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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

STATE'S REPLY TO RETURN TO PETITION FOR REHEARING

DDSN states in its Return that Rocky Linkhorn may stay in its facility[1]. This news is welcome, but it does not moot this case. The State's understanding is that Mr. Linkhorn is being allowed to stay as, in effect, a *de facto* voluntary admission. He has never applied formally for admission although the agency said at the hearing before Judge Baxley that "the statute clearly says that he cannot be involuntarily committed so he would have to agree to receive services under the Head and Spinal Cord Division." R. p. 113, ll. 1-4. The agency's position now appears to be that a formal application is not necessary for Mr. Linkhorn to

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1 Specifically, the agency states: "[a]s has been its position, DDSN is willing to continue to provide services to Linkhorn and is not intending to discharge him from their care. Linkhorn's counsel clearly takes the position with this Court that Linkhorn should remain in the care of DDSN. As long as Linkhorn does not seek his discharge . . from DDSN's care, this issue appears to be moot." DDSN Return at page 2.

remain at its facility. This position regarding *de facto* voluntary admission does not appear to have been stated previously in the agency's Brief, but it does not change the issues in this case.

The agency's position does not provide certainty as to Mr. Linkhorn's continued stay at DDSN, and it does not resolve admission questions regarding future admissions of similarly situated defendants. Although DDSN says that the agency "is not intending to discharge him" (note 1) it could do so in the future should its intent and circumstances change. S.C. Code Ann. §§44-20-430 (Director has final authority over applicant eligibility and services) and 44-20-460(A).[2] Mr. Linkhorn could voluntarily withdraw at any time, as DDSN recognizes ("[a]s long as Linkhorn does not seek his discharge . . . ."(note 1)). [3]

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[2] §44-20-460(A) provides that "[a] person admitted or committed to the services of the department remains a client and is eligible for services until discharged. When the department determines that a client admitted to services is no longer in need of them, the director or his designee may discharge him. . . . A client of the department who is receiving residential services may be released to his spouse, parent, guardian, or relative or another suitable person for a time and under conditions the director or his designee may prescribe."

[3] Section 44-20-460 (B): "When a client voluntarily admitted requests discharge or the person upon whose application the client was admitted to the department's services requests discharge in writing, the client may be detained by the department for no more than ninety-six hours. However, if the condition of the person is considered by the director or his designee to be such that he cannot be discharged with safety to himself or with safety to the general public, the director or his designee may postpone the requested discharge for not more than fifteen days and cause to be filed an application for judicial admission."

Under this Court's Opinion, and DDSN's position, the application for judicial admission would be a nullity as to Mr. Linkhorn and other similarly situated persons because, under that view, the applicable definition of "intellectual disability" is limited by the age of onset (§44-20-30(12)) and because he has, in the opinion of the agency, a head or spinal cord injury.

Therefore, unless Judge Baxley's involuntary commitment of him is upheld by this Court, the continuation of Mr. Linkhorn's stay at DDSN is within his discretion and that of DDSN. As Judge Baxley stated in his Order, the legislature "did not intend to leave treatment within the discretion of these defendants." R. p. 15. The public would not be protected with only voluntary admission of defendants such as Mr. Linkhorn, and Judge Baxley found that "accepting DDSN's analysis [regarding involuntary admission] overlooks the legislature's intent in Chapter 23, Article 5, to provide protection for the public." R. p. 15.

I

THIS CASE IS NOT MOOT

DDSN says that "this issue appears to be moot" apparently referring to his, at least for now, receiving care at that agency rather than being discharged and confined in a detention center. The above analysis shows that the issue is not moot, and DDSN recognizes that the mootness is conditional upon the actions of Mr. Linkhorn. Return of DDSN at page 4("[a]s Linkhorn does not seek his discharge from DDSN's care, this issue appears to be moot.").[4] Confinement at DDSN or release into the community remain issues. Although charges against Mr. Linkhorn were nolle prossed, the State's understanding is that he could be re-

[4] DDSN states that "[a]rguably Linkhorn would be precluded from seeking his discharge from DDSN because he did not oppose or appeal from the Order for Judicial Admission issued by the Probate Court on April 7, 2014." This position of the agency is difficult to understand because DDSN takes the position that judicial admission is contrary to the statute, and appealed Judge Baxley's Order.

indicted.[5] If he were re-indicted, he would be back in a detention center with the same issues we have now. If he were not re-indicted at the time of discharge from DDSN, he could be released into the community.

> A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court." *S.C. Ret. Syst. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). "[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties." 15 S.C. Jur. Appeal and Error § 19 (Supp.2014). "Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010).

Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander, 778 S.E.2d 898, 900, 414 S.C. 355, 359 (2015). This case is not moot because Mr. Linkhorn is subject to discretionary discharge from DDSN at his own request or that of the agency.

Even if this Court were otherwise to find this case moot, it falls within the recognized exceptions to mootness:

> "In the civil context, there are three general exceptions to the mootness doctrine." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). "First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Id.* "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Id.* at 568, 549 S.E.2d at 596. "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.* at 568, 549 S.E.2d at 596.

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[5] *See, eg. Mackey v. State*, 595 S.E.2d 241, 242, 357 S.C. 666, 668 (2004)("the solicitor did, however, retain the right to re-indict Petitioner [following a *nolle prosequi* of the indictment] because jeopardy does not attach until a jury has been empaneled and sworn."). The State waives no claims or defenses regarding any right to re-indict or future indictment of Mr. Linkhorn or any other defendant.

Wachesaw. All of these exceptions apply because the issues would arise again if Mr. Linkhorn were discharged from a DDSN facility and would arise in the future as to persons similarly situated to Mr. Linkhorn who have an intellectual disability with a late onset. These issues are of "important public interest" for the protection of our citizens as well as the care of the incompetent defendant.

II

POSSIBLE STATUTORY AND CONSTITUTIONAL CONCERNS OF INDEFINITE CONFINEMENT IN A DETENTION CENTER ARE NOT BARRED FROM CONSIDERATION

DDSN indicates that the constitutional issue of indefinite confinement in jail of incompetent criminal defendants cannot be reached because it was raised for the first time on appeal. That authority does not apply because the constitutional issue addressed a statute raised by the Court for the first time. Citing §44-20-450(G) , 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." [6] The Court said that the statute had been overlooked, but no party had previously taken the position that indefinite confinement in a detention facility was an option. The State had cited section 44-23-220 which provides that "[n]o person who is mentally ill or who has an intellectual disability shall be confined for safekeeping in any jail." Judge Baxley stated that "vulnerable individuals in need of care are warehoused in

[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.

county jails in direct violation of . . . §44-23-220." Therefore, the Constitutional issue is properly before the Court.

Therefore, for the reasons set forth in its Petition, the State respectfully requests that this Court apply the definition of §44-23-10 (22) to Mr. Linkhorn and rule that he and other similarly situated incompetent persons charged with crimes may be involuntarily committed to DDSN without regard to the age of the onset of their intellectual disability.

IV

THE DEFINITION OF "INTELLECTUAL DISABILITY" IN §44-23-10(22) APPLIES TO INVOLUNTARY ADMISSION PROCEEDINGS UNDER §44-20-450 AND ENCOMPASSES MR. LINKHORN

Section 44-20-450(A) provides in part that "[p]roceedings for the involuntary admission of a person with intellectual disability or a related disability to the services of the department may be initiated by the filing of a verified petition with the probate or the family court by . . . (8) a solicitor or an assistant solicitor responsible for the criminal prosecution pursuant to Section 44-23-430(2)." DDSN appears to argue that Mr. Linkhorn does not have a covered disability under §450, not only due to the age of onset limitation in the definition of "intellectual disability" in §44-20-30(12), but also because persons with head or spinal cord injuries, such as Mr. Linkhorn is apparently considered to have, do not fall within the scope of the terms "intellectual disability" or "related disability." This Court's Opinion found that "those individuals with a head injury or spinal cord injury can only be *voluntarily*

committed to DDSN"(emphasis in Opinion), but it also found that the age of onset limitation in §44-20-30(12) applies.[7]

To support this its argument that judicial commitment does not extend to persons with head and spinal cord injuries, DDSN points to provisions of Chapter 23, even though it argues that the definitions section of that chapter, including intellectual disability (§44-23-10(22)) do not even apply to Chapter 20. Section 44-23-430, which is expressly referenced in the commitment statute, §44-20-450(8), *supra*, states that the solicitor shall institute commitment proceedings under §450 if the person is unfit to stand trial for the reasons set forth in §44-23-410. Section 410 states that, for purposes of determining fitness to stand trial, DDSN should examine the person if he or she "is suspected of having intellectual disability or having a related disability," and the Department of Mental Health should do so if mental illness is suspected. DDSN appears to argue that head and spinal cord injuries are distinct from either "intellectual disability" or "related disability" in Chapter 23,[8] but none of the sections in Chapter 23 reference head or spinal cord injuries. Therefore, the effect of DDSN's argument could be that a person with a head or spinal cord injury, no matter how

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[7] "Instead, we hold the proper definition to apply in involuntary commitment proceedings to DDSN is the definition of 'intellectual disability' as defined in section 44-20-30(12) under the Act. We are constrained to recognize that the General Assembly has failed to provide for involuntary commitment to DDSN for any defendant who did not manifest his condition before age twenty-two." Opinion, November 16, 2016.

[8] The agency argues that the references to "related disabilities" in §410 show that the term "intellectual disability" is not all encompassing, but the term "related disabilities" is undefined in chapter 23. It is defined in Chapter 20 but not in a way that would encompass head or spinal cord injuries. §44-20-30(15) ("It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to intellectual disability.").

severe, could never be found incompetent to stand trial in Chapter 23 or at least not be examined under §410 because they would not have an "intellectual disability" or a "related disability." Such a result is patently absurd and contrary to a reasonable reading of Chapter 23. Therefore, "intellectual disability" as used in Chapter 23 must have been intended to encompass persons such as Mr. Linkhorn who are believed to have head or spinal injuries.

This definition of intellectual disability in §44-23-10(22), for the reasons argued in the Petition, applies to judicial commitment proceedings under §44-20-450 which cross-references §44-23-430. Respectfully, the State submits that the only way to construe these cross-referencing statutes "to produce a single, harmonious result" is to conclude that the broad definition of "intellectual disability" in §44-23-10(22) applies to involuntary admission proceedings in §44-20-450 and encompasses Mr. Linkhorn. *Beaufort County v. South Carolina State Election Com'n*, 718 S.E.2d 432, 435, 395 S.C. 366, 371 (2011)(statutes *in pari materia*). Doing so avoids an absurd result unintended by the General Assembly of the release into the community of incompetent persons charged with serious crimes who are unwilling to seek voluntary admission to DDSN and who fail to meet DDSN's narrow construction of the law regarding judicial admission.

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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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2016, I served a copy of the Reply to the Return to 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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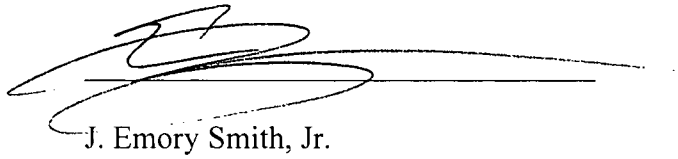

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