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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

APPELLANT

Opinion No. 5839 (S.C. Ct. App. Filed July 21, 2021)

APPELLATE CASE NO. 2021-001228

APPENDIX

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STATE OF SOUTH CAROLINA

IN 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. 2018-001975

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

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

2.

Whether the court erred where denied appellant's motion to be evaluated for competency to stand trial, where appellant 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 erred where it denied appellant'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 appellant had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable?

4.

Whether the court erred where it denied appellant's motion to be evaluated for competency to stand trial where it found the chief administrative judge's ruling on the matter months before could not be "overruled," where appellant's mental state had continued to deteriorate, and where appellant 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 OF THE CASE

Appellant 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. R. 6. James Falk represented appellant and Christopher Morrow represented the state. R. 6.

The jury found appellant was a sexually violent predator (SVP). R. 162, ll. 11-13. The court signed an order of commitment. R. 178.

This appeal follows.

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*.

STATEMENT OF FACTS

Appellant had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. R. 91, ll. 5-14. Appellant also had a history of "decompensation," "becoming more psychotic when he is noncompliant with his medications." R. 91, ll. 11-13. Appellant did not suffer from hallucinations when properly medicated, but he still had some "delusional and disorganized thinking" (such as believing he was owed close to two million dollars in social security benefits). R. 104, ll. 17-20; R. 91, ll. 14-22.

In 1999, appellant pleaded guilty but mentally ill to the offense of assault with intent to commit criminal sexual conduct with a minor in the second degree, and he was sentenced to twenty years in prison. R. 177. When appellant's release date neared, the state sought his commitment pursuant to South Carolina's Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§ 44-48-10 – 44-48-170.

Dr. Marie Gehle, a chief psychologist at the South Carolina Department of Mental Health, evaluated appellant and diagnosed him with biastophilia and schizophrenia. R. 62, l. 24 – 58, l. 1; R. 67, ll. 18-20; R. 86, ll. 1-3. Appellant's mental health history included periods of "being on his medicine to decompensating and then being restored." R. 108, l. 23 – 109, l. 3. Appellant had been restored to competency more than once. R. 108, l. 23 – 109, l. 3. Appellant's medical records from the Horry County Detention Center, where he was held prior to trial, revealed that his medications had been discontinued on January 12, 2018 due to sporadic and then eventual noncompliance. R. 108, ll. 3-10.

On February 28, 2018, defense counsel moved for an evaluation to determine appellant's competency to stand trial. R. 171- R. 173. On August 7, 2018, the parties appeared before the

Honorable William H. Seals for a hearing on the matter. R. 1. Judge Seals was the Chief Administrative Judge for the Horry County Court of Common Pleas. R. 165.

Defense counsel explained that when meeting with appellant, "there were times when his answers made no sense relative to my questions." R. 3, ll. 12-14. Counsel explained that he moved for a competency evaluation because he believed appellant "would be prejudiced by trying to have this trial where he could have a significant deprivation of liberty if he loses if he can't participate in his defense." R. 3, ll. 14-18. Counsel offered that his own observations of appellant's mental state had been "verified by what Dr. G[ehle] put in her report as far as schizophrenia and prior treatments." R. 3, ll. 6-8.

The court denied the motion based on S.C. Code Ann. § 44-48-100(B), which provided that the "right not to be tried while incompetent" was inapplicable in certain SVP proceedings. R. 3, l. 21 – 4, l. 3.

S.C. Code Ann. 44-48-100(B) provides:

> **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**. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. 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.

(emphasis added).

The court stated, "44-48-100(B) says that a 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 the constitutional rights available to defendants at criminal trials other than the right not to be tried while incompetent. So, I think that's dead on the money in the statute." R. 3, l. 22 – 4, l. 3.

On October 22, 2018, defense counsel filed a second motion for an evaluation of appellant's competency to stand trial, which was made an exhibit, and in which he stated the motion was due to a "significant change in circumstances." R. 165. Also, on that date, appellant appeared before the Honorable D. Craig Brown for trial. [1] R. 6.

Counsel argued that conducting an SVP trial when appellant lacked the ability to assist in his own defense was a violation of appellant's "due process protections under the V and XIV Amendments to the United States Constitution as well as Article 1, § 3 of the South Carolina Constitution." R. 165. Counsel posited that trying appellant under these circumstances would be a deprivation of procedural due process, as evidenced by the application of the three-pronged test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to his case. R. 166.

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[1] For clarification, appellant notes the original motion for a competency evaluation was taken under advisement by the Honorable George M. McFaddin in February of 2018. R. 165; R. 35, ll. 18-24. When the parties had not received a ruling by August 7, 2018, they agreed to have a hearing on the motion in front of the Honorable William H. Seals, who, as discussed above, denied the motion. R. 165; R. 36, ll. 2-8. However, after that hearing but before appellant's trial, the parties received a written ruling from Judge McFaddin granting the motion. R. 165, ll. 11-12; R. 36, l. 12 – 37, l. 3. However, Judge McFaddin's ruling was not enforced since the parties had in the meantime agreed to argue the motion before Judge Seals.

Counsel submitted to the trial court that per *Matter of Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), a respondent in a sexually violent predator 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." R. 40, l. 11 – 42, l. 1. Counsel offered that appellant's "mental state has significantly deteriorated," that appellant was "in no condition to testify," and that he was unable to put appellant on the stand because he found appellant to be incapable of "making a logical response to questions." R. 44, ll. 3-10; R. 43, ll. 14-25.

Counsel noted that in his experience trying SVP cases, "The only times I have won these cases is when I've been able to put my client up on the stand . . . I cannot put this client on the stand because I have no anticipation that he would answer my questions truthfully or would even make a, a logical response to the questions that I've asked." R. 43, ll. 15-25. Counsel said he had "not been able to speak with him, do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." R. 43, l. 25 – 39, l. 10. Counsel offered that over the course of his representation, appellant's handwritten letters to him had gone from being articulate to looking like they had been "scratch[ed]" out, and that conversations with appellant had gone from "iffy" to not "making any sense." R. 44, ll. 12-20.

The state argued that appellant did not have the right to be competent at trial based on the language of S.C. Code Ann. § 44-48-100(B), and since the requisite mental abnormality or personality disorder for SVP commitment might prevent competency in these cases anyway. R. 37, l. 14 – 38, l. 1. The state also cited *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004), in support of its position. R. 45, ll. 4-5.

Defense counsel countered that appellant had a "track record" of "being able to be returned to competency when he stays on his psychiatric medications." R. 43, ll. 3-5. Counsel

also pointed out that § 44-48-100(B) “does not provide that [appellant is] not entitled to a competency evaluation to stand trial.” R. 40, ll. 21-24.

The court stated, “I don’t disagree with you [counsel] at all. The statute doesn’t specifically address competencies in these types of cases.” R. 42, ll. 2-4. 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.” R. 42, ll. 5-8. “Judge Seals had the final say so . . .” R. 38, ll. 18-22. And so, the trial went forward.

After the state rested, defense counsel said he would not be putting up a case since appellant was unable to testify due to his lack of competency to stand trial. R. 132, ll. 15-25. The court noted that a sidebar discussion had occurred wherein counsel informed the court that appellant “attempted to try to talk to [counsel] today and [counsel] certainly told me at side bar . . . that [counsel] didn’t necessarily understand what he was saying. It was not in a coherent manner.” R. 133, ll. 1-6. Counsel agreed that “none of” what appellant said to him during the trial was coherent. R. 133, l. 7.

The jury deliberated for only twenty-five minutes before it found that appellant was a sexually violent predator. R. 161, ll. 9-12; R. 162, ll. 11-13. The court signed an order of commitment. R. 178.

ARGUMENT

1.

The court erred where it denied appellant's motion to be evaluated for competency to stand trial, where appellant had the right to counsel, and where counsel explained he could not effectively represent appellant at trial because appellant was incapable of rational speech, since the SVPA must be construed in a manner that recognized appellant's right to effective assistance of counsel.

Appellant was denied the right to effective assistance of counsel, as absent competency, he was unable to talk to counsel and assist in his defense. As counsel told the court, appellant should not be subjected to a "significant deprivation of liberty" where he was unable to have a logical conversation with his lawyer. R. 3, ll. 12-18.

A respondent in an SVP proceeding has a "right to effective assistance of counsel" which is statutory right contained in S.C. Code Ann. § 44-48-90,[2] and a constitutional right "arising under the Fourteenth Amendment and the South Carolina Constitution." *Matter of Chapman*, 419 S.E.2d 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. Appellant's right to effective assistance of counsel was denied here, since he was tried without the ability to assist in his defense due to his incapacity to converse with his counsel in a logical manner.

"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. "The test for

[2] S.C. Code Ann. § 44-48-90(B) provides 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."

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).

As counsel observed, appellant was unable to "participate in his defense." R. 3, ll. 14-17. Counsel correctly argued that he was unable to "be effective counsel when I can't communicate with my client." R. 40, l. 11 – 37, l. 1. Counsel, an experienced trial lawyer, explained that he had "not been able to speak with [appellant], do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted" due to appellant's apparent lack of fitness to stand trial. R. 43, l. 25 – 39, l. 3.

"[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 person who is incompetent to stand trial is unable to assist his attorney in preparing his defense. As the United States Supreme Court noted, 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). Due to his inability to communicate with and assist counsel, appellant was essentially tried in absentia through no fault of his own.

"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. In

Chapman, the South Carolina Supreme Court noted that it was tasked with the duty of "ensuring that the law comports with all constitutional requirements. Accordingly, we must avoid any application of law that does not pass constitutional muster." *Id*. at 185, 796 S.E.2d at 849. Here, the court construed the Act as depriving appellant the opportunity to attain competency prior to trial. R. 3, l. 21 – 4, l. 3. This was error, since the Act must be construed in a way that comports with an accused's constitutional and statutory rights to effective assistance of counsel.

As counsel explained, "it's very difficult for me to be effective counsel when I can't communicate with my client." R. 41, l. 25 – 42, l. 1. The court erred when it found appellant barred from being evaluated for competency to stand trial, since this construction of the SVPA did not recognize appellant's right to the effective assistance of counsel. *Chapman*, 419 S.C. at 187, 796 S.E.2d at 850.

2.

The court erred where it denied appellant's motion to be evaluated for competency to stand trial, where appellant was unable to logically communicate and thus 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.

As counsel correctly argued to the court, appellant should not be deprived of his liberty where he could not even testify in his own defense or discuss his case with counsel. R. 3, ll. 12-18; R. 43, ll. 14-15; R. 42, ll. 16-24.

"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). Here, counsel explained, "I cannot put this client on the stand because I have no anticipation that he would answer my questions truthfully or would even make a, a logical response to the questions that I've asked." R. 43, ll. 15-25. Counsel said, I have "not been able to speak with him, do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." R. 43, l. 25 – 44, l. 3. Thus, appellant was left without the opportunity to be heard in person and to be heard in a meaningful way.

"The fundamental requirement of due process is the opportunity to be heard '**at a meaningful time and in a meaningful manner**.'" *Mathews v. Eldridge*, 424 U.S. at 333 (emphasis added) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, appellant's procedural due process rights were violated by the refusal to order an evaluation for fitness to stand trial, and thus allow him to be restored to competency so that he was able to be heard at a meaningful time (after he had been restored to competency) and in a meaningful manner (when he was cogent).

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. at 334 (quoting *Morrisey 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 (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

"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." *McLaughlin v. State*, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). It was undisputed that appellant had been previously deemed not competent to stand trial but he had been successfully restored to competency. The failure to allow appellant such flexibility here, to ensure a meaningful opportunity to present his case, was error.

Due process requires the consideration of three factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335.

As counsel correctly argued, an application of the three above factors from *Eldridge* validates appellant's position. R. 167 – 169. As to the first factor, civil commitment 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 also 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").

The second factor also weighs in appellant's favor, as there was a considerable risk of an erroneous deprivation of liberty under existing procedures. Appellant was unable to be heard in a meaningful way, in that he was unable to tell his side of the story to anyone—neither his counsel

nor the jury—due to his lack of competency. The additional procedural safeguard of allowing competency evaluation and restoration would have been highly valuable.

Finally, the third factor in *Eldridge*, the government's interest and burdens, also weighs in favor of appellant. The government's interest in protecting the community from sexual predators is not served by the enrollment of an incompetent person into the SVP program, as he would need to become competent to engage in treatment. The state's burden is low here too, as there is an existing framework in South Carolina for attempting competency restoration, and it had been used successfully with appellant on prior occasions. *See* S.C. Code Ann. §§ 44-23-410 – 44-23-460. The *Eldridge* factors, therefore, weigh in appellant's favor.

The state argued that *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004), supported its position. However, an application of *Council* to these facts instead supports appellant's position. In *Council*, 359 S.C. at 124, 597 S.E.2d at 784, the South Carolina Supreme Court addressed the propriety of an indefinite stay of an applicant's post-conviction relief (PCR) proceedings until the applicant could become competent. The Court reasoned that since the majority of Council's PCR claims were legal issues and matters that could be determined from the trial record, the PCR hearing could proceed despite the applicant's incompetency. *Id*. at 127-28, 597 S.E.2d at 786.

The Supreme Court therefore held that, "the default rule is that PCR hearings must proceed even though a[n] [applicant] is incompetent." *Id*. at 130, 597 S.E.2d at 787. However, the Court recognized that even a party in such a civil case may need to be competent to assist his attorney with fact-based issues. "For issues requiring the [applicant's] competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until [the applicant] regains his

competence." *Id*. Here, appellant was unable to assist counsel with fact-based issues. As his counsel explained, he had "not been able to speak with [appellant], do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." R. 43, l. 25 – 44, l. 10. Appellant's counsel was unable to converse with appellant in a way that "ma[de] any sense," therefore preventing him from obtaining even basic information about any helpful witnesses. 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 fair trial. In *Council*, the applicant was the party with the burden of proof, unlike here, where appellant was defending himself from the state, who had the burden of proof. Nor did there appear to be the need for any indefinite stay of proceedings here—appellant's competency had been successfully restored multiple times previously.

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). Here, appellant's counsel correctly asserted that due process protections mandated a competency evaluation. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Eldridge*, 424 U.S. at 334.

3.

The court erred where it denied appellant'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 appellant had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable.[3]

The court erroneously found that S.C. Code Ann. § 44-48-100(B) was the final word on whether appellant was entitled to a competency evaluation, since § 44-48-100(B), by its own text, applied in cases where the accused SVP had not been convicted of a predicate offense, and appellant was convicted of a predicate offense.[4]

Appellant was convicted in 1999 of the offense of assault with intent to commit criminal sexual conduct with a minor (ACSCM) in the second degree, via his plea of guilty but mentally ill, and he was sentenced to twenty years in prison. R. 177.

Appellant's predicate offense was a sexually violent offense—per § 44-48-30(2)(i) ACSCM is a "sexually violent offense." His plea of guilty but mentally ill also meant that he was "convicted" of a sexually violent offense for SVPA purposes—per § 44-48-30(6)(e) a person who has "been found guilty but mentally ill of a sexually violent offense" is considered to be

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[3] Appellant hereby incorporates the legal arguments from issues 1 and 2 into this argument.

[4] Appellant uses the phrase "convicted of a predicate offense" to avoid confusion since § 44-48-30(6) provides that persons who have been "convicted of a sexually violent offense" for purposes of the SVPA include those who have "(a) pled guilty to, pled nolo contendere to, or been convicted of a sexually violent offense; (b) been adjudicated delinquent as a result of the commission of a sexually violent offense; **(c) been charged but determined to be incompetent to stand trial for a sexually violent offense**; (d) been found not guilty by reason of insanity of a sexually violent offense; **or (e) been found guilty but mentally ill of a sexually violent offense**." (emphasis added).

"convicted of a sexually violent offense." Here, it is crucial to note that appellant was "convicted of a sexually violent offense" per § 44-48-30(6)**(e)**.

§ 44-48-30(6)**(c)** provides that a person who has "been charged but determined to be incompetent to stand trial for a sexually violent offense" has also been "convicted of a sexually violent offense" for purposes of the SVPA. Therefore, a person who was never actually found guilty of a predicate offense is nonetheless considered to have "committed a sexually violent offense" where he was not competent to stand trial for the predicate offense. Appellant does not fall within this subsection.

S.C. Code Ann. § 44-48-100(B) provides a separate procedure exclusively directed at offenders who fall within § 44-48-30(6)**(c)**. § 44-48-100(B) provides,

> **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**. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. 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 not to be tried while incompetent did not apply to some hearings under the SVPA, it explicitly only extended this limitation to persons who are considered to have been "convicted of a sexually violent offense" per § 44-48-30(6)**(c)**—that is, persons who were incompetent to stand trial in the underlying criminal case, not persons like appellant.

Here, the state erroneously argued appellant did not have the right to be competent at trial based on the language of § 44-48-100(B), since he was never found incompetent to stand trial for the predicate offense. R. 37, l. 14 – 38, l. 1.

The state also argued that an offender's requisite mental abnormality or personality disorder might prevent competency anyway, but appellant's history was one of successful restorations to competency. R. 37, l. 14 – 38, l. 1; R. 166; R. 43 ll. 3-5. As discussed in Issue 2 above, 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." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)). Appellant's capacities and circumstances, as shown by his history of competency restoration, require a tailoring of procedures here.

Counsel correctly pointed out that subsection B did not bar appellant from receiving a competency evaluation. R. 40, ll. 21-24. However, the court ruled § 44-48-100(B)'s limitation on the right not to be tried while incompetent was "dead on the money" in any SVP case. R. 3, l. 22 – 4, l. 3. The court erred where it read the provision out of context. That provision did not limit appellant's right not to be tried while incompetent because appellant was not in the class of offenders to which it expressly applied.

The court's erroneous reading of § 44-48-100(B) as a bar to appellant's trial while competent deprived him of the right to counsel and the right to procedural due process. As the South Carolina Supreme Court observed in *Matter of Chapman*, 419 S.C. 172. 187, 796 S.E.2d 843, 850 (2017), "We cannot construe the Act in a manner that does not recognize an SVP's constitutional right to the effective assistance of counsel." It was also error to apply the statute in a manner that deprived appellant of procedural due process.

4.

The court erred when it denied appellant's motion to be evaluated for competency to stand trial where it found the chief administrative judge's ruling on the matter months before could not be "overruled," where appellant's mental state had continued to deteriorate, and where appellant 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.

Although it is true that one circuit judge may not overrule another,[5] the trial court here 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.

The seminal case of *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 appellant), was ordered to undergo an evaluation for competency to stand trial by Judge Spruill in October 1977 and he was found incompetent. In June 1978, he was returned to court after his competency was restored. *Id*. In August 1979, Judge Harris ordered the defendant to undergo another competency evaluation, and he was found competent to stand trial by the Department of Mental Health. *Id*. at 532, 273 S.E.2d at 537.

Here, as in *Blair*, a different judge was asked to reevaluate competency at a later date, and there was nothing improper about this request—in fact, the South Carolina Supreme 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. The Supreme Court found of particular relevance that "Blair had a

[5] As a general matter, "one circuit court judge may not overrule another." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008).

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 appellant's own history.

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 heard by the chief administrative judge. R. 171; R. 1. On October 22, 2018, during pretrial motions, counsel again moved for a competency evaluation before the trial judge and argued there was a "change in circumstances" since appellant's condition continued to deteriorate. R. 6; R. 44, ll. 8-10.

The fact that counsel was not dilatory in initially seeking an evaluation should not preclude the trial court's consideration of a subsequent motion. Counsel told the court he was unable to be "effective counsel when I can't communicate with my client." R. 41, l. 24 – 42, l. 1. The trial judge responded, "Right. And, I don't disagree with you at all. The statute doesn't specifically address competencies in these types of cases." R. 42, ll. 2-4. The court continued 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." R. 42, ll. 5-8. After the state rested, the court noted that counsel had informed him during the trial that appellant had "attempted to try to talk to" counsel during the trial but that appellant was incoherent. R. 133, ll. 1-6.

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 might not be mentally competent to understand the proceedings against him." The United States Supreme Court asked, "whether, in light of what was then known, the failure to make further inquiry into [the defendant's] competence to stand trial, denied [the defendant] a fair trial," and

concluded that the trial court "fail[ed] to give proper weight to the information suggesting incompetence which came to light during trial." *Id*. at 174-75, 178.

"[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 and proper to reevaluate competency since competency may change over time. *See 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"). Here, counsel noted that appellant had a history of psychotic disorder, and that he been found incompetent to stand trial a number of times previously. R. 166; R. 108, l. 23 – 109, l. 3. Counsel explained appellant's letters to him had gone from rational to gibberish, and that conversations with appellant over the course of his representation had gone from "iffy" to not "making any sense." R. 44, ll. 16-20; R. 44, 39, ll. 12-16. These facts were relevant to reevaluating appellant's need for a competency evaluation.

"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). Here, the court's determination that it could not "overrule" the prior judge was

error—the prior judge's order was not final since the matter was one of appellant's present competency. Competency is a fluid issue that, by its nature, may need to be revisited at a later date. *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Blair*, 275 S.C. 529, 273 S.E.2d at 536 (1981).

CONCLUSION

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

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of July, 2020.

STATE OF SOUTH CAROLINA

IN 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

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 13th day of July, 2020.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 13, 2020

s/ *Joanna K. Delany*
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001075

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant

AMENDED FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's motions for a competency evaluation because people subject to the SVPA do not have a due process or statutory right to be competent to participate in the SVPA proceedings. (Appellant's Issues I, II, III, and IV).

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On June 14, 1999, Appellant Thomas Griffin was convicted of one count of second degree criminal sexual conduct with a minor, and sentenced to twenty years incarceration. Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment to the South Carolina Department of Mental Health as a sexually violent predator, for long term, control case and treatment.

A trial on the merits was originally scheduled in March 2018 but the trial was continued because Appellant requested a competency evaluation, which the presiding judge took under advisement. The judge did not issue an order, and the parties agreed to present the motion to the chief administrative judge on August 7, 2018. After a hearing, the Honorable William H. Seals, Circuit Court Judge, denied the motion on the ground the SVPA does not require that persons subject to its terms be competent before the matter can proceed. (August 7, 2018 Hearing Transcript [HT], pp. 1-4; Record on Appeal [R.], pp. 1-4).

The case was then called for a jury trial on October 22, 2018, before the Honorable D. Craig Brown, Circuit Court Judge. On the day of trial, Appellant again moved for a competency evaluation on the grounds counsel was unable to effectively communicate with Appellant and prepare for trial due to Appellant's documented mental illness. Appellant also argued due process required that he be competent to assist counsel with his defense, and his counsel stated the only time he had won a SVPA case was when he was able to call the client to testify and rebut the State's expert. The State opposed the motion, again on the ground the SVPA did not require the person to be competent for the SVPA proceedings to go forward. The court denied Appellant's motion on the ground the issue had been conclusively decided by Judge Seals, and the court did not have the authority to overrule another circuit court judge. (Trial Transcript [TT], pp. 29-40,

Defendant's Exhibit 1 [Respondent's Second Motion for Competency to Stand Trial Evaluation, filed October 22, 2018]; R., pp. 34-45, 165-176).

Marie Gehle, Psy.D, was qualified as an expert in forensic psychology without objection and testified she was appointed by the court to evaluate Appellant pursuant to the SVPA. As part of the evaluation, Dr. Gehle reviewed all available records regarding Appellant's criminal history, his periods of incarceration, mental health evaluations and interviewed Appellant for approximately four hours. She testified the person's past sexual behavior is "the best indicator of their future sexual behavior" because a person's sexual behavior tends to remain consistent over time, "especially when it's deviant." (TT, pp. 57-66; R., pp. 62-71).

In 1972, Appellant was convicted of assault with intent to commit rape in North Carolina. He was released from the North Carolina prison in 1996, and approximately one month later he assaulted a twelve year old female in Horry County, South Carolina. He confronted the victim as she came out of a convenience store restroom, presented a knife, pushed her back into the restroom, and stated he had not had sex in three years. He fled when the victim screamed for her father. On June 14, 1999, Appellant pled guilty to assault with intent to commit second degree criminal sexual conduct with a minor. (TT, pp. 67-72, State's Exhibit 1 [Sentencing Sheet and Indictment]; R., pp. 72-77, 177).

Appellant was released on bond for the December 1996 offense in February 1997. While out on bond, he committed a similar sexual offense in North Carolina in May 1997. He sexually assaulted a twelve year old female when she left her school classroom to walk to the restroom. He initially approached her and asked for money, and the victim gave him a dollar before going into the restroom and entering a bathroom stall. Appellant followed her into the restroom, reached over the stall door, unlocked it, presented a knife and told the victim he wanted sex and he would not

hurt her if she complied. Appellant then performed oral sex on the victim, digitally penetrated her vagina and fondled her breasts. After another student walked into the bathroom and observed what was happening, Appellant told the victim to get dressed and he was going to take her to his house, and said he had a gun. When they left the restroom, the victim broke away from Appellant and ran to a classroom. During the interview with Dr. Gehle, Appellant verified the victim's account and admitted he committed the offense. (TT, pp. 72-74; R., pp. 77-79).

In addition to his sexual offenses and convictions, Appellant had a significant history of non-sexual, violent offenses. While incarcerated, Appellant had numerous disciplinary infractions, including violent misconduct and sexual misconduct. Dr. Gehle testified Appellant's history indicated he had significant difficulty controlling his behavior. (TT, pp. 74-78; R., pp. 79-83).

The records revealed Appellant completed the first phase of the Department of Corrections' sex offender treatment program in 2008. Appellant told Dr. Gehle the four months of treatment consisted of watching a film, and he could not tell Dr. Gehle any treatment terms, such as risk factors, somebody should learn in treatment. (TT, pp, 78-79; R., pp, 83-84).

Dr. Gehle testified Appellant told her that if he was released, "he was going to go to church and sit in the back row and get his big money and look out for his great, great grandchildren." He claimed he was going to receive almost $2 million from Social Security, and he was going to enjoy that money. He stated he might live with his family, or buy a piece of land and a mobile home.

Dr. Gehle stated Appellant's release plans were not practical. His sister told her the amount of money he claimed he will receive from Social Security was inaccurate. In addition, he told Dr. Gehle he committed the North Carolina offense "because he wanted to go back to prison,"

"because his family was trying to kill him because of this money." She testified he had some delusions and odd beliefs that were "really concerning." (TT, pp. 79-80; R., pp.84-85).

Dr. Gehle diagnosed Appellant with Other Specified Paraphilic Disorder (Biastophilia), and Schizophrenia (Continuous). She testified Appellant's paraphilic disorder was based on Appellant's "deviant sexual interests involving coercive sexual acts with non-consenting persons." She further testified Appellant has a long history of diagnosed Schizophrenia, which is a type of psychotic disorder. During her interview of Appellant, he "exhibited delusions and disorganized speech," and he told her "he had a history of auditory and visual hallucinations when he wasn't taking his antipsychotic medication." Dr. Gehle also stated Appellant had a history of decompensation when he was not compliant with his medication, but his delusional thinking had remained present even when he was taking psychotic medications. (TT, pp. 80-86; R., pp. 85-91).

Dr. Gehle testified the combination of a paraphilia and Schizophrenia "impairs [Appellant's] impulse control," he exhibited paranoid delusions "related to physical violence and things like that against women," and he had "delusions related to sexual functioning." All those things "just impair his judgment and increase his risk that he'll commit another sexual offense." (TT, p. 87-88; R., pp. 92-93).

Based on Appellant's score (4) on the Static 99R, an actuarial risk assessment tool, Dr. Gehle testified Appellant was almost two times more likely to reoffend sexually compared to the average sex offender. In addition to the static factors encompassed by the Static 99-R, Dr. Gehle stated Appellant exhibited multiple dynamic risk factors for reoffending sexually, including "a preference for pubescent children, offense supportive attitudes, sexualized violence, lack of emotionally intimate relationships with adults, poor problem solving abilities, lifestyle impulsiveness, and resistance to rules and supervision." (TT, pp. 88-93; R., pp. 93-98).

Dr. Gehle testified it was her opinion Appellant had Biastophilia and Schizophrenia, and those mental abnormalities made him likely to commit sexual offenses in the future if not confined for control, care and treatment. She further opined Appellant met the criteria for civil commitment pursuant to the SVPA. (TT, pp. 93-95; R., pp. 98-100).

On cross-examination, Dr. Gehle testified her opinions were based, in part, on things Appellant told her during the interview. She stated she asked follow-up questions at times, asked Appellant to repeat himself, and sometimes asked him to spell words she could not understand because he tended to mumble. She stated his spelling "was not terrible," and Appellant might have "a little bit of [intelligence] impairment," which could be related to his Schizophrenia or an intellectual disability. (TT, pp. 97-98; R., pp. 102-103).

Dr. Gehle stated Appellant was on his antipsychotic medication the day she interviewed him, and he still displayed some schizophrenic symptoms, such as delusional and disorganized thinking. She noted Appellant had been found incompetent to stand trial during his criminal case, and after a period of hospitalization, he was found competent. (TT, pp. 99-102; R., pp. 104-107).

Based on medical records from the detention center where Appellant was located after his prison term ended, Dr. Gehle testified Appellant had been prescribed antipsychotic medication, but his compliance had been "somewhat sporadic," and he stopped taking it altogether in mid-January 2018. As a result, the doctor discontinued his medication due to Appellant's noncompliance. (TT, pp. 102-103; R., pp.107-108).

As to Appellant's medication compliance while in the community, Dr. Gehle stated Appellant told her he took medication in prison, but she did not know if he was on medication at the time he committed the qualifying sexually violent offense in South Carolina. She testified the records indicated Appellant "decompensates and gets very ill" when not on medication, but he still

had impaired and disorganized thinking and delusions when he was appropriately medicated. She further testified untreated Schizophrenia can cause more impaired behavior, and can "cause somebody to act out in a variety of ways," which seemed to be part of Appellant's offense pattern. (TT, pp. 109-112; R., pp. 114-117).

On re-direct examination, Dr. Gehle testified she considered the circumstances of Appellant sexual offenses, particularly the South Carolina offense and the subsequent North Carolina offense, and some of the significant circumstances were Appellant's use of a weapon in both offenses and he offended in places he could be easily caught. She also considered the fact that Appellant had only been out in the community a total of approximately three months since the age of sixteen, and during those three months he sexually offended twice, with the second offense occurring while Appellant was out on bond from the South Carolina offense. (TT, pp. 121-125; R., pp. 126-130).

After the State rested, Appellant's counsel moved for a directed verdict, which was denied. He also stated it was not necessary for the court to ask Appellant about testifying, and he was making "that decision as [Appellant's] counsel based on [counsel's] conversations with [Appellant] that I do not think that that would work." The court noted for the record that counsel had indicated to the court Appellant attempted to talk to counsel during the trial, and counsel told the court he "did not necessarily understand what [Appellant] was saying," and "[i]t was not in a coherent manner." (TT, pp. 126-128; R., pp. 131-133).

During closing argument, Appellant's counsel stated Appellant "needs to go to a mental hospital where he can get the treatment, be brought back to sanity like he was in 1999 and he was at other times in the past." Counsel then told the jury:

> I'm put in a situation today that I can hardly communicate with [Appellant] because he talks and gesticulates, and I have no idea what he's saying. It's sort of, you

> know, he may be saying inside a body that's trapped that he can't talk but anyways he doesn't need to go to a program to be tried and taught how not to be a sexually violent predator. I mean, he needs to go to someplace where he can be restored to competency.

(TT, p. 149; R., p. 154).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt. The court ordered that he be committed to the South Carolina Department of Mental Health for long term control care and treatment. (TT. p. 157, Order of Commitment filed October 23, 2018; R., pp. 162,178). This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." Carson v. CSX Transp., Inc., 400 S.C. 221, 734 S.E.2d 148, 152 (2012). "Questions of statutory construction are a matter of law." Boiter v. S.C. Dep't of Trans. 393 S.C. 123, 712 S.E.2d 401, 405 (2011). The Court reviews questions of law *de novo*. Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288, 291 (2012).

ARGUMENT

The circuit court properly denied Appellant's motions for a competency evaluation because people subject to the SVPA do not have a due process or statutory right to be competent before SVPA proceedings can move forward. (Appellant's Issues I, II, III, and IV).

Appellant contends the circuit court erred in denying his motion for a competency evaluation to determine if he was competent to be tried because: 1) counsel told the court he could not effectively represent him; 2) procedural due process required the requested evaluation because the SVPA constitutes a significant deprivation of his liberty interest, and his history indicated he could be successfully restored to competency; 3) the circuit court incorrectly applied §44-48-100(B); and 4) the circuit court erroneously ruled it could not overrule another circuit court judge because he had been found to be incompetent to stand trial in a previous criminal case, and his mental condition had deteriorated since the previous order was entered. While set forth in Appellant's Brief as four separate issues, all of the asserted errors are ultimately premised on a purported procedural due process violation.[1]

A. SPVA, Competency and Procedural Due Process (Appellant's Issue II)

1. Statutory Interpretation

"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, 831 S.E.2d 429, 432 (2019) (*citing* Greene v. S.C. Election Comm'n, 314 S.C. 449, 445 S.E.2d 451, 453 [1994]). The court must first attempt to construe the plain language of the statute, and if the language of a statute is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.' *Id.* (*quoting*

[1]Appellant asserts procedural due process, but has not challenged the constitutionality of the SVPA itself, so the ultimate issue is statutory construction as applied.

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 [2000]) (emphasis in original). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent." Hodges, 533 S.E.2d at 581. The statute's words must 'be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.' Odom, 831 S.E.2s at 432 (*quoting* Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 642 S.E.2d 751, 754 [2007]); *see also* State v. Simpson, No. 2016-002210, 2020 WL 86625, at *4 (S.C. Ct. App. Jan. 8, 2020) (same).

The legislative intent must be gleaned from the entire statute rather than clauses taken out of context. Singletary v. S.C. Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231, 236 (Ct. App. 1994). "The statute must be read as a whole, and sections that are part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 629 S.E.2d 624, 629 (2006). The court should not concentrate on isolated phrases within the statute, but read the statute as a whole and in a manner consonant and in harmony with its purpose. *Id.* "In that vein, [the court] must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (citation omitted) (alterations in original) (*quoting* State v. Sweat, 379 S.C. 367, 665 S.E.2d 645, 651, 654 [Ct. App. 2008]).

To ascertain the legislative intent to encompass mentally incompetent persons in the class of persons covered under the SVPA, the court need look no further than the express purpose of the statute. The Legislature found "that a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the

existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018). The SVPA defines "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons whose relevant mental abnormalities render them incompetent to participate in the court proceedings.

This legislative intent is further evidenced by the express exclusion of the right not to be tried while incompetent in hearings required by §44-48-100(B). This section provides that when a person was found to be incompetent to stand trial on a sexually violent offense, the court must hold a hearing to determine whether the person committed the charged act or acts ("guilt/innocence hearing"), and all constitutional rights afforded a defendant at criminal trials apply to the hearing "**other than the right not to be tried while incompetent.**" S.C. Code Ann. §44-48-100(B) (2018) (emphasis added).[2] If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt that the person actually committed the charged offenses, it is disingenuous to argue the Legislature intended that competency be required for other SVPA proceedings, including a trial to determine if the person qualifies as a sexually violent predator. Holding otherwise would lead to SVPA proceedings pending indefinitely while the person is detained in a secure facility without "long term control, care and treatment," or the release of

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[2]The statute requires the court to make specific findings on "the extent to which the person's incompetence . . . affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf." In this case, even though the trial was not a guilt/innocence hearing pursuant to 44-48-100(B), the court did note on the record counsel's report he could not understand Appellant when Appellant tried to talk to him during the trial. (TT, p. 128; R., p 133).

potential sexually violent predators with virtually no supervision and no treatment. Either alternative is an absurd result, and undermines the ultimate goals of public safety, and "long term control, care and treatment" of sexually violent predators.

2. Procedural Due Process

It is now well established that sexual predator civil commitment proceedings are civil, not criminal, even if the applicable statute affords certain rights routinely recognized in criminal cases. Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding the constitutionality of Kansas' sexual predator civil commitment statute); In re Matthews, 345 S.C.638, 550 S.E.2d 311, 316-317 (2001) (SVPA proceedings are civil, not criminal, in nature); In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 344 (2002) (same). As a result, procedures for establishing competence for criminal defendants do not apply, and the abatement requirements of criminal procedure do not apply. In re Sykes, 303 Kan. 820, 367 P.3d 1244, 1247 (2016).

The Kansas Supreme Court's thorough, well-reasoned analysis of the interplay between sexually violent predator civil commitment proceedings and the person's competency in Sykes is instructive. As in this case, Sykes contended the civil commitment proceedings violated his due process right to assist in his own defense. After again acknowledging the civil nature of sexual predator commitment proceedings, the court found there was no statutory requirement of competence in civil proceedings, and declined to create one, citing Hendricks and In re Hay, 263 Kan. 822, 953 P.2d 666 (1992) (specific protections provided by the sexual predator civil commitment statute satisfy procedural due process requirements). *Id.* at 1247-1248.

The court then reviewed the Washington Supreme Court's analysis of due process and competency in civil commitment proceedings in In re Detention of Morgan, 180 Wash.2d 312, 330 P.3d 774 (2016), and concurred in the Washington court's conclusion that the three part due

process requirements outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), weighed in favor of allowing sexual predator proceedings to move forward if the person is incompetent to assist in his defense.[3] *Id.* The court then noted seven other jurisdictions had reached the same conclusion on the issue. *Id.* (*citing* Moore v. Superior Court, 237 P.3d 530 (2010) (due process does not require mental competence of individual subject to commitment under Sexually Violent Predators Act); In re Commitment of Weekly, 956 N.E.2d 634, 647 (2011) (establishing that fitness evaluation does not affect ability to receive a fair commitment trial because of numerous procedural safeguards against erroneous deprivation of liberty); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (lack of pretrial competence evaluation causes no deprivation of due process rights); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) ("robust, adversary character" of commitment proceeding minimizes risk of erroneous commitment of person who is not sexually dangerous; due process is preserved through adversarial process); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App.2003) (SVP determination, regardless of competency of respondent, is not unconstitutional deprivation of liberty); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (difference between sexual predator commitment proceedings and conventional commitment proceedings does not make predator proceedings punitive; competency requirement for criminal proceedings is inapplicable to civil commitments); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (no right to competency evaluation before hearing on sexually violent person status; commitment is for treatment, not punishment, and due process concerns are remote)).

The court expressed concerns regarding the alternatives if competency was required in sexual predator civil commitment proceedings, which are the same concerns outlined above. The

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[3]The Mathews three part test is discussed below in relation to this case.

first alternative was to release the person from the State's control until such time as he may become competent to stand trial, which releases an individual with violent tendencies into society. The second alternative was to commit him for treatment as a mentally ill person subject to involuntary commitment under regular civil commitment laws, which would provide care and treatment for the mental illness, but the person is still institutionalized without being competent to represent himself at a commitment hearing, even if under a different statutory provision than the sexually violent predator statute. Addressing the contention that the sexually violent treatment would not sufficiently address other mental disorders, the court concluded:

> [T]he State is not required to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. The legislature is free to recognize degrees of harm, and it may address restrictions to those cases where it deems the need to be most clear. In this instance, the State has chosen treatment of the sexual predatory mental defect as having a priority over Schizophrenia or other mental disorders.

Id. at 1248 (internal citation omitted).

This case presents a prime example of why competency is not required in SVPA proceedings. Appellant acknowledged to Dr. Gehle he is better when he takes the prescribed medication for his Schizophrenia, which is the primary source of his incompetency. While he contends he was not receiving medication after he was transferred from the Department of Corrections, where he was on medication and competent, to the Horry County Detention Center, the records reveal the medication **was** initially prescribed at the Detention Center, but Appellant would not take it consistently, and the prescription was eventually discontinued because Appellant **refused to take the medication**. (TT, pp. 102-103; R., 107-108). Given his long history and experience with the effect of not taking the prescribed medication, as well as his statements about his medical history to Dr. Gehle during the interview, Appellant knew his condition would

deteriorate if he stopped taking the medication.[4] In short, any issue regarding Appellant's competency at the time of trial was an issue created by Appellant's own conduct in refusing to take prescribed medication he knew made his condition better.

Further, if Appellant received a competency examination and was declared incompetent, he would receive medical treatment designed to address his incompetency, with no sex offender treatment even offered. Once Appellant's competency was "restored," he would return to, and remain in, the Detention Center with no treatment (except prescribed anti-psychotic medication which he could refuse to take) until a new SVPA trial could be scheduled. Assuming Appellant took the prescribed medication, after the case was scheduled for trial, he could stop taking the medication, as he did in January 2018 after the case was first scheduled for trial, and once again decompensate, thus starting the vicious cycle over again. Such a result would be absurd, and completely undermine the purpose of the SVPA.

3. Mathews Three Part Test

Appellant argues the circuit court erred in finding his procedural due process rights were not violated when he was subjected to "what essentially amounted to (sic) quasi-criminal trial, complete with a 'verdict' beyond a reasonable doubt, while he was incompetent and unable to meaningfully participate in his defense." (Brief of Appellant, p. 19). While facially acknowledging the difference between SVPA proceedings and criminal proceedings, Appellant ultimately ignores that difference, instead relying on criminal due process case law and conclusory statements rather than true analysis.

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[4]The Detention Center could not force medicate Appellant absent a court order to do so, which was never even requested between February 2018 and October 2018.

Appellant cites the factors identified in Mathews v. Eldridge, 424 U.S. 319 (1976), as the benchmarks for determining whether procedural protection is warranted.[5] Those factors include: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probative value, if any, of additional safeguards; and 3) the government interest, including the function involved, as well as the fiscal and administrative burdens additional or substitute procedural requirements would entail. *Id.* at 334-335. In essence, he summarily concludes all these factors weigh in his favor, with his ultimate conclusion being the **only** due process procedure that will meet constitutional muster is to require all people subject to the SVPA be competent to stand trial. Again, Appellant asks this Court to ignore relevant case law, and write out entire sections of the SVPA, which it cannot do.

Procedural due process requires notice and a meaningful opportunity to be heard. Mathews, 424 U.S. at 333. What process is due depends on what is fair in a particular context. *Id.* at 334; *see also* Morgan, 330 P.3d at 779 (same); Weekly, 956 N.E.2d at 644-645 (same); Moore v. Superior Court, 237 P.3d 530, 539 (Cal. 2010) (balancing test required to determine what process is due to a potential civil committee); Commonwealth v. Burgess, 878 N.E.2d 921, 928 (Mass. 2008) (deprivation of liberty interest must be balanced against governmental interest in protecting citizens); Commonwealth v. Nieves, 846 N.E.2d 379 (Mass. 2006) (same). Contrary to Appellant's conclusory assertion the Mathews three part test weighs in his favor, the procedural due process afforded to Appellant under the SVPA, combined with the State's compelling public safety interest, weighs in favor of the State.

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[5]As discussed above, the Washington Supreme Court and the Kansas Supreme Court have analyzed the Mathews three part test in relation to sexual predator civil commitment statutes, and held the statutes do not violate procedural due process. South Carolina's SVPA was premised on the Kansas sexual predator statute.

a. Liberty Interest

The State does not dispute civil commitment under the SVPA affects a significant liberty interest. The liberty interest must be considered in context, including the purpose of the interest deprivation, which is public safety and long term control, care and treatment under the SVPA.

Contrary to Appellant's repeated attempts to conflate the SVPA with a criminal proceeding, South Carolina courts have conclusively determined a SVPA proceeding is civil, not criminal, and is aimed at treatment rather than punishment. *See* Matthews, 550 S.E.2d at 315-317. While Appellant's liberty will be significantly impacted by civil commitment, he will not just be confined as he would with a criminal sentence, or even housed in a mental health facility where he will receive treatment only for his Schizophenia in hopes of restoring him to competency. Rather, he will be housed in a separate, secure facility, where he will receive appropriate medical and psychological treatment, including medications as needed, to address both his paraphilic and schizophrenic disorders, throughout his commitment.[6]

b. Risk of Erroneous Liberty Deprivation

Assuming for argument only that the liberty factor, standing alone, weighs in Appellant's favor, his remaining analysis is fundamentally flawed. His overriding premise regarding the risk of erroneous liberty deprivation is his incompetency.[7] Again, Appellant conflates the requirement of competency in a criminal trial with a SVPA civil commitment trial.

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[6]The fact that the SVPA treatment program is not a "forensic" mental health hospital does not negate the fact it provides appropriate medical and mental health treatment. Further, the appropriateness of the treatment provided can be addressed in the statutorily required annual reviews of the committee's mental health status.

[7]The State does not dispute Appellant's Schizophrenia diagnosis impacts his mental incompetency, even when he takes his prescribed medication. The question of Appellant's mental competency is not the issue; rather, the issue is whether the SVPA proceedings can move forward even assuming he is mentally incompetent.

As discussed above other jurisdictions analyzing the issue of mental incompetency in sexual predator proceedings based on statutes similar to the SVPA have determined the risk of an erroneous deprivation of liberty is minimal in light of the numerous procedural safeguards and heightened burden of proof in sexual predator cases. *See* Morgan, 330 P.3d at 779 (the robust statutory guaranties provide substantial protection against an erroneous deprivation of liberty); Weekly, 956 N.E.2d at 645 (procedural safeguards of the sexual predator act ensure the risk of erroneous deprivation of liberty is slight); Moore, 237 P.3d at 543-544 (same); Burgess, 878 N.E.2d at 929 (same). The procedural safeguards identified in those cases include: 1) assistance of counsel (at public expense when appropriate); 2) ability to retain experts (at public expense when appropriate); 3) use of process to compel attendance of witnesses; 4) cross-examination of adverse witnesses; 5) right to appeal final determination; 6) right to have hearing conducted according to the rules of evidence; and 8) determination of whether the person meets the criteria for civil commitment under the SVPA is beyond a reasonable doubt. Burgess at 929.

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford the mentally incompetent person appropriate due process. In addition to the numerous levels of review prior to the commitment trial, the person has; 1) the right to counsel; 2) the right to present evidence; 3) the right to cross-examine witnesses; 4) the right to retain experts; 5) the right to have the rules of evidence apply; and 6) the right to have the civil commitment determination made beyond a reasonable doubt. S.C. Code §§44-48-50, -60, -70, -80, -90, and -100(A). Contrary to Appellant's assertion this factor weighs in his favor, these safeguards make the risk of an erroneous deprivation of liberty under the SVPA minimal, and the factor weighs in the State's favor.

c. Governmental Interest

It cannot be disputed the State has a compelling interest in protecting society from sexual predators, which is the over-arching purpose of the SVPA. The effectiveness, or even availability, of treatment is not relevant if a goal of a sexual predator statute is to provide treatment. Hendricks, 521 U.S. at 365; *see also* Nieves, 846 N.E.2d at 387 (commitment to protect the public under a sexually violent predator statute is not improper even where no effective treatment exists to remedy the person's infirmity).

Even if Appellant's mental status prevented his actual participation in trial preparation and trial, the State's interest in protecting the public from sexual predators is paramount to his liberty interest. Experts and counsel can review Appellant's history, arrest records, previous mental health evaluations and treatment records, and interview him to the extent possible, in order to reach conclusions regarding his mental diagnosis and risk to reoffend sexually, and how to handle such issues at trial. *See* Moore, 237 P.3d at 543 (nature of issues, evidence and findings in sexual predator proceeding prevents person from playing much more than a supporting role; any chance the person's mental incompetence would significantly impair his contribution to his defense is relatively attenuated). Requiring competency before a SVPA case can proceed undermines the clear legislative intent of the SVPA.

The SVPA contains unambiguous statutory language expressing the legislative intent that commitment proceedings go forward against an incompetent person, even if the person may have limited comprehension of the proceedings. S.C. Code §44-48-100(B) (person deemed incompetent and not likely to become competent does not have right to be competent at a guilt/innocence hearing); *see also* Burgess, 878 N.E.2d at 927 (same). Requiring competency before a SVPA case can move forward effectively writes §44-48-30(6)(c) and §44-48-100(B) out

of the statute, which flies in the face of well-established rules of statutory construction. *See* Buscemi (court must avoid interpretation that effectively reads a provision out of the statute).

Taken to its logical conclusion, Appellant's contention would substantially impair the State's substantial interest in protecting the public if an alleged sexual predator can claim he is too incompetent to undergo a sexual predator trial because of his mental disorder. There may well be significant overlaps between mental disorders qualifying someone for commitment as a sexual predator, and those rendering the person unable to comprehend the proceedings or assist in his defense. *See* Moore, 237 P.3d at 544 (potential overlap exists between sexual predator type mental disorders and those making the person incompetent). As discussed above, requiring competency restoration before a sexual predator trial can proceed could indefinitely, or permanently, delay sexual predator proceedings, which weighs "heavily, and in fact dispositively, against recognition of a due process right of this kind." *Id. See also,* Morgan, 330 P.3d at 779 (recognizing negative impact of requiring competency in sexual predator proceedings); Sykes, 367 P.3d at 1247–48 (same).

B. Ineffective Assistance of Counsel (Appellant's Issue I)

Appellant makes repeated references to the right to effective assistance of counsel in SVPA proceedings as recognized in Matter of Chapman, 419 S.C.172, 796 S.E.2d 843 (2017). Chapman held the SVPA's general statutory right to counsel encompassed the constitutional right to effective assistance of counsel, and a person committed pursuant to the SVPA could raise ineffective assistance of counsel claims via a common law petition for habeas relief. *Id.* at 846-847.

Chapman also held, however, that allegations of ineffective assistance of counsel could not be raised on direct appeal. *Id.* at 848 (merits of ineffective assistance of SVPA counsel will not be addressed on direct appeal because such claims may be raised in a habeas proceeding).

Appellant now seeks to expand Chapman to apply in a direct appeal if counsel merely tells the trial court he cannot effectively represent his client for some reason. Chapman does not stand for this proposition, and expanding its scope will result in the very thing the Supreme Court sought to avoid – addressing the merits of ineffective assistance of counsel claims in direct appeals from civil commitments pursuant to the SVPA.[8] Therefore, Appellant's claim of ineffective assistance of counsel is not properly presented in this direct appeal.

Even if the Court considers the ineffective assistance of counsel allegations, a review of the trial record reveals Appellant's counsel was very effective in vigorously protecting Appellant's interests. In his brief to this Court, Appellant refers to trial counsel as a seasoned, well experienced trial attorney, and it must be presumed he acted as such in the proceeding. In addition to repeatedly raising the competency issue at every opportunity, including in closing argument, he aggressively cross-examined the State's expert regarding the basis for her diagnoses and conclusions, and made a thorough and impassioned closing argument, which included reference to his inability to call Appellant as a witness. Thus, trial counsel acted exactly how a seasoned, experienced trial attorney would be expected to act under the circumstances, and his actions cannot be considered ineffective for purposes of an ineffective assistance of counsel claim.

Finally, trial counsel claimed he could only win the case if Appellant was able to testify on his own behalf about his offenses, particularly the North Carolina pending charge, and the inability to call Appellant as a witness rendered counsel's representation ineffective.[9] This contention

[8]Indeed, trial counsel stated multiple times he could not "effectively" represent Appellant. It can be inferred counsel used the effective representation language precisely to try to expand Chapman and make the ineffective assistance issue reviewable on direct appeals.

[9]If the State had been aware counsel would make this claim, it could have presented examples of SVPA cases the State has lost in the absence of any testimony on behalf of the respondents. The often repeated contention SVPA cases are essentially "slam dunks" for the State is simply inaccurate.

requires extensive speculation, as well as disregard for evidence in the record, to rule in Appellant's favor. The Court must assume Appellant could have prevailed at trial **but for** counsel's inability to call him as a witness, which ignores significant undisputed facts that fully support the jury's verdict.

There was no dispute at trial about Appellant's Schizophrenia diagnosis, and Dr. Gehle testified Appellant continued to exhibit certain schizophrenic symptoms, including delusions and disorganized thinking, even when he was adequately medicated. It does not require speculation to assume Appellant would have exhibited those symptoms when subjected to the stress of testifying at trial, the jury would have observed Appellant's condition, and considered it in reaching a verdict.

Further, Dr. Gehle testified Appellant admitted to her during the interview that he committed the North Carolina offense, and verified the victim's factual account as accurate. In light of this evidence, and the probability Appellant would have exhibited schizophrenic symptoms while testifying, it is likely the jury verdict would be the same if Appellant had testified at trial.

C. Court's Reliance on §44-48-100(B) (Appellant's Issue III)

Appellant contends the circuit court's reference to §44-48-100(B) as the basis for its ruling at the August 7, 2018 hearing on Appellant's motion for a competency evaluation was error because that section of the SVPA did not apply. While §44-48-100(B) did not directly relate to Appellant's case, it does provide insight and guidance into the Legislature's intent regarding competency in SVPA cases. As discussed above, the legislative intent must be gleaned from the entire statute rather than sections considered in isolation, and considering the SVPA in its entirety and its underlying purpose, including §44-48-100(B), the Legislature did not intend mental incompetency to factor into the efficacy of SVPA proceedings. Accordingly, the circuit court's

consideration of that statute section as instructive on the issue of Appellant's right to a competency evaluation was not erroneous.

D. Overruling Another Circuit Court Judge (Appellant's Issue IV)

Appellant contends the circuit court judge presiding at trial erred in ruling he could not overrule the circuit court judge's ruling at the August 7, 2018 hearing. He argues this was error because his mental health status was "fluid" and had deteriorated since the August hearing, and therefore, the prior circuit court ruling was not binding on the trial judge. This contention is the ultimate red herring.

The issue at the August 7, 2018 hearing was whether Appellant was entitled to a competency evaluation at all under the SVPA, and that issue did not change between August and October. The fluidity or deterioration of Appellant's mental health and competency was irrelevant in August 2018, and it remained irrelevant in October, 2018. At the August 2018 hearing, the circuit court ruled Appellant was not entitled to a competency evaluation under the SVPA, and the ruling on that issue was binding in subsequent circuit court proceedings.

CONCLUSION

Based on the foregoing, the State respectfully submits the judgment of the circuit court and Appellant's commitment as a sexually violent predator should be affirmed.

Respectfully submitted,

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July 22, 2020

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001075

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "revised Order Concerning Personal Identifying Information and Other Sensitive Informationin Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

July 22, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Thomas Griffin, Appellant.

Appellate Case No. 2018-001975

Appeal From Horry County
William H. Seals, Circuit Judge
D. Craig Brown, Circuit Court Judge

Opinion No. 5839
Heard June 9, 2021 – Filed July 21, 2021

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

WILLIAMS, J.: Thomas Griffin appeals his commitment to the South Carolina Department of Mental Health (the Department) as a sexually violent predator (SVP). On appeal, Griffin argues the trial court violated his procedural due process rights in denying his request for a competency evaluation. We affirm.

FACTS/PROCEDURAL HISTORY

In 1999, Griffin pled guilty but mentally ill to assault with intent to commit criminal sexual conduct (CSC) with a minor in the second degree. The plea court sentenced him to twenty years' imprisonment. Prior to his release, the State filed a

petition for Griffin's civil commitment to the Department pursuant to the Sexually Violent Predator Act[1] (the Act).

Prior to trial, Griffin moved for a competency evaluation. The trial court held a hearing on the matter and denied Griffin's motion, finding the Act does not require a prisoner to be competent for SVP proceedings.[2]

On the first day of trial, Griffin again moved for a competency evaluation. Finding it could not overrule the prior holding, the trial court denied the motion.[3]

At the close of trial, the jury found beyond a reasonable doubt that Griffin posed a danger to society, and the trial court filed an order of commitment. This appeal followed.

ISSUE ON APPEAL

Did the trial court violate Griffin's procedural due process rights in denying his pretrial motion for a competency evaluation?

STANDARD OF REVIEW

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *In re Oxner*, 430 S.C. 555, 561, 846 S.E.2d 365, 369 (Ct. App. 2020) (quoting *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 547, 819 S.E.2d 124, 126 (2018)).

LAW/ANALYSIS

Griffin argues the trial court violated his procedural due process rights in denying his pretrial motion for a competency evaluation. We disagree.

The General Assembly enacted the Act to establish the "involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators." § 44-48-20. "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.'" *In re Chapman*, 419

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[1] S.C. Code Ann. §§44-48-10 to -170 (2018).
[2] The hearing occurred before the Honorable William H. Seals.
[3] The Honorable D. Craig Brown presided over the trial.

S.C. 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). Our supreme court has found that "to satisfy due process, prisoners suffering from a mental disease or defect requiring involuntary commitment must be provided with independent assistance during the commitment proceeding." *Id.* However, our appellate courts have not yet addressed the issue raised by Griffin: does a potential SVP's right to counsel naturally encompass the right to be competent to assist counsel in his or her defense during the civil commitment trial? We find it does not.

"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). In construing the Act in its entirety, we can find 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. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process. *See Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). Furthermore, our precedent supports this conclusion. *See Oxner*, 430 S.C. at 566–69, 846 S.E.2d at 371–73 (finding the appellant's procedural due process rights were not violated when the appellant was incompetent for the SVP probable cause hearing); *c.f. Council v. Catoe*, 359 S.C. 120, 125, 597 S.E.2d 782, 784–85 (2004) (finding "the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply" in PCR actions).[4] Thus, we find a prisoner is not entitled to be competent to stand trial under the Act.

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[4] Several jurisdictions have made similar findings. *See Moore v. Superior Court*, 237 P.3d 530 (Cal. 2010); *In re Commitment of Weekly*, 956 N.E.2d 634 (Ill. App. Ct. 2011); *In re Det. of Cubbage*, 671 N.W.2d 442 (Iowa 2003); *In re Sykes*, 367 P.3d 1244 (Kan. 2016); *Commonwealth v. Nieves*, 846 N.E.2d 379 (Mass. 2006); *In re Det. of Morgan*, 330 P.3d 774 (Wash. 2014).

Based on the foregoing, we hold the trial court did not err in denying Griffin's pretrial motion for a competency evaluation.[5]

CONCLUSION

Accordingly, Griffin's commitment is

AFFIRMED.

THOMAS and HILL, JJ., concur.

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[5] Because our finding above is dispositive of the appeal, we decline to address Griffin's remaining issue of whether the trial court erred in denying Griffin's second motion for a competency evaluation. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

APPELLANT

APPELLATE CASE NO. 2018-001975

Appeal from Horry County

D. Craig Brown, Circuit Court Judge

Opinion No. 5839

PETITION FOR REHEARING

On July 21, 2021, this Court affirmed Appellant's commitment in a published opinion. *In the Matter of the Care and Treatment of Thomas Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 27). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

In affirming Appellant's commitment to the South Carolina Department of Mental Health as a Sexually Violent Predator (SVP), this Court held there was no error in denying Appellant's motion for a competency evaluation because "a prisoner is not entitled to be competent to stand

trial under the Act." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30). Appellant respectfully submits that this Court overlooked and/or misapprehended Appellant's prior history of decompensation and successful restoration to competency, and the relevance of these facts given the flexibility of the protections to be afforded by the Due Process Clause, and given that the right to effective assistance of counsel is not merely a superficial right. Appellant should have been granted a competency evaluation in this case, to effectuate his rights to a meaningful opportunity to be heard and the effective assistance of counsel. By holding that no judge ever has the discretion to order a competency evaluation in an SVP case, this Court improperly construes the Sexually Violent Predator Act (SVPA or the Act), too narrowly constricts the Due Process Clause, and renders the right to effective assistance of counsel superficial.

Appellant also respectfully submits this Court overlooked or misapprehended his argument that the first trial judge's decision Appellant was not entitled to an evaluation was based on the trial court's reading of an inapplicable portion of the Act. Finally, Appellant respectfully submits that because Appellant was eligible for a competency evaluation the Court should have addressed Appellant's final argument: since competency is fluid, Appellant's further decompensation meant that the second trial judge would not have been "overruling" another judge but would instead have been addressing a different issue.

FACTS

In 1999, Appellant pleaded guilty but mentally ill (GBMI) to the offense of assault with intent to commit criminal sexual conduct with a minor in the second degree, and he was sentenced to twenty years in prison. R. 177. When Appellant's release date neared, the State sought his commitment pursuant to the SVPA, S.C. Code Ann. §§ 44-48-10 – 44-48-170.

Appellant had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. R. 91, ll. 5-14. Appellant also had a history of "decompensation;" "becoming more psychotic when he is noncompliant with his medications." R. 91, ll. 11-13.

On February 28, 2018, defense counsel moved for a competency evaluation. R. 171- R. 173. 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, for a hearing on the matter. R. 1; R. 65. Defense counsel explained that when meeting with Appellant, "there were times when his answers made no sense relative to my questions," and Appellant could not participate in his defense. R. 3, ll. 12-18. Counsel offered that his own observations had been "verified by what Dr. G[ehle] put in her report as far as schizophrenia and prior treatments." R. 3, ll. 6-8.

Dr. Marie Gehle, a chief psychologist at the South Carolina Department of Mental Health, had evaluated Appellant to determine whether he was an SVP, and she diagnosed him with biastophilia and schizophrenia. R. 62, l. 24 – 58, l. 1; R. 67, ll. 18-20; R. 86, ll. 1-3. Appellant's mental health history included periods of "being on his medicine to decompensating and then being restored." R. 108, l. 23 – 109, l. 3. Appellant had been restored to competency more than once. R. 108, l. 23 – 109, l. 3. Appellant's medical records from the Horry County Detention Center, where he was held prior to trial, revealed that his medications had been discontinued on January 12, 2018 due to sporadic and then eventual noncompliance. R. 108, ll. 3-10.

The trial court denied the motion based on S.C. Code Ann. § 44-48-100(B), 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. R. 3, l. 21 – 4, l. 3.

However, Appellant was not incompetent to stand trial on the predicate offense—as seen, he pleaded GBMI and served twenty years in prison.

On October 22, 2018, when Appellant 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 circumstances." R. 6; R. 165. Counsel argued that conducting an SVP trial when Appellant lacked the ability to assist in his own defense was a violation of Appellant'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. R. 165 – 166.

Counsel submitted to the trial court 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." R. 40, l. 11 – 42, l. 1. Counsel explained that Appellant's "mental state has significantly deteriorated," that Appellant was "in no condition to testify," and that he was unable to put Appellant on the stand because Appellant was incapable of "making a logical response to questions," and because he did not know if Appellant could answer questions truthfully. R. 44, ll. 3-25; R. 43, ll. 14-25.

Counsel further explained he had "not been able to speak with [Appellant], do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." R. 43, l. 25 – 39, l. 10. Counsel offered that over the course of his representation, Appellant's handwritten letters to him had become more illegible, and that conversations with Appellant had gone from "iffy" to not "making any sense." R. 44, ll. 12-20.

The State erroneously argued that Appellant did not have the right to be competent at trial based on S.C. Code Ann. § 44-48-100(B) (an inapplicable provision) and since the requisite mental abnormality or personality disorder for SVP commitment might prevent competency in some of

these cases anyway. R. 37, l. 14 – 38, l. 1. Defense counsel countered that Appellant had a "track record" of "being able to be returned to competency when he stays on his psychiatric medications." R. 43, ll. 3-5. Counsel also pointed out that § 44-48-100(B) was inapplicable. 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." R. 42, ll. 2-4. 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." R. 42, ll. 5-8. "Judge Seals had the final say so . . ." R. 38, ll. 18-22.

The jury found that Appellant was a sexually violent predator and the court signed an order of commitment. R. 178; R. 161, ll. 9-12; R. 162, ll. 11-13.

ARGUMENT

1.

The court erred where it denied Appellant's motion to be evaluated for competency to stand trial, where Appellant had the right to counsel, and where counsel explained he could not effectively represent Appellant at trial because Appellant was incapable of rational speech, since the SVPA must be construed in a manner that recognized Appellant's right to effective assistance of counsel.

Appellant respectfully submits this Court overlooked and/or misapprehended his argument that absent competency, Appellant's right to the effective assistance of counsel was merely a superficial right. A respondent in an SVP proceeding has a "right to effective assistance of counsel" which is statutory right contained in S.C. Code Ann. § 44-48-90, and a constitutional right "arising under the Fourteenth Amendment and the South Carolina Constitution." *Matter of Chapman*, 419

S.E.2d 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.

"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. "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). "[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)). Here, Appellant was unable to "participate in his defense" or "communicate with" counsel. R. 3, ll. 14-17; R. 40, l. 11 – 37, l. 1. "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.

In addressing Appellant's argument that he was unable to meaningfully exercise his right to counsel since he was likely incompetent, this Court recognized that Appellant was entitled to counsel but held, "[O]ur appellate courts have not yet addressed the issue raised by [Appellant]: does a potential SVP's right to counsel naturally encompass the right to be competent to assist counsel in his or her defense during the civil commitment trial? We find it does not." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29).

> [I]t appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the

> imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process . . . Thus, we find a prisoner is not entitled to be competent to stand trial under the Act.

Matter of Griffin, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30).

Although this Court recognized the General Assembly intended to safeguard SVP respondents' rights through the provision of counsel, this Court concluded that no incompetent respondent (including Appellant, who had a track record of successful restoration) was entitled to be evaluated for competency. *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30). As seen, Appellant was unable to logically converse with or respond to his counsel. This Court's construction of the Act improperly rendered Appellant's right to counsel a superficial right rather than a substantial one. *Chapman*, 419 S.C. at 184, 796 S.E.2d at 849.

2.

The court erred where it denied Appellant's motion to be evaluated for competency to stand trial, where Appellant was unable to logically communicate and thus 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.

Appellant respectfully submits this Court overlooked and/or misapprehended the import of the undisputed evidence that Appellant had been restored successfully to competency to stand trial in connection with a prior case or cases. A competency evaluation was needed to effectuate Appellant's right to a meaningful opportunity to be heard in these circumstances, since absent

competency Appellant could not communicate with his counsel and since he could not testify before the jury.

"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). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "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).

Here, Appellant's procedural due process rights were violated by the denial of an evaluation for fitness to stand trial so he could be heard in person at a meaningful time (after he had been evaluated for competency) and in a meaningful manner (when he was cogent). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. at 334 (quoting *Morrisey 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 (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

It was undisputed that Appellant had been previously deemed not competent to stand trial on other matters, but he had been successfully restored to competency. The failure to allow Appellant flexibility here, to ensure a meaningful opportunity to present his case and be heard in person, was error.

Due process requires the consideration of three factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335. An application of *Eldridge* validates Appellant's position. R. 167 – 169. As to the first factor, civil commitment 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 also 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").

The second factor also weighs in Appellant's favor. Appellant, who could neither converse with his counsel nor testify before the jury, had no meaningful opportunity to be heard. The jury could not hear from Appellant or through defense witnesses, for example, on whether Appellant could identify his triggers, or what his plan was to prevent reoffending. The additional procedural

safeguard of allowing a competency evaluation would have been highly valuable here so Appellant could speak to his counsel or to the jury in his defense.

Finally, the third factor in *Eldridge* also weighs in favor of Appellant because the government's interest in protecting the community from sexual predators is not served by the enrollment of an incompetent person into the SVP program, as he would need to become competent to engage in treatment. The State's burden is low here too, as there is an existing framework in South Carolina for attempting competency restoration. *See* S.C. Code Ann. §§ 44-23-410 – 44-23-460. Further, there was no harm to the State in waiting for a competency evaluation since Appellant was the party who was detained. The *Eldridge* factors weighed in Appellant's favor.

3.

The court erred where it denied Appellant'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 Appellant had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable.

Appellant respectfully submits this Court overlooked or misapprehended the legal error committed by the first trial judge, and overlooked or misapprehended legislative intent regarding an SVP respondent's right to be tried while competent.

When Appellant initially moved for a competency evaluation before the chief administrative judge, the court erroneously found that S.C. Code Ann. § 44-48-100(B) controlled whether Appellant was eligible for a competency evaluation. But, § 44-48-100(B) applied in cases where the accused SVP **was not** convicted of a predicate offense, and Appellant **was** convicted of

a predicate offense.[1] This Court did not address Appellant's argument that the trial court applied the wrong statutory provision, although it did discuss statutory construction.

> **In construing the Act in its entirety, we can find 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**. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process. *See Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). Furthermore, our precedent supports this conclusion. *See Oxner*, 430 S.C. at 566–69, 846 S.E.2d at 371–73 (finding the appellant's procedural due process rights were not violated when the appellant was incompetent for the SVP probable cause hearing); *c.f. Council v. Catoe*, 359 S.C. 120, 125, 597 S.E.2d 782, 784–85 (2004) (finding "the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply" in PCR actions). Thus, we find a prisoner is not entitled to be competent to stand trial under the Act.

Matter of Griffin, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29) (footnote omitted) (emphasis added).

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[1] Appellant uses the phrase "convicted of a predicate offense" to avoid confusion since § 44-48-30(6) provides that persons who have been "convicted of a sexually violent offense" for purposes of the SVPA include those who have "(a) pled guilty to, pled nolo contendere to, or been convicted of a sexually violent offense; (b) been adjudicated delinquent as a result of the commission of a sexually violent offense; **(c) been charged but determined to be incompetent to stand trial for a sexually violent offense**; (d) been found not guilty by reason of insanity of a sexually violent offense; **or (e) been found guilty but mentally ill of a sexually violent offense**." (emphasis added).

Appellant's 1999 GMBI plea to assault with intent to commit criminal sexual conduct with a minor in the second degree meant that he was convicted of a sexually violent offense so as to qualify as a potential SVP. Per § 44-48-30(6)**(e)** a person who has "been found guilty but mentally ill of a sexually violent offense" is considered to be "convicted of a sexually violent offense." Here, it is crucial to note that Appellant was "convicted of a sexually violent offense" per § 44-48-30(6)**(e)**, not (c).

§ 44-48-30(6)**(c)** provides that a person who has "been charged but determined to be incompetent to stand trial for a sexually violent offense" has also been "convicted of a sexually violent offense" for purposes of the SVPA. S.C. Code Ann. § 44-48-100(B) provides a procedure exclusively directed at offenders who fall within § 44-48-30(6)**(c).** § 44-48-100(B) provides,

> **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**. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. 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.

(emphasis added). Therefore, while the General Assembly provided that the right not to be tried while incompetent did not apply to some respondents under the SVPA, it only provided that such

limitation applied to persons who have been "convicted of a sexually violent offense" per § 44-48-30(6)**(c)**—that is, persons who were incompetent to stand trial in the underlying criminal case, not persons like Appellant.

Here, the State erroneously argued Appellant did not have the right to be competent at trial based on the language of § 44-48-100(B). R. 37, l. 14 – 38, l. 1. Appellant was never found incompetent to stand trial for the predicate offense so subsection (B) was inapplicable. The trial court erred when it relied on this subsection to conclude that Appellant was not eligible for a competency evaluation, since Appellant was not in the class of offenders to which it applied.

Appellant respectfully submits that this Court's determination that no SVP respondent is ever permitted a competency evaluation is incorrect. The SVPA mandates one set of procedures for respondents who were incompetent on the predicate offense and another set of procedures for respondents who were competent on the predicate offense. The General Assembly only specified that the right to be competent did not apply to respondents who were not competent on the predicate offense.

By denying the right to competency to only one category of respondents, the Act expects that the other respondents, who were competent on the predicate offense, are (or can become) competent for the SVP trial. A reading of the above-cited statutory provisions evinces a legislative intent to afford respondents like Appellant the right to competency when tried. "The legislature's intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia–Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003)). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended

purpose of the statute." *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. at 23, 579 S.E.2d at 336.

"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). "A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of the statute, and cannot, under its power of construction, supply an omission in a statute." *State v. Johnson*, 396 S.C. 424, 429, 721 S.E.2d 786, 788–89 (Ct. App. 2012) (citing *State v. White*, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999)). "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

Appellant respectfully asserts that this Court's construction of the Act was improperly expansive and was contrary to legislative intent. Had the General Assembly intended that the right to be competent at trial did not apply to respondents who were competent on the predicate offense, it would have so provided. The fact that the General Assembly did so provide as to offenders who were not competent on the predicate offense shows it intended the right not apply only to that category of offenders it specified.

The trial court's erroneous interpretation of the Act as a bar to Appellant's trial while competent deprived Appellant of the right to counsel and the right to procedural due process, as argued in Issues 1 and 2 above. Appellant hereby incorporates those arguments. As the South Carolina Supreme Court observed in *Matter of Chapman*, 419 S.C. 172. 187, 796 S.E.2d 843, 850 (2017), "We cannot construe the Act in a manner that does not recognize an SVP's constitutional

right to the effective assistance of counsel." It was also error to construe the Act in a manner that deprived Appellant of procedural due process.

Finally, *Matter of Care and Treatment of Oxner*, 430 S.C. 555, 559, 846 S.E.2d 365, 368 (Ct. App. 2020) does not support the conclusion that Appellant was not entitled to a competency evaluation, since Oxner was not competent to stand trial on the predicate offense, unlike Appellant who was competent on the predicate offense. Additionally, Oxner merely challenged the propriety of conducting a pretrial hearing while he was incompetent, rather than challenging the propriety of conducting the trial. Nor does *Council v. Catoe*, 359 S.C. 120, 123, 597 S.E.2d 782, 783 (2004), support such a conclusion since Council was the plaintiff in a collateral attack on his convictions rather than the respondent in a commitment action.

It was an error of law to find Appellant statutorily barred from an evaluation here, and Appellant respectfully submits this Court overlooked and/or misapprehended the above points.

4.

<u>The court erred when it denied Appellant's motion to be evaluated for competency to stand trial where it found the chief administrative judge's ruling on the matter months before could not be "overruled," where Appellant's mental state had continued to deteriorate, and where Appellant 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.</u>

This Court declined to address Appellant's Issue 4, concluding, "Because our finding above is dispositive of the appeal, we decline to address [Appellant's] remaining issue of whether the trial court erred in denying [Appellant's] second motion for a competency evaluation." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 30).

However, as discussed above, the trial court should have discretion to order a competency evaluation in SVP cases. Appellant respectfully submits that because this Court misapprehended or overlooked the points raised in Issues 1 – 3 discussed above, it misapprehended and/or overlooked this issue.

Although one circuit judge may not overrule another, the trial court here 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. The seminal case of *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 Appellant), was ordered to undergo an evaluation for competency to stand trial by Judge Spruill in October 1977 and he was found incompetent. In June 1978, he was returned to court after his competency was restored. *Id*. In August 1979, Judge Harris ordered the defendant to undergo another competency evaluation, and he was found competent to stand trial by the Department of Mental Health. *Id*. at 532, 273 S.E.2d at 537.

Here, as in *Blair*, a different judge was asked to reevaluate competency at a later date, and there was nothing improper about the motion—in fact, the South Carolina Supreme 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. The Supreme Court found of particular relevance 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 Appellant's own history.

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 heard and denied by the chief administrative judge. R. 171; R. 1. On October 22, 2018, during pretrial motions, counsel again moved for a

competency evaluation before the trial judge and argued there was a change in circumstances since Appellant's condition had continued to deteriorate. R. 6; R. 44, ll. 8-10.

It appeared the trial judge wanted to grant the motion but believed he could not. The trial judge responded, "Right. And, I don't disagree with you at all. The statute doesn't specifically address competencies in these types of cases." R. 42, ll. 2-4. The court continued 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." R. 42, ll. 5-8.

"[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 . . ." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). *Drope* illustrates that as late as during the trial, it may be necessary and proper to reevaluate competency since competency may change over time. *Id.* at 174-75, 178; *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"). Here, Appellant had a history of schizophrenia and he had been found incompetent to stand trial and restored more than once in other case(s) previously. R. 166; R. 108, l. 23 – 109, l. 3. Appellant's letters to counsel deteriorated over the course of representation, and conversations had gone from "iffy" to not "making any sense." R. 44, ll. 16-20; R. 44, 39, ll. 12-16. These facts demonstrated the need to reconsider an evaluation of Appellant's fitness to stand trial.

The trial court's determination that it could not "overrule" the prior judge was error—the prior judge's order was not controlling since the matter was one of Appellant's present competency. Competency is a fluid issue that, by its nature, may need to be revisited at a later date. *Drope v. Missouri*, 420 U.S. 162; *State v. Blair*, 275 S.C. 529, 273 S.E.2d at 536.

CONCLUSION

The court erred by denying Appellant's motions for a competency evaluation: where the SVPA must be construed in a manner that recognized Appellant's right to the effective assistance of counsel was a substantial right rather than a superficial right; where Appellant was entitled to a meaningful opportunity to be heard; where the first judge's decision erroneously rested an inapplicable statutory provision; and where the second judge's decision (that he could not overrule the first judge) also rested on a legal error because Appellant's mental state had continued to deteriorate and his motion thus presented a new question to the court. Appellant's history of decompensation and successful restoration supported his motion. These points were overlooked and/or misapprehended by this Court in its opinion, and Appellant respectfully requests rehearing.

Moreover, this Court's published opinion appears to completely deny trial courts the discretion to grant a competency evaluation in an SVP case, even in cases such as Appellant's, where the respondent had a history of successful restoration. Even if this Court does not alter the result of this case, the opinion should be modified to reflect that trial courts do have the discretion to order competency evaluations.

Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's commitment.

Respectfully Submitted,

s/ *Joanna K. Delany*
JOANNA K. DELANY
Appellate Defender

This 3rd day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

D. Craig Brown, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO. 2018-001975

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Thomas Griffin, at 4546 Broad River Road, Columbia, SC 29210, this 3rd day of August, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001975
Op. No. 5839

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant

RETURN TO APPELLANT'S PETITION FOR REHEARING

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ATTORNEYS FOR RESPONDENT

By published opinion filed July 21, 2021, the Court affirmed Appellant's commitment as a sexually violent predator pursuant to the Sexually Violent Predator Act (SVPA). Appellant filed a Petition for Rehearing on August 3, 2021, asserting the Court overlooked and/or misapprehended significant points, and the Court requested a Return to the Petition for Rehearing. Reduced to its essence, Appellant's Petition for Rehearing merely regurgitates the issues and arguments set for in the Final Brief of Appellant.[1]

Relying on criminal case law regarding a criminal defendant's right to counsel, and In the Matter of the Care and Treatment of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017), Appellant contends this Court erred because it overlooked Appellant's inability to consult with his attorney during trial, which violated his right to effective assistance of counsel. He further asserts this Court overlooked Appellant's history of being restored to competency, applied §44-48-100(B) out of context and too broadly, and overlooked the fluidity of competency. These assertions are meritless.

Chapman

As set forth in the Final Brief of Respondent, Appellant seeks to expand Chapman far beyond the scope of the Supreme Court's holding. Chapman held the SVPA's general statutory right to counsel encompassed the constitutional right to effective assistance of counsel, and a person committed pursuant to the SVPA could raise ineffective assistance of counsel claims via a common law petition for habeas relief. *Id.* at 846-847. Chapman also held, however, that allegations of ineffective assistance of counsel could not be raised on direct appeal. *Id.* at 848

[1]Respondent craves reference to the Final Brief of Respondent for a complete statement of relevant facts. (Final Brief of Respondent, pp. 3-9). In addition, the issues Appellant raises on rehearing are addressed in the Final Brief of Respondent, which is incorporated herein as if stated verbatim.

(merits of ineffective assistance of SVPA counsel will not be addressed on direct appeal because such claims may be raised in a habeas proceeding).

Appellant asks this Court to expand Chapman to direct appeals if counsel merely tells the trial court he cannot effectively represent his client for some reason, which conclusively establishes ineffective assistance of counsel and a due process violation. Chapman does not stand for this proposition, and expanding its scope will result in the very thing the Supreme Court sought to avoid – addressing the merits of ineffective assistance of counsel claims in direct appeals from civil commitments pursuant to the SVPA.[2]

As in his Final Brief, Appellant refers to his trial counsel as an "experienced trial lawyer." Proving the accuracy of Appellant's assessment, the record reveals trial counsel vigorously protected Appellant's interests prior to and during trial, including repeatedly raising the competency issue at every opportunity, aggressively cross-examining the court appointed expert, and giving a thorough and impassioned closing argument, which included references to Appellant's mental incapacity and inability to testify at trial. Counsel acted exactly as a seasoned, experienced trial attorney would be expected to act under the circumstances, especially one with extensive experience in SVPA cases, and provided much more than mere "superficial" assistance of counsel. Concluding otherwise requires rank speculation.[3]

Appellant ignores trial counsel's statement to the circuit court that Appellant was able to communicate with him "fine" at the probable cause hearing, but the communication level began to deteriorate after Appellant was transferred from the Department of Corrections to the Horry

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[2]Indeed, trial counsel stated multiple times he could not "effectively" represent Appellant. It can be inferred counsel used the effective representation language precisely to try to expand Chapman and make the ineffective assistance issue reviewable on direct appeal.

[3]The effectiveness of what counsel did, or did not do, prior to and during trial can only be adequately assessed in an appropriately filed habeas proceeding.

County Detention Center. (R., p. 39). Appellant also ignores the court appointed expert's testimony that Appellant was on his antipsychotic medication the day she interviewed him for almost four hours, and while he still had some delusions, he was able to communicate with her, respond to follow-up questions, repeat himself when asked, and spell some words she could not understand because he was mumbling. (R., pp. 68, 84-91).

Significantly, Appellant stopped regularly taking his antipsychotic medication after his transfer to the Detention Center, and he completely stopped taking it in January 2018, **after** this case was originally scheduled for trial in March 2018. (R., pp. 107-108). Given Appellant's mental health history and his statements to the court appointed expert, Appellant was aware taking his antipsychotic medication was crucial to maintaining his ability to understand and communicate, even if still suffering from some delusions, and it is certainly inferable he knowingly stopped taking the medication regularly after he was transferred to the Detention Center rather than released from incarceration, and then stopped it completely after the trial was scheduled.[4]

Due Process

The State does not dispute, and never has disputed, Appellant's right to counsel in this case. Contrary to Appellant's repeated efforts to conflate SVPA cases with criminal cases, however, South Carolina courts have conclusively determined SVPA proceedings are civil, not criminal, and are aimed at treatment rather than punishment. *See, e,g.*, In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 315-317 (2001).

In order to confine a person pursuant to the SVPA, the State must prove beyond a reasonable doubt the person has a diagnosed mental abnormality or personality disorder that makes

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[4]Appellant knew from experience that his criminal trials were delayed when he decompensated, so he likely believed the SVPA trial would not proceed either.

him likely to reoffend sexually if not confined for treatment. Given that foundational requirement, it stands to reason the person's mental abnormality or personality disorder may impact his mental capacity, even if the person takes medication as prescribed. In light of that reality, this Court properly considered the legislative intent of the SVPA to determine if there was a statutory requirement of competence in SVPA proceedings.

As this Court found, when the SVPA is construed in its entirety, "it appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense." Support for that finding begins with the purpose of the statute as expressed in the very first subsection of the SVPA.

The Legislature found "that a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018). The Legislature then defined "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons whose relevant mental abnormalities render them incompetent to participate in the civil commitment court proceedings.

As part of its legislative intent analysis, this Court appropriately considered the statute in its entirety, including §44-48-100(B), which requires a hearing to determine the likelihood of guilt when the person was not tried on the sexually violent offense due to a finding of incompetence.

In that subsection, the General Assembly afforded the person all the same constitutional rights afforded to criminal defendants, **except** the right to be competent at trial. *See* In re Oxner, 430 S.C. 555, 846 S.E.2d 365, 370-371 (Ct. App. 2020), *cert. granted* (S.Ct. Aug. 25, 2021) (General Assembly contemplated competence issues in cases involving sexually violent offenders, addressed those issues in the plain language of § 44-48-30 and § 44-48-100(B), and made no distinction between pending charges and charges dismissed due to the person's incompetence).

If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt the person actually committed the charged offenses, it is disingenuous to argue the General Assembly intended that competency be required for other SVPA proceedings, including a trial to determine if the person qualifies as a sexually violent predator.[5] According to Appellant's circular reasoning, once a court finds sufficient evidence at a 100(B) charges hearing, no further SVPA proceedings can take place until the person becomes competent. Such a result is ludicrous on its face.

This Court appropriately determined the procedural safeguards included in the SVPA were included to "ensure an individual's constitutional right to procedural due process is not violated," and "sufficiently satisfy the requirements of procedural due process." Every jurisdiction examining this exact issue has concluded likewise. *See* In re Sykes, 303 Kan. 820, 367 P.3d 1244 (2016) (protections provided by the sexual predator statute satisfy procedural due process requirements, there is no statutory requirement of competence in civil proceedings, and the abatement requirements of criminal procedure do not apply); In re Detention of Morgan, 180

[5]Holding otherwise would lead to SVPA proceedings pending indefinitely while the person is detained in a secure facility without "long term control, care and treatment," or the release of potential sexually violent predators with virtually no supervision and no treatment. As other courts have found, either alternative is an absurd result, and undermines the ultimate goals of public safety, and "long term control, care and treatment" of sexually violent predators.

Wash.2d 312, 330 P.3d 774 (2016) (three part test in Mathews v. Eldridge, 424 U.S. 319 [1976] weigh in favor of allowing sexual predator proceedings to move forward if the person is incompetent to assist in his defense)[6]; In re Commitment of Weekly, 956 N.E.2d 634, 647 (2011) (establishing that fitness evaluation does not affect ability to receive a fair commitment trial because of numerous procedural safeguards against erroneous deprivation of liberty); Moore v. Superior Court, 237 P.3d 530, 539-544 (Cal. 2010) (procedural safeguards of sexual predator act ensure the risk of erroneous deprivation of liberty is slight); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (lack of pretrial competence evaluation causes no deprivation of due process rights); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) ("robust, adversary character" of commitment proceeding minimizes risk of erroneous commitment of person who is not sexually dangerous; due process is preserved through adversarial process); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App. 2003) (SVP determination, regardless of competency of respondent, is not unconstitutional deprivation of liberty); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (difference between sexual predator commitment proceedings and conventional commitment proceedings does not make predator proceedings punitive; competency requirement for criminal proceedings is inapplicable to civil commitments); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (no right to competency evaluation before hearing on sexually violent person status; commitment is for treatment, not punishment, and due process concerns are remote).

The Sykes court expressed concerns regarding the alternatives, if competency was required in sexual predator civil commitment proceedings, which are discussed above and equally

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[6]The Mathews factors as applied to this case are discussed in depth in the Final Brief of Respondent at pages 17-22.

applicable in South Carolina. The first alternative would be to release the person from the State's control until such time as he may become competent to stand trial, which releases an individual with violent tendencies into society. The second alternative would be to commit him for treatment as a mentally ill person subject to involuntary commitment under regular civil commitment laws, which would provide care and treatment for the mental illness, but the person is still institutionalized without being competent to represent himself at a commitment hearing, even if under a different statutory provision than the sexually violent predator statute. Addressing the contention that sexually violent treatment would not sufficiently address other mental disorders, the court concluded:

> [T]he State is not required to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. The legislature is free to recognize degrees of harm, and it may address restrictions to those cases where it deems the need to be most clear. In this instance, the State has chosen treatment of the sexual predatory mental defect as having a priority over Schizophrenia or other mental disorders.

367 P.3d at 1248 (internal citation omitted).

The facts of this case present a prime example of why competency is not, and should not be, required in SVPA proceedings. Appellant acknowledged to Dr. Gehle he is better <u>when</u> he takes the prescribed medication for his Schizophrenia, which is the primary source of his incompetency. (R., p. 91). While he contended he was not <u>receiving</u> medication after he was transferred from the Department of Corrections, where he was on medication and competent, to the Horry County Detention Center, the records reveal the medication **was** initially prescribed at the Detention Center, but Appellant would not take it consistently, and the prescription was eventually discontinued only after Appellant **refused to take it**. (TT, pp. 102-103; R., 107-108).

As set forth above, given his long history and experience with the effect of not taking the prescribed medication, as well as his statements about his medical history to the court appointed

expert during the interview, Appellant knew his condition would deteriorate if he stopped taking the medication.[7] In short, any issue regarding Appellant's competency at the time of trial was an issue created by Appellant's own conduct in refusing to take prescribed medication he knew made his condition better.

Further, if Appellant received a competency examination and was declared incompetent, he would receive medical treatment designed to address his incompetency, with no sex offender treatment even offered. Once Appellant's competency was "restored," he would return to, and remain in, the Detention Center with no treatment (except prescribed anti-psychotic medication which he could refuse to take) until a new SVPA trial could be scheduled. Assuming Appellant took the prescribed medication, after the case was scheduled for trial, he could stop taking the medication, as he did in January 2018 after the case was first scheduled for trial, and once again decompensate, thus starting the vicious cycle over again. Such a result would be absurd, and completely undermine the purpose of the SVPA.[8]

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford appropriate due process to a mentally incompetent person subject to the SVPA process. In addition to the numerous levels of review prior to the commitment trial, the person has; 1) the right to counsel; 2) the right to present evidence; 3) the right to cross-examine witnesses;

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[7]The Detention Center could not force medicate Appellant absent a court order to do so, which was never even requested between February 2018 and October 2018.

[8]Even if Appellant's mental status prevented his actual participation in trial preparation and trial, experts and counsel can review Appellant's history, arrest records, previous mental health evaluations and treatment records, and interview him to the extent possible, in order to reach conclusions regarding his mental diagnosis and risk to reoffend sexually, and how to handle such issues at trial. *See* Moore, 237 P.3d at 543 (nature of issues, evidence and findings in sexual predator proceeding prevents person from playing much more than a supporting role; any chance the person's mental incompetence would significantly impair his contribution to his defense is relatively attenuated).

4) the right to retain experts; 5) the right to have the rules of evidence apply; 6) the right to have the civil commitment determination made beyond a reasonable doubt; and 7) the right to appeal the final determination. S.C. Code §§44-48-50, -60, -70, -80, -90, -100(A), and -100(B). Thus, Appellant's procedural due process rights were amply protected by the SVPA.

Section 44-48-100(B)

Appellant's assertion regarding the Court's reliance on §44-48-100(B) as the cornerstone of its statutory interpretation is disingenuous. A cursory review of the Court's opinion makes it clear its statutory interpretation consisted of reviewing the SVPA **in its entirety**, as required by the most basic rules of statutory interpretation, and the Court interpreted the statute to give effect to **all** of its parts. Appellant's argument necessarily ignores the rules of statutory construction, and does the very thing he accuses this Court of doing – considering 100(B) in isolation without regard to the clearly stated legislative intent and other portions of the SVPA.

Overruling Prior Ruling

This Court properly declined to rule on the issue of whether the circuit court erred in denying Appellant's second motion for a competency evaluation because its holding that the SVPA did not afford Appellant the right to be competent for the trial to proceed was dispositive. In any event, the issue fails on the merits.

As set forth in the Final Brief of Respondent, the prior circuit court ruling on Appellant's first motion for a competency evaluation was premised on the question of whether Appellant was entitled to a competency evaluation at all under the SVPA, and that issue did not change between August and October. The fluidity or deterioration of Appellant's mental health and competency was irrelevant in August 2018, and it remained irrelevant in October, 2018. At the August 2018

hearing, the circuit court ruled Appellant was not entitled to a competency evaluation under the SVPA, and the ruling on that issue was binding in subsequent circuit court proceedings.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State respectfully submits Appellant's Petition for Rehearing should be denied in its entirety.

Respectfully submitted,

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Attorney General

DEBORAH R.J. SHUPE
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ATTORNEYS FOR RESPONDENT

August 31, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001975

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant

PROOF OF SERVICE

I, Caroline Collins, certify I served a copy of the Return to Appellant's Petition for Rehearing on Appellant via email to the address listed in AIS for:

Joanna K. Delany
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense

CAROLINE COLLINS
Administrative Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

This 31st day of August, 2021.

The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Thomas Griffin, Appellant.

Appellate Case No. 2018-001975

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams, J.

Paula H. Thomas, J.

D. Garrison Hill, J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Joanna Katherine Delany, Esquire
Deborah R.J. Shupe, Esquire
The Honorable D. Craig Brown

FILED
Sep 27 2021