Court." (R. 48). This case was heard in the Court of General Sessions. Even if the Motion for a Rule to Show Cause did not completely comply with Rule 4, SCRCrimP, the lower court and the parties could comprehend the essence of the relief sought. Rule 4(a) requires that motions "shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Rule 4, SCRCrimP. South Carolina's appellate

courts have not interpreted Rule 4, SCRCrimP. However, the rule's language is identical to that contained in Rule 7(b)(1), SCRCP. Rule 7(b)(1) provides guidance in interpreting Rule 4. Regarding Rule 7(b)(1), the Court held:

> The particularity requirement is to be read flexibly in recognition of the peculiar circumstances of the case. By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly. Therefore when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly. *The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized.*

Camp v Camp, 386 S.C. 571, 575, 689 S.E.2d 634,636 (2010) (emphasis added). The particularity requirement is variable, and it is the substance of the relief requested, rather than the form or caption of a motion, that allows a trial court to rule thereon. *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct.App. 2012). *Cf.*, *Melton v Olenik*, 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008) (interpreting Rules 59 and 60, SCRCP).

The relief sought by the solicitor's office was clear: the state wanted DDSN to explain to the court why it refused to provide involuntary commitment services to respondent Linkhorn, a criminal defendant found to be incompetent to stand trial.

Furthermore, appellant cannot show it was prejudiced by any insufficiencies in the pleading. The circuit court outlined the issues to be resolved in a letter dated April 12, 2013, which was sent to counsel for all parties four months before the August 20, 2013, hearing. The issues set forth in the letter are as follows: (1) what condition renders respondent Linkhorn incompetent to stand trial; (2) can DDSN, the Department of Mental Health, or both, best provide care and treatment for respondent Linkhorn; and (3) is DDSN's interpretation of the statutory term "intellectual disability or related disability" excluding Linkhorn and others with brain injuries permissible. (R. 89-91). Counsel for all parties also received a copy of the Court's April 10, 2013, letter to the court's expert witness, Beattie Butler. In that letter, the court advised Mr. Butler that it sought an opinion on this question: "Is a brain injury an 'other related disability' as contemplated in chapter twenty-three of title forty-four of the South Carolina Code of Laws such that DDDSN cannot automatically exclude such individuals from services upon referral from General Sessions courts?" (R. 87-88).

The appellant had notice since April 2013 of all of the issues that would arise during the August 20, 2013 hearing. Notably, even though Judge Baxley's April 12 letter offered all parties an opportunity to take depositions, DDSN failed to do so. The appellant filed its return to the rule to show cause on July 30, 2013. The return did not complain of lack of notice or allege any prejudice resulting from

the form of the solicitor's motion. The appellant does not show how it would have defended against the motion in a different manner if another method notice was used. This sort of showing is required to establish prejudice due to insufficient notice. *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct.App. 2009). DDSN should not be allowed to complain now about any alleged deficiency in the pleading that initiated the lower court's hearing.

II. The Circuit Court had subject matter jurisdiction to issue the appealed order.

The appellant alleges the circuit court lacked subject matter jurisdiction, appearing to argue that the circuit court usurped the probate court's exclusive jurisdiction over involuntary commitment proceedings. The appellant complains that it did not have notice that the probate proceedings against respondent Linkhorn were dismissed before the circuit court hearing was held. Finally, it challenges the court's jurisdiction to order injunctive relief that applies to respondent Linkhorn and to other similarly situated individuals.

The circuit courts are "general trial court[s] 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. Jurisdiction is the power of the court to hear a particular case and render judgment. *In re: Estate of Hover*, 407 S.C. 194, 754 S.E.2d 875 (2014). If jurisdiction does not exist, the only action available to the

court is to dismiss the case. *Id.* Jurisdiction consists of three components: personal jurisdiction, subject matter jurisdiction, and the court's authority to grant the relief requested. *Id.* "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. . . . In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Ex parte Harrell v. Attorney General of the State of South Carolina*, Op. No. 27412 (S.C., filed July 9, 2014), (slip op. at 9).

The appellant's argument suggests that the lower court infringed upon the probate and family courts' exclusive jurisdiction to hear involuntary commitment proceedings. *See*, S.C. Code Ann. §44-20-450. This is incorrect; the court's order did not involuntarily commit respondent Linkhorn to the appellant's care or in any other way interfere with the probate court's jurisdiction.

This case began when respondent Linkhorn was charged with criminal sexual conduct with a minor in the second degree, lewd act on a minor, and disseminating obscene material to a minor. Jurisdiction to dispose of these charges lies in the Court of General Sessions. An involuntary commitment proceeding was filed against him by the solicitor's office as required by S.C. Code Ann. 44-23-130(2) after he was found incompetent to stand trial. The matter on appeal arose after the appellant refused to provide involuntary commitment services to the

respondent. The appellant justified denying services by using the restrictive definitions of "intellectual disability" and "related disability" contained in S.C. Code Ann. §44-20-30(12) and (15) rather than the definition of "person with an intellectual disability" in the statute governing disposition of persons found incompetent to stand trial. S.C. Code Ann. §44-23-10(21).

It is immaterial whether or not proceedings were pending in probate court at the time of the hearing because the circuit court was not asked to make a ruling that in any way infringed upon the probate court's power to involuntarily commit respondent Linkhorn. Regardless of whether or not a probate petition was pending, criminal charges were pending in the circuit court, and the Court of General Sessions did not lose jurisdiction of the criminal charges. "[A] court, once having obtained jurisdiction of a cause of action, has inherent power to do all things reasonably necessary to the administration of justice in the case before it." *State Record Company v. State*, 332 S.C. 346, 349, 504 S.E.2d 592, 593 (1998). A court of competent jurisdiction has "inherent authority . . . . to protect its proceedings." *Id.*, citing *Degen v. United States*, 517 U.S. 820 (1996).

The appellant sought to thwart Mr. Linkhorn's probate court proceedings by refusing to provide involuntary commitment services to a criminal defendant with a brain or spinal cord injury. This prevented the probate court from making a meaningful assessment of his treatment needs. As a result, the active general

sessions case could not be resolved. The circuit court possessed the inherent authority to preserve the integrity of a case falling within its jurisdiction.

III. An individual found unfit to stand trial due to an "intellectual disability" as defined in S.C. Code Ann. §44-23-10(21) can be involuntarily committed by a solicitor to the care and treatment of DDSN.

This is the primary issue on appeal. The appellant argues that criminal defendants who are cognitively impaired due to a brain or spinal cord injury cannot be involuntarily committed to its care after they are found incompetent to stand trial. Its argument would have this Court ignore basic rules of statutory construction and find that the provisions of S.C. Code Ann. §44-23-430(2) cannot be fulfilled when an incompetent criminal defendant is intellectually impaired after they are 22 years of age. It would also have the Court hold that the definition of "intellectual disability" contained in S.C. Code Ann. §44-23-10(21) is merely statutory surplusage. If the Court accepts the appellant's argument, the courts of general sessions will not have authority to monitor cognitively impaired criminal defendants unless their conditions arose prior to the age of 22.

This case concerns construction of Chapter 20, articles 1 and 3, and Chapter 23, articles 1 and 5, of Title 44 of the Code of Laws of South Carolina. Title 44 contains laws governing health. Chapter 20 establishes and sets out the responsibilities of the South Carolina Department of Disabilities and Special

Needs. Article 1 defines terms used throughout Chapter 20. S.C. Code Ann. §44-20-30. Article 3 contains provisions dealing with involuntary commitment to the care and treatment of DDSN. S.C. Code Ann. §44-20-450. Chapter 23 of Title 44 applies to both the mental ill and the intellectually disabled. Article 5 of this chapter concerns competence to stand trial in the circuit or family courts. S.C. Code Ann. §§44-23-410 through -460. It, too, contains definitions of terms used in that article. S.C. Code Ann. §44-23-10.

A defendant charged with a crime in circuit court must have a rational capacity to understand the proceedings against him and to assist in his own defense. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002). The procedures used to determine competency to stand trial are set forth in S.C. Code Ann. §§44-23-410 through -460. A procedure for competency examinations is established. S.C. Code Ann. §44-23-410. These examinations are made by the Department of Mental Health if the defendant is mentally ill, or by the Department of Disabilities and Special Needs if the defendant is intellectually disabled. If the defendant is both mentally ill and intellectually disabled, both departments conduct a joint examination. S.C. Code Ann. §44-23-410(A)(1). Competency hearings are mandatory for those defendants who are evaluated for fitness to stand trial. S.C. Code Ann. §44-23-430. If the circuit court rules that a defendant is incompetent to stand trial and unlikely to achieve competency in the foreseeable future, the

prosecuting solicitor is statutorily required to institute involuntary commitment proceedings against the defendant in the county probate court. *Id.* Commitment to the Department of Mental Health is sought for defendants who suffer from a mental illness. Commitment to the DDSN, pursuant to S.C. Code Ann. §44-20-450, is sought for defendants who are "person[s] with an intellectual disability" or who have a "related disability."[1] A person with an intellectual disability is defined as:

> [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).

Section 44-20-450 permits several categories of persons to institute involuntary commitment proceedings to the custody of DDSN. These include certain enumerated relatives, legal guardians, the chief supervisor at an institution where the person resides, the director of a county department of social services where the person resides, and "a solicitor or an assistant solicitor responsible for the criminal prosecution pursuant to S.C. Code Ann. §44-23-430(2)." S.C. Code

[1] "Related disability" is not defined in chapter 23, article 5 of Title 44

Ann. §44-20-450(A)(8). DDSN argues that proceedings under §44-23-430 may only be initiated against persons who fall within the definitions of "intellectual disability"[2] or "related disability"[3] as those terms are defined in §44-20-30(12) and (15), regardless of whether a person, an institution, or a solicitor is seeking the commitment. It argues that §44-20-450 only allows involuntary commitment of persons who have an intellectual disability or related disability as defined in §44-20-30(12) and (15).

If this is the case, only defendants who became cognitively impaired prior to age 22 can be committed under §44-20-450. Defendants with brain and spinal cord

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[2] "Intellectual disability" is defined in S C Code Ann §44-20-30(12) as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the development period "

[3] Section 44-20-30(15) defines "related disability"

"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 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

injuries cannot be involuntarily committed. DDSN takes the position that these persons can only receive voluntary services under S.C. Code Ann. §44-38-370. Even if a person consents to the services, they have no entitlement to receive them. S.C. Code Ann. §44-38-390.

The overriding rule of statutory construction is that the legislature's intent must be given effect if it can be reasonably discerned from the statutory language. *State v Sweat,* 386 S.C. 339, 688 S.E.2d 569 (2010). Words used in a statute should be given their plain and ordinary meaning and, if not ambiguous, those definitions must be applied. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011).

> "[A] statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. . . .We therefore should not concentrate on isolated phrases within the statute. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose. . . . [W]e must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage or superfluous, . . . for the General Assembly obviously intended [it] to have some efficacy, or the legislature would not have enacted it into law.

Id. at 74, 716 S.E.2d at 881 (citations and internal quotation marks omitted). Statutory interpretations that lead to patently absurd results which cannot reasonably have been intended by the Legislature or which would defeat the clear

legislative intent must be rejected, for a statute must be construed to effectuate the legislative intent. *City of Rock Hill v. Harris*, 391S.C. 149, 705 S.E.2d 53 (2011).

The General Assembly's intent in enacting Chapter 20 of Title 44 is explicitly set forth in the body of the statute:

> The State of South Carolina recognizes that a person with an 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.

S.C. Code Ann. § 44-20-20. Chapter 20 creates DDSN and its articles establish the framework upon which it operates. The statute addresses the organizational framework of the agency, sets out its duties and powers, provides for the licensure of its facilities and generally provides for services to those with cognitive disabilities. The purpose of the statute is to provide for a network of state services to provide for the protection, welfare and quality of life for those citizens who qualify for DDSN services.

The intent behind enactment of article 5 of chapter 23 is not explicitly set out in the legislation. However, in addressing the matter of competence to stand trial, it is clearly meant to achieve a balance between the right of a criminal

defendant not to be subject to answering a criminal charge when he is intellectually unable to do so with the interest of the state in proceeding with a criminal prosecution. The article also seeks to promote public safety. This can be discerned in the mandatory requirement that the solicitor seek involuntarily commitment and treatment of an incompetent criminal defendant. This ensures that incompetent defendants in need to treatment receive it before they resume their life in society. The statute also provides for oversight by the court when persons found incompetent to stand trial no longer need hospitalization. In that instance, a competency hearing is held and the either the prosecution resumes or the court dismisses the charges. S.C. Code Ann. §44-23-460. This demonstrates an intent that the circuit court retain some power over the disposition of a defendant found incompetent to stand trial.

Section 44-20-450 sets out a general framework for involuntary commitment to the custody and care of DDSN. But when a solicitor seeks to commit a criminal defendant as mandated by §44-23-430(2), that statute must be read in conjunction with the general provisions of §44-20-450, as the former statute pertains to a specific group of persons that might not otherwise be involuntarily committed. Specific statutes qualify, or contain exceptions to, general statutes, *Florence County Democratic Party v Florence County Republican Party*, 398 S.C. 124, 727 S.E.2d 418 (2012), and specific laws prevail over general ones. *Hembree v. One*

Thousand Eight Hundred Forty-Seven Dollars (1,847 00) U.S. Currency, 404 S.C. 241, 743 S.E.2d 864 (Ct.App. 2013). Statutes *in pari materia* must be analyzed together to attempt to achieve a harmonious result. *Ranucci v. Crain*, Op. No. 27422 (S.C., filed July 23, 2014).

The General Assembly cannot have intended to exclude a class of criminal defendants incompetent to stand trial; that is, those suffering an intellectual disability that arose after the developmental period, from being considered for involuntary commitment in the probate court. It intended all persons whose cognitive impairments falling within the parameters of "intellectual disability," as defined in S.C. Code Ann. §44-23-10(21), to be given a hearing on the merits in the probate court. It did not intend to allow the appellant carve out an arbitrary exception which precludes the probate court from considering whether a person's condition requires, either for the person or for the public, commitment to the care of DDSN.

Internal cross-references indicate a legislative intent to read separate statutes in a harmonious manner. *Id.* The statutes in question here cross-reference each other. Section 44-23-430 requires a solicitor to petition for involuntary commitment to DDSN pursuant to §44-20-450 when an incompetent criminal defendant is a "person with an intellectual disability" as defined in §44-23-10(21). In like manner, §44-20-450 allows a solicitor to file a petition for involuntary

commitment "pursuant to §44-23-430(2)." S.C. Code Ann. §44-20-450(A)(8). When a solicitor seeks involuntary commitment of a defendant who is incompetent to stand trial, the probate court must evaluate the treatment needs of that person regardless of their age at the onset of the disability.

Accepting the appellant's position leads to absurd results. A criminal defendant with cognitive impairments that arose after youth could not be compelled to accept DDSN services after being found incompetent to stand trial. Even though he could not be tried as a result of his disability, he could not be compelled to obtain treatment from DDSN. This would be the case regardless of whether he is in need of treatment for the benefit of himself or the public at large. While he could receive voluntary services, there is no requirement that DDSN tailor his treatment to address the concerns that underlie enactment of chapter 5 of article 23. The legislature did not intend to allow the decision to receive treatment depend on the whim of an incompetent criminal defendant.

The facts of this case illustrate the fallacy in the appellant's argument. Respondent Linkhorn suffered an anoxic brain injury at the age of 24. As a result he suffers from dementia. (R. 135, ll. 2 – 5). His full-scale I.Q. is 61 (R. 142, ll. 1-3). His memory is impaired, he has language deficits, and he has difficulty performing the tasks of daily living. (R. 135, l. 9 - 45, l. 9). He cannot cook, manage money, or maintain adequate personal hygiene without prompting. (R.

136, ll. 16 - 24). Mr. Linkhorn's expert psychiatric witness, Richard Frierson, M.D., testified that in his opinion, Mr. Linkhorn was incapable of independent living. (R. 137, ll. 6 - 7).

Mr. Linkhorn's living conditions were deplorable at the time of his arrest. He lived in a camper adjacent to his sister's home. He did not have running water. Despite his intellectual limitations, his sister used him as a babysitter for her 10 year old son and four year old daughter while she was at work. (R. 98, ll. 14-16). On the day of his arrest, Mr. Linkhorn's nephew entered the camper and found his sister, nude, sitting on Mr. Linkhorn's lap. Mr. Linkhorn was also nude. (R. 98, ll. 17 – 25). Pornography was playing on the television. (R. 99, ll. 4-6).

Dr. Frierson testified that in his opinion, Mr. Linkhorn is a "person with an intellectual disability" as that condition is defined in S.C. Code Ann. §44-23-10(21). (R. 138, l. 14 - 48, l. 3). His clinical presentation; i.e., the symptoms apparent in examining him, are identical to those who suffer an "intellectual disability" or "related disability" as those terms are defined in §44-20-30(12) and (15). (R. 139, l. 4 - 49, l. 8). His treatment needs are identical to those that would be needed by a similarly-situated person whose impairment arose before the age of 22. (R. 140, ll. 17-23). Concerning treatment, Dr. Frierson testified that Mr. Linkhorn needs to live in a setting where he is supervised at all times "in his

activities of daily living." (R. 137, l. 23 - 138, line 47, l. 1). In light of the allegations leading to his arrest, he should not be around children. (R. 138, ll. 1-3).

It is inconceivable that the General Assembly intended to have a group persons with an intellectual disability, as defined in S.C. Code Ann. §44-23-10(21), excluded from having the merits of their need for treatment heard by allowing the appellant deny them services solely on the basis of when their disability arose. It is also absurd to conclude that the General Assembly intended that these individuals be able to avoid the court's continued jurisdiction and review provided by S.C. Code §44-23-460. It is impossible to conclude the legislature intended this dichotomy between identically situated criminal defendants. Read together, the statutes in issue require that this Court reject the appellant's argument. The trial court's ruling should be affirmed.

IV. Appellant did not preserve the issues briefed concerning the court's expert witness. Even so, no error occurred by taking this testimony and, in any event, any error was harmless.

The trial court, through a letter dated April 12, 2013, advised counsel for all parties of the issues it intended to address at the hearing. In the letter, the parties were told that the court would call attorney Beattie Butler as its expert witness. Mr. Butler would provide "a systemic discussion of this issue, its history in South Carolina jurisprudence, and the ramifications for defendants and stakeholders. . . ." (R. 90). Counsel were also provided with a copy of the court's

letter to Mr. Butler, which outlined the areas on which he would be questioned. (R. 87-88). Counsel for all parties were therefore aware of the scope of the testimony Mr. Butler would offer.

Appellant now assigns error to allowing Mr. Butler to testify on ultimate issues of law. This error was not raised in the court below. Appellant's counsel objected on this basis: "Your Honor, I object to him being qualified as an expert in regard to this. He has had experience and so have all the attorneys here in regards to that. I would say he doesn't meet the qualifications of an expert, particularly in a constitutional argument, he doesn't have any more training in that regards in particular to the Department of Disabilities and Special Needs." (R. 154, ll. 8-15). The objection was as to the witness's qualifications rather than to the substance of his testimony. Appellant made two objections during Mr. Butler's testimony. One was to an opinion concerning the Equal Protection Clause (R. 166, ll. 16-18), and the other to the witness having no clinical background in the area of the treatment of cognitive disabilities. (R. 167, ll. 7-10). At no time did appellant raise a contemporaneous objection on grounds that Mr. Butler was offering an opinion concerning the ultimate issue in the case. Having failed to do so, the Court should not consider this issue on appeal. *Busillo v. City of North Charleston*, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013).

Even if the Court addresses this issue, no error occurred. Qualification of witnesses and admission of testimony are matters primarily within the discretion of the trial court and are not reversible error unless there was an abuse of discretion. *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008). While it is generally true that expert testimony concerning issues of law is impermissible, an opinion that touches upon legal concepts along with the facts in issue is not inadmissible because it concerns the ultimate issue involved in a case. *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) (law professor could give opinion about the existence of a fiduciary duty), *State v. Morris, supra* (law professor could give opinion about fraudulent misrepresentations in prosecution for security fraud).

While Mr. Butler gave testimony concerning construction of the statutes, without objection by appellant, he also testified about his experience in application of these statutes in the courts of this state. He related how the appellant refused to examine a client for competency to stand trial because Mr. Butler could not provide documents that proved the client was cognitively impaired prior to the age of 18. (R. 167, l. 21 - to 77, l. 1). He discussed a hypothetical situation of a defendant who fell through the safety net of social services. (R. 168, ll. 2-11). He explained similar statutory frameworks in Georgia and North Carolina (R. 169, l. 24 to 80, l. 6). Throughout, he testified that appellant had a pattern and practice of

denying involuntary commitment services to criminal defendants found incompetent to stand trial on the basis of age of onset of their disabilities. While his testimony dealt with legal issues, these matters were incidental to the factual aspects of his testimony. His testimony was relevant and instructive about how DDSN actually discharges its duties to criminal defendants in the probate courts of this state. No error occurred in receiving his testimony.

Even if the court erred in allowing Mr. Butler to testify as an expert, the appellant has not shown any resulting prejudice. While the appellant finds it "remarkable" that the court included a discussion of his testimony in its findings of fact, (Brief of Appellant at 23), this demonstrates the court did not abrogate its responsibility to make the ultimate legal determination. The court looked to Butler to provide facts concerning application of the statutes. The portion of the court's order which discusses Mr. Butler's testimony makes findings as to the appellant's historical pattern and practice in involuntary commitment proceedings filed by a solicitor under §44-20-450(8). It does not arrive at conclusions that are legal in nature. As appellant's counsel noted, all participants in the hearing, save for Mr. Linkhorn himself, were qualified to engage in statutory construction. (R. 154, ll. 8-11). That includes the court. There is nothing in the record or the court's order showing the court deferred to Mr. Butler in reaching its legal conclusions. Even if

error occurred, the appellant was not prejudiced and the trial court's order should be affirmed.

V. The relief ordered by the circuit court does not violate the state or federal rights of any present or future client of DDSN, nor does it order more restrictive placements.

The appellant complains that the court issued injunctive relief that violated the due process rights of the appellant and of its present and prospective clients. This is incorrect. The court's order does not prescribe a method or manner of treatment of DDSN clients. Rather, it ensures that all persons with an intellectual disability found incompetent to stand trial would be considered for DDSN services, doing away with the arbitrary and artificial bar that DDSN has historically raised to deny services to persons similarly situated to respondent Linkhorn.

Appellant claims "[t]he 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.'" (Brief of Appellant at 26). This is preposterous. The court ordered DDSN to assume custody of respondent Linkhorn within five days of the hearing and to house him in a secure facility pending the refiling of probate commitment proceedings. It did not rule that this placement be permanent. Mr. Linkhorn had been warehoused at the Lexington County Detention Center for 1,133 days at the time of the hearing. (R. 9). Five hundred ninety two of

those days are attributable to DDSN's arbitrary refusal to provide him involuntary commitment services.[4] The court possessed authority to order Mr. Linkhorn hospitalized during the pendency of the commitment proceedings. S.C. Code Ann. §44-23-430(2). The court also possessed authority to address the illegality of safekeeping Mr. Linkhorn at the county jail. S.C. Code Ann. §44-23-220.

The court's order does not infringe on Mr. Linkhorn rights or those of any other criminal defendant who is incompetent to stand trial due to a head or spinal cord injury. Rather, it insures their treatment needs are considered in a meaningful manner and that they receive involuntary commitment services as intended by the General Assembly. If, after a probate court hearing, they are committed to the custody of DDSN, they possess the rights and privileges of any other involuntarily committed person, subject to oversight by the court. S.C. Code Ann. §44-23-430. This includes treatment in the least restrictive alternative. Additionally, by ruling that criminal defendants with brain and spinal cord injuries could be involuntarily commitment to the care and custody of DDSN, the court ensured that the cases of those persons so committed will be reviewed by the circuit court before their release from care. S.C. Code Ann. §44-23-460. In this way, the public safety concerns underlying article 5 of Chapter 23 are addressed.

[4] The Eleventh Circuit Solicitor's office filed its petition in probate court seeking involuntary commitment of respondent Linkhorn to the custody of DDSN on January 5, 2012 DDSN opposed this placement from that time until the August 20, 2013 hearing

CONCLUSION

For the foregoing reasons, respondent Linkhorn asks that the Court affirm the judgment of the circuit court.

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

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SC Court of Appeals

Indictments Nos 2011-GS-32-0242
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2011-GS-32-0244

EX PARTE

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

IN RE:

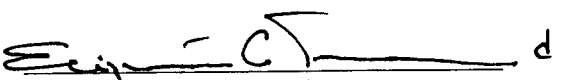
State of South Carolina, ... Respondent,

v

Rocky A Linkhorn, ... Respondent.

CERTIFICATE OF COUNSEL

The undersignes certified that this Final Brief complies with Rule 211(b), SCACR.



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October 27, 2014

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Rocky A. Linkhorn, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned, attorney for respondent Rocky A. Linkhorn, does hereby certify that service of the Brief of Respondent Rocky A Linkhorn in the above-captioned matter was made upon the principal appellate counsel of record for all parties by placing copies in the United States Mail, first-class postage prepaid, at the below listed address clearly indicated on said envelopes on this 29 day of October, 2014

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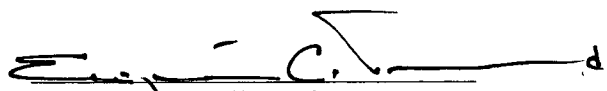

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