

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
Honorable D. Craig Brown, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS GRIFFIN,

APPELLANT

APPELLATE CASE NO. 2021-001228

BRIEF OF PETITIONER

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ISSUES PRESENTED

1.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial, where Petitioner had the right to counsel, and where counsel explained he could not effectively represent Petitioner at trial because Petitioner was incapable of rational conversation, since the SVPA must be construed in a manner that recognized Petitioner's right to effective assistance of counsel?

2.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial, where Petitioner was unable to logically communicate and thus unable to testify, but he had history of successful restoration to competency, since procedural due process forbids the significant deprivation of an individual's liberty without giving him the opportunity to be heard in a meaningful way?

3.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial where § 44-48-100(B) provided "the right not to be tried while incompetent" did not apply to an accused SVP who was charged with a predicate offense but found incompetent to stand trial for that offense, since Petitioner had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable?

4.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial where the trial court had found the chief administrative judge's ruling on the matter months before could not be "overruled," where Petitioner's mental state had continued to deteriorate, and where Petitioner was found unfit to stand trial in connection with a prior case, since evidence of a defendant's irrational behavior and prior medical opinion on competence to stand trial may signal the need for further inquiry into competency?

STATEMENT

Petitioner was tried before the Honorable D. Craig Brown and a jury pursuant to the Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§ 44-48-10 – 44-48-170, from October 22 – 23, 2018, in Horry County. James Falk represented Petitioner and Christopher Morrow represented the State. The jury found Petitioner was a sexually violent predator (SVP). The trial court signed an order of commitment.¹

On November 1, 2018, Petitioner served his notice of appeal. The Court of Appeals affirmed in a published opinion. *Matter of Griffin*, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021). Petitioner sought rehearing. Rehearing was denied in an order filed September 27, 2021.² Petitioner filed a petition for writ of certiorari and the State made its return. This Court granted certiorari in an order dated September 12, 2023.

This brief of petitioner follows.

¹ R. 6; R. 162, ll. 11-13; R. 178.

² App. 65 – 68; App. 69 – 88; App. 89 – 100; App. 101.

STANDARD OF REVIEW

On appeal from a case tried before a jury in an action at law, the appellate court's jurisdiction in cases "extends merely to the correction of errors of law." *In re Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014). "Questions of statutory construction are a matter of law." *Matter of Chapman*, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017) (quoting *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011)). The appellate courts of South Carolina review questions of law de novo. *Id.*

ARGUMENT

Introduction

Unlike the defendant in this Court’s decision in *Matter of Oxner*, 440 S.C. 5, 889 S.E.2d 586 (2023), Petitioner had an undisputed history of being returned to competency. Despite this history, the Attorney General insisted on trying Petitioner as an SVP while he was not competent. While the SVPA allows the commitment of incompetent persons, this case presents the important due process question of whether someone who can be restored to competency should be forced to trial by the Attorney General when he cannot assist in his own defense.

Relevant facts

In 1999, Petitioner pleaded guilty but mentally ill (GBMI) to second degree assault with intent to commit criminal sexual conduct with a minor, and he was sentenced to twenty years in prison. When Petitioner’s release date neared, the Attorney General sought his commitment pursuant to the SVPA. Petitioner had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. Petitioner also had a history of “decompensation:” “becoming more psychotic when he is noncompliant with his medications.”³

On February 28, 2018, defense counsel moved for a competency evaluation. On August 7, 2018, the parties appeared before the Honorable William H. Seals, the chief administrative judge for the Horry County Court of Common Pleas, and defense counsel explained that Petitioner could not participate in his defense because when meeting with counsel, “there were times when [Petitioner’s] answers made no sense relative to my questions.” Counsel offered that his own

³ R. 177; R. 91, ll. 5-14.

observations had been “verified by what [the evaluator] put in her report as far as schizophrenia and prior treatments.” Counsel argued Petitioner “would be prejudiced by trying to have this trial where he could have a significant deprivation of liberty . . . [since] he can’t participate in his defense.”⁴

Dr. Marie Gehle, the chief psychologist at the South Carolina Department of Mental Health, had evaluated Petitioner to determine whether he was an SVP, and diagnosed him with biastophilia and schizophrenia. Petitioner’s mental health history included periods of “being on his medicine to decompensating and then being restored.” Petitioner had been restored to competency *more than once* in connection with at least one prior case. It was undisputed Petitioner had been restored to competency more than once, but it is unclear whether that was in connection with one case or more than one case. At least one successful competency restoration was for his predicate South Carolina conviction from 1999:

Q So in your report you show the time that in 1999 he was evaluated for competency to stand trial, isn’t that correct?

A Yes. I believe so. Yes.

Q Late 90s?

A It was 1999.

Q And your record shows that he was returned to competency or rehabilitated?

A Well, he was diagnosed with psychotic disorder not otherwise specified. He was deemed incompetent. He was hospitalized at a psychiatric facility for competency restoration, treatment, and he was then, with treatment he was found competent to stand trial. So after a period of treatment he was then reevaluated and found competent to stand trial.

...

⁴ R. 171 – 173; R. 1; R. 3, ll. 6-17.

Q Okay. Is there any other evidence in his medical records that he's gone from periods of being on his medicine to decompensating and then being restored?

A Yes.

Q Okay. So is it more than once?

A Yes. I believe so.⁵

Petitioner had been compliant with his medications for periods as long as seventeen years. However, prior to trial, Petitioner was moved from the Department of Corrections to the Horry County jail. Shortly before he decompensated, his medications were changed from injections to oral medications. Petitioner was “generally compliant with medications” while incarcerated. Petitioner’s psychiatric medications were discontinued on January 12, 2018 (nine months before his SVP trial and one month before his motion for a competency evaluation), due to sporadic and then eventual noncompliance with the medication regimen.⁶

The circuit court denied the motion based on an incorrect reading of S.C. Code Ann. § 44-48-100(B) (2010) (amended 2023), which provided that the “right not to be tried while incompetent” was inapplicable in SVP proceedings against a respondent who was incompetent to stand trial on the predicate offense. (Notably, Petitioner was competent to stand trial on the predicate offense.)⁷

S.C. Code Ann. § 44-48-100(B) provided that a pretrial hearing may proceed with an incompetent respondent where the respondent was incompetent on the predicate offense:

⁵ R. 62, 1. 24 – 63, 1. 1; R. 67, ll. 8-20; R. 86, ll. 2-3; R. 105, ll. 9-23; R. 108, 1. 23 – 109, 1. 3.

⁶ R. 108, 1. 3 – 109, 1. 3; R. 171 – 172; R. 166.

⁷ R. 3, 1. 21 – 4, 1. 3.

If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person’s commitment is sought pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and **all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply. . .**

(emphasis added).⁸ Based on that inapplicable provision, the circuit court ruled, “44-48-100(B) says that . . . all the constitutional rights available to defendants at criminal trials [apply] other than the right not to be tried while incompetent. So, I think that’s dead on the money in the statute.”⁹

On October 22, 2018, when Petitioner appeared before the Honorable D. Craig Brown for trial, defense counsel made a second motion for a competency evaluation based on a “significant change in Respondent’s condition.” Counsel explained that Petitioner’s “mental state ha[d] significantly deteriorated” since his prior motion, and that Petitioner could not testify because he was incapable of logically or truthfully answering questions. Counsel offered that over the course of his representation, conversations with Petitioner had gone from “iffy” to not “making any sense:” “I can say that I’ve had four meetings with my client and his mental state has significantly deteriorated from each meeting.” Counsel noted Petitioner’s written correspondence had deteriorated, going from “articulate and well-lettered” to “look[ing] like they’ve been written with . . . your left hand, just kind of scratching it out.”¹⁰

⁸ S.C. Code Ann. § 44-48-100(B) was amended in 2023 to clarify that a 100(B) hearing was to be a “non-jury hearing.”

⁹ R. 3, 1. 22 – 4, 1. 3.

¹⁰ R. 6; R. 166; R. 43, 1. 14 – 44, 1. 21.

Counsel submitted that per *Matter of Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), a respondent in an SVP trial had the right to effective assistance of counsel, and that he was unable to “be effective counsel when I can’t communicate with my client.” Counsel argued that conducting an SVP trial when Petitioner lacked the ability to assist in his own defense was a violation of Petitioner’s procedural due process protections under the state and federal constitutions, as evidenced by the application of the three-pronged test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to his case.¹¹

The State argued that Petitioner did not have the right to be competent at trial based on S.C. Code Ann. § 44-48-100(B) (as seen, an inapplicable provision) and since the requisite mental abnormality or personality disorder for SVP commitment might prevent competency in some cases. It appears the Attorney General had made this same argument in chambers prior to the first judge’s denial of Petitioner’s motion for a competency evaluation: “Again, it’s still the State’s position that he’s, he’s not entitled to a competency evaluation in this matter because both the statute contemplates such a, such a finding under 44-48-100(B) . . . [and] that mental abnormality or personality disorder might prevent, you know, people from being competent.”¹²

Defense counsel countered that Petitioner had a “track record here in this case of him being able to be returned to competency when he stays on his psychiatric medications.” Counsel also pointed out that § 44-48-100(B) was inapplicable. “[T]he statute does not provide that he’s not entitled to a competency evaluation to stand trial.”¹³

¹¹ R. 40, l. 11 – 42, l. 1; R. 165 – 169.

¹² R. 37, l. 13 – 38, l. 1.

¹³ R. 43, ll. 3-5; R. 40, ll. 21-24.

The trial court stated, “I don’t disagree with you [counsel] at all. The statute doesn’t specifically address competencies in these types of cases.” However, the court ruled that, “even if for argument sake I agreed with you . . . I don’t think I have authority to overrule what Judge Seals has done. He’s already decided.”¹⁴

Interestingly, another circuit court judge also believed Petitioner should receive a competency evaluation. The original motion for a competency evaluation was taken under advisement by the Honorable George M. McFaddin, Jr., in February of 2018. When the parties had not received a ruling by August 7, 2018, they agreed to have a hearing on the motion in front of Judge Seals, who, as discussed above, denied the motion. However, the parties subsequently received a written ruling from Judge McFaddin granting the motion. This ruling was not enforced since the parties had in the meantime agreed to argue the motion before Judge Seals.¹⁵

The trial went forward and the jury deliberated for only twenty-five minutes before it found that Petitioner was a sexually violent predator. The court signed an order of commitment.¹⁶

In a published opinion, the Court of Appeals found no error and held that an accused SVP cannot be entitled to a competency evaluation. *Matter of Griffin*, 434 S.C. 338, 341, 863 S.E.2d 346, 348 (Ct. App. 2021). The opinion did not address Petitioner’s history of successful competency restoration. The Court of Appeals recognized that whether an accused SVP’s right to counsel encompassed the right to be competent to assist counsel was a novel issue but concluded there was no statutory right to competency and that other procedural protections afforded by the

¹⁴ R. 42, ll. 2-8; R. 38, ll. 18-22.

¹⁵ R. 165; R. 35, l. 18 – 38, l. 16.

¹⁶ R. 161, ll. 9-12; R. 162, ll. 11-13; R. 178.

Act sufficiently satisfied due process. The Court of Appeals further found *In re Oxner*, 430 S.C. 555, 566-69, 846 S.E.2d 365, 371-73 (Ct. App. 2020), *aff'd*, 440 S.C. 5, 889 S.E.2d 586 (2023), supported its decision. *Matter of Griffin*, 434 S.C. at 341, 863 S.E.2d at 348.¹⁷

¹⁷ App. 65 – 68.

1.

The Court of Appeals erred where it affirmed the denial of Petitioner’s motion to be evaluated for competency to stand trial, where Petitioner had the right to counsel, and where counsel explained he could not effectively represent Petitioner at trial because Petitioner was incapable of rational conversation, since the SVPA must be construed in a manner that recognized Petitioner’s right to effective assistance of counsel.

The State opposed a competency evaluation, although Petitioner had been successfully restored to competency before, *more than once*, including during the predicate criminal case. A competency evaluation in this case would have cost the State nothing, since competency restoration must be attempted upon commitment of an incompetent offender in order to provide SVP treatment. Like all SVPs, Petitioner has a right to the effective assistance of counsel. Absent competency, Petitioner was unable to access this right because he could not communicate with his counsel and assist in his defense. Petitioner should have been granted a competency evaluation to protect his due process rights.

A respondent in an SVP proceeding has a “right to effective assistance of counsel” which is a statutory right contained in S.C. Code Ann. § 44-48-90,¹⁸ and a constitutional right “arising under the Fourteenth Amendment and the South Carolina Constitution.” *Matter of Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). “[T]he General Assembly provided SVPs with a right to counsel, which cannot be merely a superficial right.” *Id.* at 184, 796 S.E.2d at 849.

¹⁸ At the time of Petitioner’s trial, S.C. Code Ann. § 44-48-90(B) (2010) (amended 2023) provided in relevant part, “At all stages of the proceedings under this chapter, a person subject to this chapter is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person.” (The language of that statute was slightly altered in 2023, but the gist of the provision is the same.)

“An SVP’s right to counsel arises from a constitutional right to due process similar to the rights attendant to a criminal trial.” *Chapman*, 419 S.C. at 185, 796 S.E.2d at 849. In criminal cases, “[t]he test for competency to stand or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him.” *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987). “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). *See Pate v. Robinson*, 383 U.S. 375, 385 (1966) (failure to hold hearing on competency of insane defendant deprived him of constitutional right to fair trial).

“[T]he aim of requiring a defendant to be competent [i]s ‘to ensure that he has the capacity to understand the proceedings and to assist counsel.’” *Sims v. State*, 313 S.C. 420, 423, 438 S.E.2d 253, 254 (1993) (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993)). A “mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no chance to defend himself.” *Drope*, 420 U.S. at 171 (internal quotations omitted). In this case, Petitioner was unable to “participate in his defense” because he could not communicate with counsel. R. 3, ll. 14-17; R. 40, l. 11 – 37, l. 1. Due to his inability to engage in rational thought and communicate with and assist counsel, Petitioner was essentially tried *in absentia*.

“We cannot construe the Act in a manner that does not recognize an SVP’s constitutional right to the effective assistance of counsel.” *Chapman*, 419 S.C. at 187, 796 S.E.2d at 850. But the circuit court and Court of Appeals construed the Act as depriving Petitioner of the opportunity to

attain competency for trial. R. 3, l. 21 – 4, l. 3; *Matter of Griffin*, 434 S.C. at 341, 863 S.E.2d at 348.

To be clear, Petitioner does not assert an ineffective assistance of counsel claim here. *See Chapman*, 419 S.C. at 182, 796 S.E.2d at 847 (On direct appeal, the appellate courts will not consider ineffective assistance of counsel claims; those claims are limited to review during PCR or habeas.). Instead, Petitioner asserts that the lower courts' statutory interpretation prevented him from *accessing* his right to counsel. (Perhaps the denial of a competency evaluation in this case, which was needed to effectuate Petitioner's right to counsel, could be compared with a denial of the services of a foreign language interpreter: a matter proper for address during this appeal rather than during PCR or habeas, where counsel made the appropriate motion at the appropriate time.)

The State would have suffered zero prejudice by allowing Petitioner a competency evaluation, since competency has to be restored to participate in SVP treatment. The Attorney General's opposition to a competency evaluation on these facts, where Petitioner had been successfully restored to competency multiple times, rendered the right to effective assistance of counsel illusory and ran roughshod over Petitioner's rights. This opposition should be considered in light of the Attorney General's refusal to concede that the right to effective assistance of counsel existed at all in *Chapman, supra*. *See State's Brief of Respondent in Chapman* at 11 – 12. The denial of a competency evaluation was error in this case since the Act must be construed so that an accused's right to counsel is not merely a superficial right. *Chapman*, 419 S.C. at 184, 796 S.E.2d at 849; U.S. Const. amend. XIV; S.C. Const. art. I, § 3; S.C. Code Ann. § 44-48-90.

2.

The Court of Appeals erred where it affirmed the denial of Petitioner’s motion to be evaluated for competency to stand trial, where Petitioner was unable to logically communicate and thus unable to testify, but he had history of successful restoration to competency, since procedural due process forbids the significant deprivation of an individual’s liberty without giving him the opportunity to be heard in a meaningful way.

Petitioner was unable to communicate with his lawyer or the jury, but he had been successfully restored to competency *more than once* in connection with at least one prior criminal case. On these facts, the flexible protections of due process should have afforded Petitioner a competency evaluation to provide him with a meaningful opportunity to be heard before he was indefinitely deprived of his liberty. The State suffered no prejudice by waiting, because Petitioner would remain confined during restoration and up until his trial.

“The United States Supreme Court ‘repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.’” *Matter of Chapman*, 419 S.E.2d 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A civil commitment is a “significant deprivation of liberty.” *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425).

“The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, *the opportunity to be heard in person*, the opportunity to introduce evidence, the right

to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.” *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008) (emphasis added). “Procedural due process requires notice, *the opportunity to be heard in a meaningful way*, and judicial review.” *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (emphasis added). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Counsel explained Petitioner could not testify since he was unable to logically or truthfully answer questions. Counsel was unable to consult with Petitioner about his defense. R. 43, 1. 15 – 44, 1. 3. Petitioner was denied a competency evaluation—to determine whether he could be heard in person and in a meaningful way—before he was indefinitely deprived of his liberty.

In affirming the denial of a competency evaluation, the Court of Appeals identified other rights afforded offenders under the SVPA, including the right to counsel, the right to a probable cause hearing, and the right to a jury trial. It concluded those rights were sufficient to satisfy procedural due process. However, it did not address the important fact of Petitioner’s history of successful competency restoration. *Matter of Griffin*, 434 S.C. at 341, 863 S.E.2d at 348. Overlooking this fact leads to a Kafkaesque result: the State must attempt to restore Petitioner’s competency if he is adjudged an SVP so that he may participate in sex offender treatment, but he may not be restored to competency a few months earlier—when it might prevent him from being adjudged an SVP in the first place.

“Due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (alterations omitted)). Due process requires that “procedures be tailored, in light of the decision to

be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.” *Eldridge*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (cleaned up)).

Mathews v. Eldridge, 424 U.S. at 335, held that due process requires the consideration of three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional procedural safeguards; and 3) the Government’s interest, including the function involved and the burdens that the additional safeguards would entail. All three of the *Mathews* factors support Petitioner’s position.

First, indefinite commitment as an SVP constitutes a “significant deprivation of liberty.” *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425). *See In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2012) (a person’s interest in the freedom from bodily restraint is at the core of due process protections) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *In re Taft*, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015) (“A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy.”). SVP commitment is imprisonment in all but name. Unlike imprisonment, it has no defined end. In addition to physical restraint, opprobrium and indignities attach. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980) (“The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.”).

Second, there was a considerable risk of an erroneous deprivation of liberty under existing procedures. Petitioner was unable to communicate due to his apparent lack of competency. He could not alert his counsel to any favorable facts or witnesses. He could not testify before the jury about, for example, whether he recognized his condition, whether he had a plan to prevent

reoffending, and whether he had learned methods to resist urges to commit sexual misconduct. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (The prohibition against trying an incompetent defendant “is fundamental to an adversary system of justice.”). The additional procedural safeguard of allowing Petitioner the chance to attain competency would have been highly valuable, so that Petitioner could be heard by his counsel or by the jury in his defense. *See United States v. White*, 927 F.3d 257, 266 (4th Cir. 2019) (“there is always some degree of risk inherent in any type of adversary proceeding, including [an SVP proceeding]”). Moreover, a material change in mental status could affect the risk calculus regarding future conduct. Permitting a competency evaluation here would lower the chance of an erroneous deprivation of liberty.

Third, the State has an interest in protecting the community from sexual predators, but has zero interest in trying an incompetent accused if that person can be restored. Moreover, because the State will have to attempt to restore Petitioner to competency if committed (in order to participate in treatment), the costs involved are the same. It makes more sense from a cost-benefit perspective to handle competency on the front end. “[A]ttempting to curb the compulsively lurid behaviors of an SVP that precipitate within the matrix of a florid psychosis or severe cognitive impairments would likely prove futile . . . [C]urrently available treatments for SVPs finds its provenance in rational, goal-directed, even insightful, cognition.” *In re Det. of Morgan*, 330 P.3d 774, 784 (Wash. 2014) (Stephens, J., dissenting) (quoting Alan A. Abrams et al., *The Case for a Threshold for Competency in Sexually Violent Predator Civil Commitment Proceedings*, 28 Am. J. Forensic Psychiatry no. 3, 2007, at 7, 22–23).

Petitioner should have been allowed the opportunity to be evaluated and restored a few months prior to his SVP trial, when he might have been able to provide information to his lawyer or the jury that would have prevented his commitment as an SVP. The State’s cost is also low since

Petitioner had been successfully restored to competency before. All of the *Mathews* factors weigh in Petitioner's favor.

However, if a competency evaluator concludes it is unlikely Petitioner can be restored to competency, then given this Court's recent decision in *Matter of Oxner*, 440 S.C. 5, 889 S.E.2d 586 (2023), it appears the *Mathews* factors would be inapplicable—a competency evaluation (and attempted restoration if recommended) is the procedural safeguard and no additional procedural safeguards have been identified. *See Oxner*, 440 S.C. at 12, 889 S.E.2d at 590 (General Assembly excluded right not to be tried while incompetent from the constitutional rights available to persons subject to proceedings under 44-48-100(B), since: “Without exclusion of this right, the State is unable to protect the public from some dangerous sexually violent persons.”). Petitioner is not claiming he can never be tried if he does not regain competency.

Next, the Court of Appeals found *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004), supported its decision. *Matter of Griffin*, 434 S.C. at 341, 863 S.E.2d at 348. However, considering *Council* in relation to Petitioner's case instead favors permitting a competency evaluation. At issue in *Council*, 359 S.C. at 124, 597 S.E.2d at 784, was the propriety of an indefinite stay of an applicant's PCR proceedings until he could become competent (rather than a brief stay as here). This Court reasoned that since the majority of Council's PCR claims were legal matters that could be determined from the trial record, the PCR hearing could proceed despite his incompetency. *Id.*, 359 S.C. at 127-28, 597 S.E.2d at 786. However, this Court recognized that even a PCR applicant may need to be competent to assist his lawyer with fact-based issues. *Id.* In this case, Petitioner was unable to assist his lawyer with fact-based issues since he was incapable of communication. Counsel could not obtain critical information from Petitioner about his plans to avoid reoffending, such as whether he intended to undergo treatment in an outpatient setting, any plans for medication

compliance, or the identities of any family members or friends with whom Petitioner might live if not committed as an SVP. R. 44, ll. 12-20. Also, *Council* was not a civil commitment proceeding aimed at depriving a person of his liberty. Council had already been deprived of his liberty at a trial, unlike Petitioner, who had served his sentence and was awaiting trial to determine if he should be indefinitely committed. Moreover, Council was the party with the burden of proof, unlike this case, where Petitioner was defending himself against the State's offer of proof.

Finally, throughout the pendency of this appeal the State has cited to caselaw on SVPs and competency from other jurisdictions, and the Court of Appeals cited to several of these same decisions in its opinion. See State's Return to Petition for Writ of Certiorari at 15 – 17; *Matter of Griffin*, 434 S.C. at 341 n. 4, 863 S.E.2d at 348. None of these cases involved the South Carolina Constitution. Some of the decisions involved accused SVPs who were intellectually disabled. See *In re Det. Of Cabbage*, 671 N.W.2d 442, 444 (Iowa 2003) (defendant with “senile dementia, was functioning in the mentally retarded range”); *Commonwealth v. Nieves*, 846 N.E.2d 379, 384 (Mass. 2006) (defendant with “limited intellectual ability (mild retardation)”). This is a critical fact, since someone with an intellectual disability cannot have restored what he never possessed. Those defendants, unlike Petitioner, had never been and could never become competent.

Other decisions cited by the State and Court of Appeals involved accused SVPs who *did* receive competency evaluations (unlike Petitioner). See *In re Det. Of Morgan*, 330 P.3d 774, 777-80 (Wash. 2014) (Defendant found incompetent after a hearing, a guardian ad litem was appointed, involuntary medication was ordered. “Although his participation was potentially diminished due to incompetency . . . We find no additional protections that would minimize the risk of error without significantly undermining compelling State interests.”); *In re Sykes*, 367 P.3d 1244, 1245 (Kan. 2016) (Trial court found defendant was not competent, evaluation and treatment was

ordered. Defendant was again found not competent and unlikely to become competent in the foreseeable future, “further competency evaluations” followed); *Nieves*, 846 N.E.2d at 384 (qualified examiner concluded defendant’s competency was “compromised” due to intellectual disability: “there may be some fluctuations in the degree of the defendant’s competence”) (cleaned up). Those cases are not like this case: No additional protections could have availed those defendants.

A civil commitment is a “significant deprivation of liberty.” *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Eldridge*, 424 U.S. at 334. A flexible application of due process required a competency evaluation here, given Petitioner’s history of successful competency restoration. U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

3.

The Court of Appeals erred where it affirmed the denial of Petitioner’s motion to be evaluated for competency to stand trial where § 44-48-100(B) provided “the right not to be tried while incompetent” did not apply to an accused SVP who was charged with a predicate offense but found incompetent to stand trial for that offense, since Petitioner had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable.

The chief administrative judge incorrectly based his denial of Petitioner’s motion for a competency evaluation on an inapplicable portion of the SVPA. The Court of Appeals and the circuit judge both misinterpreted the legislative intent of the Act, which provided the right to competency at trial was unavailable only to those offenders who were not competent to stand trial on the predicate offense. *See* S.C. Code Ann. § 44-48-100(B) (2010) (amended 2023). Therefore, the Act does not preclude that a right to competency at an SVP trial exists for offenders who were competent to stand trial on the predicate criminal offense.

The SVPA addresses both the commitment of offenders like Petitioner, who have been found guilty of sexually violent crimes, and offenders who could not be tried for their sexually violent crimes due to incompetency. Petitioner’s GBMI plea to a sexually violent offense qualified him as a potential SVP pursuant to § 44-48-30(6)(**e**): “‘Convicted of a sexually violent offense’ means a person has . . . been found guilty but mentally ill of a sexually violent offense.”

In contrast, under § 44-48-30(6)(**c**), a person who has “been charged but determined to be incompetent to stand trial for a sexually violent offense” is also considered to have been convicted of a sexually violent offense for purposes of SVP commitment. For example, the respondent in *Oxner*, 440 S.C. 5, 889 S.E.2d 586 (2023), fell under subsection (c) since he was incompetent to stand trial on the predicate criminal offense. S.C. Code Ann. § 44-48-100(B) provides a separate

pretrial hearing procedure exclusively directed at offenders like Oxner, who fall within subsection **(c)** of § 44-48-30(6). As to subsection **(c)** offenders, § 44-48-100(B) provided¹⁹ in part,

If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person’s commitment is sought pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and **all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply.** . . . If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court must enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this chapter.

Therefore, while the General Assembly provided that the right to competency did not apply to some offenders under the SVPA, it only extended this limitation to persons who fall under § 44-48-30(6)**(c)**—that is, persons who were incompetent to stand trial in the underlying criminal case—not persons like Petitioner, who fell under subsection **(e)**. “The canon of construction ‘expressio unius est exclusio alterius’ or ‘inclusio unius est exclusio alterius’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” *Hodges v. Rainey*, 341 S.C. 79, 86–87, 533 S.E.2d 578, 582 (2000) (quoting Black’s Law Dictionary 602 (7th ed. 1999)). “The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.” *Hodges*, 341 S.C. at 87, 533 S.E.2d

¹⁹ § 44-48-100(B) (2010) (amended 2023) was slightly altered but the thrust of the provision is the same.

at 582 (quoting Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed. 1992)).

The General Assembly precluded the right of competency only as to one category of offenders, leaving extant a right to competency for the remaining offenders. “The cardinal rule of statutory construction is that the court ascertain and effectuate the intent of the legislature.” *Odom v. Town of McBee Election Comm’n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). “Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). *See also First Citizens Bank & Tr. Co. v. Blue Ox, LLC*, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018) (“the legislature knew how to provide for an exception had it desired to do so as evidenced by the ‘fraudulent conveyance’ exception in the preceding subsection”).

In this case, the Court of Appeals held there was “no statutory requirement of competence for proceedings arising under the Act. Rather, it appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense.” *Matter of Griffin*, 434 S.C. 338, 341, 863 S.E.2d 346, 348 (Ct. App. 2021). This construction of the Act was improperly expansive. Had the legislature intended to include persons who were competent on the predicate offense in the category of offenders denied the right to competency at the SVP trial, the fact that it knew how to do so was evidenced by its provision that offenders who

were not competent on the predicate offense had no right to competency at the SVP trial. *First Citizens Bank*, 422 S.C. at 471, 812 S.E.2d at 423.

Construing the statutory language of the Act as a whole supports finding that offenders like Petitioner are not precluded from competency evaluations. “A statute should be read as a whole.” *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690 (1996)). “Further, statutes which are part of the same legislative scheme should be read together.” *Id.* (quoting *Great Games, Inc. v. S.C. Dep’t of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) (cleaned up)). S.C. Code Ann. § 44-48-40, which regards the timing of written notice to the multidisciplinary team and Attorney General, is helpful in this regard. Subsections (2) and (3) of that statute anticipate the need for a hearing on fitness to stand trial for those offenders found not guilty by reason of insanity (NGRI) on the predicate offense and those offenders found not competent to stand trial on the predicate offense. However, subsection (4) of that statute does not anticipate the need for a hearing on fitness to stand trial for GBMI offenders (like Petitioner). Therefore, it appears the General Assembly expected that a person who was GBMI but competent would be competent (or could be restored) for the SVP trial (i.e., the General Assembly presumed GBMI offenders would not need a hearing because they would be or could become competent).

Additionally, the legislature’s manifest intent to provide robust criminal-like procedural protections aids in construction. The General Assembly provided for probable cause determinations (§§ 44-48-60 – 80); the right to request an independent evaluation (§44-48-90); the assistance of counsel (§44-48-90(B)); the right to a jury trial (§44-48-100); and a burden of proof beyond a reasonable doubt (§44-48-100). Reading the Act as a whole indicates the legislature

intended to provide accused SVPs with quasi-criminal protections, one of them being the right to competency.

Next, a brief note on the Court of Appeals' conclusion that its decision in *Matter of Oxner*, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020), *aff'd*, 440 S.C. 5, 889 S.E.2d 586 (2023), supported its decision. The Court of Appeals had found Oxner's procedural due process rights were not violated when a pretrial hearing was held while Oxner was incompetent. *Matter of Griffin*, 434 S.C. at 341, 863 S.E.2d at 348. However, Oxner fell into the category of offenders to which § 44-48-100(B) explicitly applied: § 44-48-30(6)(c) offenders who have "been charged but determined to be incompetent to stand trial for a sexually violent offense." The result in Oxner's case was in keeping with due process: No further procedural protections existed that could help Oxner.²⁰ *Oxner*, 430 S.C. at 558-61, 846 S.E.2d at 367-69. *Oxner* does not support barring competency evaluations for subsection (e) offenders like Petitioner.

Finally, as discussed in Issues 1 and 2 above,²¹ Petitioner needed to be competent to access effective assistance of counsel. The SVPA may not be construed "in a manner that does not recognize an SVP's constitutional right to the effective assistance of counsel." *Chapman*, 419 S.C. at 187, 796 S.E.2d at 850. Statutory construction here must also account for the due process right to be heard at a meaningful time and in a meaningful manner. The circuit court and Court of Appeals' statutory interpretation was incompatible with Petitioner's rights to counsel and due process, and violated the rules of statutory construction. That interpretation improperly expanded upon the SVPA by coupling a provision applicable to one class of offenders with all classes of

²⁰ Additionally, the objection to competency in *Oxner* was merely as to his competency at a pretrial hearing rather than at trial, as in this case.

²¹ Petitioner hereby incorporates the arguments from Issues 1 and 2, above.

offenders. S.C. Code Ann. § 44-48-90; U.S. Const. amend. XIV; S.C. Const. art. I, § 3; *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

4.

The Court of Appeals erred where it affirmed the denial of Petitioner’s motion to be evaluated for competency to stand trial where the trial court had found the chief administrative judge’s ruling on the matter months before could not be “overruled,” where Petitioner’s mental state had continued to deteriorate, and where Petitioner was found unfit to stand trial in connection with a prior case, since evidence of a defendant’s irrational behavior and prior medical opinion on competence to stand trial may signal the need for further inquiry into competency.

The trial judge was inclined to grant Petitioner’s competency motion, but believed he was bound by the chief administrative judge’s earlier decision. This was error, since Petitioner’s continued cognitive decline presented a new matter to the court. The Court of Appeals declined to address this issue, finding its resolution of the other issues dispositive. *Matter of Griffin*, 434 S.C. 338, 341 n. 5, 863 S.E.2d 346, 348 (Ct. App. 2021).

As a general matter, “one circuit court judge may not overrule another.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). However, the trial court was not asked to overrule the prior judge since competency is a fluid issue that changes over time and may require reevaluation in light of new facts and circumstances. *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981), illustrates the changing nature of competency. In *Blair*, 275 S.C. at 531-32, 273 S.E.2d at 537, the defendant, who suffered from schizophrenia (like Petitioner), was ordered to undergo a competency evaluation by Judge Spruill in 1977 and he was found not competent. In 1978, he was returned to court after his competency was restored. *Id.* In 1979, Judge Harris ordered the defendant to undergo another competency evaluation, and he was found competent to stand trial. *Id.* at 532, 273 S.E.2d at 537.

Here, as in *Blair*, a different judge was asked to revisit competency at a later date, and nothing precluded the second judge from acting: this Court found the latter judge in *Blair* should have held a hearing on the matter of competency. *Id.* at 533, 273 S.E.2d at 538. Of particular relevance was that “Blair had a history of mental disorders and past admissions to State Hospital in addition to a past adjudication of incompetence to stand trial in this case.” *Id.* These facts are similar to Petitioner’s own history. Although Petitioner was evaluated as a potential SVP by Dr. Gehle, he was not evaluated for competency. However, Dr. Gehle noted Petitioner had previously, successfully, been hospitalized for competency restoration, and he historically decompensated into psychosis when he did not take prescribed medications.²²

Counsel first moved for a competency evaluation in February of 2018, although the motion was not ruled upon until August 7, 2018, when it was denied by the chief administrative judge. On October 22, 2018, counsel again moved for a competency evaluation before the trial judge and argued there was a “change in circumstances” since Petitioner’s condition continued to deteriorate. The trial judge was inclined to grant the motion, but incorrectly understood himself bound by the prior judge’s decision. The trial judge ruled, “I don’t disagree with you at all. The statute doesn’t specifically address competencies in these types of cases . . . even if for argument sake I agreed with you . . . I don’t think I have authority to overrule what Judge Seals has done. He’s already decided.” (As seen, a third circuit court judge would have also granted Petitioner a competency evaluation.)²³

In *Drope v. Missouri*, 420 U.S. 162, 169 (1975), the question arose whether there was “reasonable cause to believe that a person who attempted to commit suicide in the midst of a trial

²² R. 108, l. 23 – 109, l. 3; R. 166.

²³ R. 171 – 173; R. 1; R. 6; R. 44, ll. 8-10; R. 42, ll. 2-8; R. 165; R. 35, l. 18 – 38, l. 16.

might not be mentally competent to understand the proceedings against him.” The United States Supreme Court held, “[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may, in some circumstances, be sufficient [to signal] . . . the need for further inquiry to determine fitness to proceed . . .” *Id.* at 180. *Drope* illustrates that as late as during the trial, it may be necessary to reevaluate competency. *See also State v. Lee*, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980) (competency to stand trial “relates to the time when the case would be submitted to the court and jury”); *State v. Motts*, 391 S.C. 635, 650-51, 707 S.E.2d 804, 812 (2011) (testimony by two expert witnesses that “competency can change over time”).

Counsel argued that Petitioner had a history of psychosis and had been found not competent to stand trial a number of times before. Counsel explained that conversations with Petitioner over the course of his representation had gone from “iffy” to not “making any sense.” These facts were relevant to revisiting Petitioner’s need for a competency evaluation.²⁴

“The test for competency to stand trial or continue trial is whether the defendant has the sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him.” *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (emphasis added). The trial court’s determination that it could not “overrule” the prior judge was error—the prior judge’s order was not the final word since the matter was one of Petitioner’s present competency. Moreover, “the Constitution’s safeguards of human liberty in the area of mental illness and the

²⁴ R. 166; R. 108, l. 23 – 109, l. 3; R. 44, ll. 8-20.

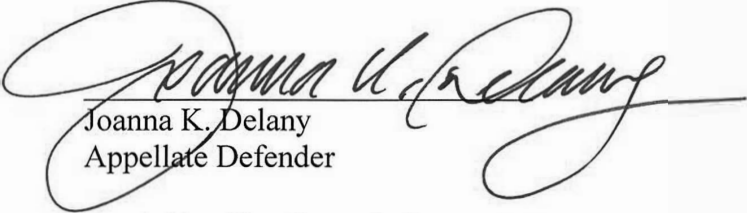
law are not always best enforced through precise bright-line rules.” *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The trial judge had the discretion to order an evaluation notwithstanding the prior ruling.

As discussed in Issues 1 and 2, above, Petitioner had substantial constitutional and statutory rights to effective assistance of counsel and procedural due process.²⁵ These rights were related to his competency at the time of trial. The trial court’s failure to permit a competency evaluation was an improper deprivation of those rights. *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Blair*, 275 S.C. 529, 273 S.E.2d at 536 (1981); U.S. Const. amend. XIV; S.C. Const. art. I, § 3; *Matter of Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017).

²⁵ Petitioner hereby incorporates the arguments from Issues 1 and 2, above.

CONCLUSION

Based on the foregoing arguments, this Court should reverse Petitioner's commitment and remand this case for a new trial.



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This 23rd day of October, 2023.