THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2013-002208

Ex Parte: South Carolina Department of Disabilities and Special Needs,..... Appellant.

In Re: State of South Carolina, ...Respondent,

v.

Rocky A. Linkhorn,..... Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the State respectfully petitions for rehearing of this appeal. This Court's Opinion of November 16, 2016, held that the circuit court erred in applying to this case the definition of "person with intellectual disability" as defined in S.C. Code Ann. § 44-23-10(21), now renumbered as §44-23-10(22).[1] The Court concluded that the proper definition to apply to involuntary commitment proceedings to DDSN is the

1 Section 44-23-10: "When used in this chapter, 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: . . .(22) "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." Act No. 225, 2016 S.C. Acts, amended §44-23-10 to add another definition that resulted in the renumbering of the definition of "intellectual disability" from subsection 21 to subsection 22.

definition of "intellectual disability" in §44-20-30(12)[2] of the South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act, §44-20-10, et seq. rather than §44-23-10(22) The difference in the definitions is that §44-23-10(22) contains no age of onset limitation whereas §44-20-30(12) contains an age of onset limitation that would exclude Respondent Linkhorn from involuntary commitment to the Department of Disabilities and Special Needs and subject him to release into the community despite serious charges that were brought against him including criminal sexual conduct in the first degree with a minor.[3]

Respectfully, that Opinion overlooked or misapprehended the following points as explained below:

1. The differing definitions of "intellectual disability" are in chapters that cross-reference each other such that the definition in §44-23-10(22), without an age of onset limitation, applies to Respondent Linkhorn.

2. Since oral argument, the legislature has reenacted §44-23-10(22) in the bill amending other definitions in §44-23-10. Act No. 225, 2016 S.C. Acts.

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2 §44-20-30: "As used in this chapter: . . . (12) "Intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Although the developmental period is not defined in this definition, §44-20-30(15) defines a "related disability" so that it must be manifested before twenty-two. Testimony in the Record indicated that onset must be before the age of 18. R. p. 140, ll. 4-9; p. 141, l. 25 – p. 142, l. 7.

3 Mr. Linkhorn was arrested and remains in custody under the supervision of DDSN in a Community Training Home in Richland County. For the information of the Court and the parties, charges against Mr. Linkhorn were nolle prossed following the determination that he was incompetent to stand trial. This Court may take judicial notice of those facts. Rule 201, SCRE.

3. To construe the statutory scheme as allowing for the continued confinement in jail of an incompetent defendant would raise constitutional concerns although the State waives no claim or defense to such a defense raised by a criminal defendant.

4. The Court's construction of the statutory scheme and the possible constitutional concerns could result in the release into community of criminals charged with serious crimes but incompetent to stand trial. Such a result would be absurd and therefore, unintended by the General Assembly.

These points are supported by the following authority.

ARGUMENT

I

THE STATUTORY SCHEME SHOWS THAT SECTION 44-23-10(22) IS THE CONTROLLING DEFINITION

Section 44-23-220 states that persons in jail with intellectual disabilities must be examined for determination of whether "admission to a mental health or intellectual disability facility is warranted."[4] If that determination is made, commitment proceedings are

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4 §44-23-220: "No person who is mentally ill or who has an intellectual disability shall be confined for safekeeping in any jail. If it appears to the officer in charge of the jail that such a person is in prison, he shall immediately cause the person to be examined by two examiners designated by the Department of Mental Health or the Department of Disabilities and Special Needs, or both, and if in their opinion admission to a mental health or intellectual disability facility is warranted, the officer in charge of the jail shall commence proceedings pursuant to Sections 44-17-510 through 44-17-610, or Section 44-21-90. 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."

to be instituted. This provision contains no age of onset limitation. The definition of §44-23-10 applies to §44-23-220 because it applies to the same chapter.

Section 44-23-430(2) states that if a "person is unfit to stand trial for the reasons set forth in Section 44-23-410 and is unlikely to become fit to stand trial in the foreseeable future, the solicitor responsible for the criminal prosecution shall initiate judicial admission proceedings pursuant to . . . Section 44-20-450 . . . ." Section 44-23-430(2) is controlled by the definition in §44-23-10 which does not contain an age of onset limitation. Section 44-20-450(A)(8), which is referenced in §44-23-450, gives solicitors authority to initiate involuntary admissions pursuant to §44-23-430(2) so the definition of 44-23-10(22) applies to §44-23-450. These statutes regarding judicial admissions cross-reference each other and pull in the §44-23-10(22) definition.

Construing these cross referencing statutes together so that the definition in §44-23-10(22) applies is consistent with the rule of statutory construction that "statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. South Carolina State Election Com'n*, 718 S.E.2d 432, 435, 395 S.C. 366, 371 (2011). This construction is also consistent with Judge Baxley's determination 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(22), be eligible for involuntary admission to the jurisdiction of the DDSN. R. p. 15. This reading is further supported by the fact that the legislature's most recent enactment of the definition of "intellectual disability" was §44-23-10(22) in the bill amending other definitions in §44-23-10. Act 225, *supra*; *Hodges v. Rainey*, 533 S.E.2d

578, 583, 341 S.C. 79, 89 (2000)("The more recent and specific legislation controls if there is a conflict between two statutes.").

II

POSSIBLE STATUTORY AND CONSTITUTIONAL CONCERNS COULD BE RAISED BY INDEFINITE CONFINEMENT IN JAIL OF PERSONS FOUND INCOMPETENT TO STAND TRIAL

Citing §44-20-450(G)[5], this Court ruled that "if an individual cannot be involuntarily committed to DDSN following judicial admission proceedings, the individual *may* be confined in jail if there are criminal charges pending against him." (emphasis in Opinion). This statutory provision for confinement in jail is in the context of the pendency of an appeal and may not address confinement following a final determination denying commitment.

Even if the statute permits confinement in jail generally, constitutional concerns could be raised by continued imprisonment of a person incompetent to stand trial.[6] *See, eg.*

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5 §44-20-450(G): "A party to these proceedings may appeal from the order of the court to the court of common pleas, and a trial de novo with a jury must be held in the same manner as in civil actions unless the petitioner through his attorney waives his right to a jury trial. Pending a final determination of the appeal, the person with intellectual disability or a related disability must be placed in protective custody in either a facility of the department or in some other suitable place designated by the court. No person with intellectual disability or a related disability must be confined in jail unless there is a criminal charge pending against him."

6 The State waives no claims or defenses as to whether Mr. Linkhorn may be confined in jail if incompetent to stand trial. The State notes this issue for purposes of the statutory construction issue and preserves all claims and defenses related to possible constitutional issues.

Jackson v. Indiana, 406 U.S. 715, 738 (1972); [7] *Disability Law Center v. Utah*, 2016 WL 1389592, at *7 (D.Utah, 2016);[8] *Cooper v. Kliebert*, 2016 WL 3892445, at *5 (M.D.La., 2016[9]. "This Court has held that where a statute is susceptible to more than one construction, the court should interpret the statute so as to avoid constitutional questions . . ." *State v. Pittman*, 647 S.E.2d 144, 162, 373 S.C. 527, 562 (2007). Interpreting the statutory scheme at issue to apply the §44-23-10(22) definition without an age of onset limitation would avoid

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7 *Jackson,* states: "We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. [footnote omitted]."

8 *Disability Law Center*: "These cases establish that incompetent criminal defendants—as pretrial detainees—have a liberty interest in being free from incarceration absent a criminal conviction . . . Indeed, the court reads *Jackson* to suggest that a state's interest in, and sole justification for, continuing to detain a defendant pretrial after he has been declared incompetent—opposed to releasing him—is to evaluate whether there is a substantial probability that he will become competent in the foreseeable future."

9 *Cooper*: "Federal Courts around the country have repeatedly recognized that "an individual has a liberty interest in being free from incarceration absent a criminal conviction."[footnote omitted] In *Oregon Advocacy Center v. Mink*, the Ninth Circuit further recognized that "[i]ncapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment."[footnote omitted] Plaintiffs have alleged that, as pretrial detainees who have been found incompetent to stand trial and who have not been convicted of any crimes, their substantive due process rights . . . have been violated by Defendants' policies, practices, and procedures. Specifically, Defendants' practices have caused Plaintiffs to be unlawfully incarcerated for longer than the reasonable period of time necessary to determine their competency and have delayed their access to restorative treatment. . . . the Court finds that Plaintiffs have sufficiently pled a violation of their substantive due process. . . ." *Id.*

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any possible constitutional questions and provide for the care of the incompetent defendant and the protection of the public.

III

TO CONSTRUE THE STATUTORY SCHEME TO REQUIRE THE RELEASE INTO THE COMMUNITY OF PERSONS CHARGED WITH SERIOUS CRIMES BUT INCOMPETENT TO STAND TRIAL DUE TO INTELLECTUAL DISABILITES WITH AN ONSET AFTER THE AGE OF 21 WOULD BE AN ABSURD RESULT UNINTENDED BY THE GENERAL ASSEMBLY

Construing the statutory scheme to impose an age of onset limitation on judicial commitments of persons found incompetent to stand trial would reach an absurd result unintended by the legislature because it could lead to the release of persons charged with serious crimes into the community. The continued confinement of such persons in jail could raise constitutional and statutory concerns which arguably could lead to their release. *See supra,* Argument II, including footnote 6. The Court "will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Unisun Ins. Co. v. Schmidt*, 529 S.E.2d 280, 283, 339 S.C. 362, 368 (2000). Applying the age of onset definition in §44-20-30(12) rather than the definition of §44-23-10(22) would work an absurd result contrary to legislative intent and potentially harmful to the public.

IV

REQUEST FOR NOTIFICATION

Although the State respectfully requests that this Petition be granted, should this Court deny this Petition, the State asks that DDSN be directed to provide reasonable notice (30 days or more) before releasing Mr. Linkhorn.

CONCLUSION

The State respectfully requests that this Court grant this Petition and rule that the controlling definition for this case is §44-23-10(22).

Respectfully submitted,

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November 30, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I served a copy of the Petition for Rehearing of the State upon the other parties by depositing copies of it in the U.S. Mail, postage prepaid, addressed as follows to their attorneys::

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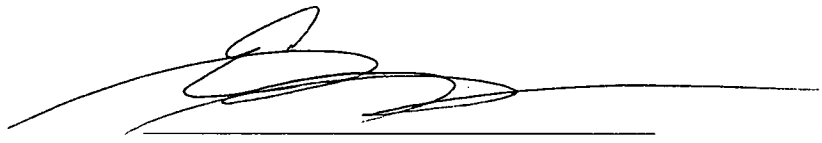

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