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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
On Certiorari to the Court of Appeals
Court of Appeals Appellate Case No. 2018-001075
Supreme Court Appellate Case No. 2021-001228

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

Petitioner.

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE PRESENTED

The court of appeals properly interpreted the SVPA in determining the legislative intent regarding inclusion of incompetent persons in the SVPA's scope, and in affirming Judge Seals and Judge Brown's denials of Petitioner'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, and as recognized in Matter of Oxner, 440 S.C. 4, 889 S.E.2d 586 (2023), the SVPA affords numerous procedural safeguards to protect the due process rights of individuals subject to its terms who may be incompetent due to their mental status. (Petitioner's Issues I, II, III, and IV).

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural Statement of the case.

STATEMENT OF FACTS

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

A trial on the merits was scheduled in March 2018 but the trial was continued because Petitioner requested a competency evaluation, which the presiding judge took under advisement.[1] That 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.[2] (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, Petitioner again moved for a competency evaluation on the grounds counsel was unable to effectively communicate with Petitioner and prepare for trial due to Petitioner's documented mental illness. Trial counsel argued due process required that Petitioner be competent to assist counsel with his defense, and 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

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[1]The case had previously been scheduled for trial in September 2017 and January 2018, but was continued due to scheduling conflicts.

[2]The judge who originally heard the motion in February 2018 sent both counsel an email on October 16, 2018, granting "**the State's** motion for evaluation of competency to stand trial," and asking the **Assistant Attorney General** to prepare a proposed order. (R. p. 175) (emphasis added).

expert. The State opposed the motion on the ground that the SVPA does not require the person to be competent for the SVPA proceedings to go forward. Judge Brown denied Petitioner's motion finding the issue had been conclusively decided by Judge Seals, and he did not have the authority to overrule Judge Seals. (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 Petitioner pursuant to the SVPA. As part of the evaluation, Dr. Gehle reviewed all available records regarding Petitioner's criminal history, his periods of incarceration and his mental health evaluations, and she interviewed Petitioner for approximately four hours. She testified a 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." (R., pp. 62-71).

According to the official records, Petitioner was convicted in 1972 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 (December 1996) 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. Petitioner was arrested and released on bond in February 1997. (R., pp. 72-77).

While out on bond, Petitioner 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. Petitioner 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. Petitioner 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, Petitioner told the victim to get dressed and said he was going to take her to his house and that he had a gun. When they left the restroom, the victim broke away from Petitioner and ran to a classroom. During the interview with Dr. Gehle, Petitioner verified the victim's account and admitted he committed the offense. (R., pp. 77-79).

On June 14, 1999, Petitioner pled guilty to assault with intent to commit second degree criminal sexual conduct with a minor for the December 1996 offense in Horry County. He was sentenced to twenty years incarceration. (R., p. 177).

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

The records also revealed Petitioner completed the first phase of the Department of Corrections' sex offender treatment program in 2008. Petitioner 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, that somebody should learn in treatment. (R., pp. 83-84).

Dr. Gehle testified Petitioner 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. (R., pp. 84-85).

Dr. Gehle stated Petitioner's release plans were not practical. Petitioner's sister told her the amount of money he claimed he will receive from Social Security was inaccurate. In addition, Petitioner told Dr. Gehle he committed one of his sex offenses 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." (R., pp. 84-85).

Dr. Gehle diagnosed Petitioner with other specified paraphilic disorder (biastophilia), and schizophrenia (continuous). She testified Petitioner's paraphilic disorder was based on Petitioner's "deviant sexual interests involving coercive sexual acts with non-consenting persons." She further testified Petitioner has a long history of diagnosed schizophrenia, which is a type of psychotic disorder. During her interview of Petitioner, he "exhibited delusions and disorganized speech," and told Dr. Gehle "he had a history of auditory and visual hallucinations when he wasn't taking his antipsychotic medication." Dr. Gehle stated Petitioner 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. (R., pp. 85-91).

Dr. Gehle testified the combination of a paraphilia and schizophrenia "impairs [Petitioner'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." (R., pp. 92-93).

Based on Petitioner's score (4) on the Static 99R, an actuarial risk assessment tool, Dr. Gehle testified Petitioner 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 Petitioner 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." (R., pp. 93-98).

Dr. Gehle testified it was her opinion Petitioner 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 Petitioner met the criteria for civil commitment pursuant to the SVPA. (R., pp. 98-100).

On cross-examination, Dr. Gehle testified her opinions were based, in part, on things Petitioner told her during the interview. She stated she asked follow-up questions at times, asked Petitioner 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 Petitioner might have "a little bit of [intelligence] impairment," which could be related to his schizophrenia or an intellectual disability. (R., pp. 102-103).

Dr. Gehle further testified Petitioner 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 Petitioner had been found incompetent to stand trial during his criminal case, and after a period of hospitalization, he was found competent. (R., pp. 104-107).

Based on medical records from the detention center where Petitioner was located after his prison term ended, Dr. Gehle testified Petitioner 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 the medication due to Petitioner's noncompliance. (R., pp.107-108).

As to Petitioner's medication compliance while in the community, Dr. Gehle stated Petitioner 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 Petitioner "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 Petitioner's offense pattern. (R., pp. 114-117).

On re-direct examination, Dr. Gehle testified she considered the circumstances of Petitioner's sexual offenses, particularly the South Carolina offense and the subsequent North Carolina offense, and some of the significant circumstances were Petitioner's use of a weapon in both offenses and he offended in places he could be easily caught. She also considered the fact that Petitioner 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 Petitioner was out on bond from the South Carolina offense. (R., pp. 126-130).

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

During closing argument, Petitioner's counsel stated Petitioner "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 [Petitioner] 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.

(R., p. 154).

The jury found Petitioner is a sexually violent predator beyond a reasonable doubt, and Judge Brown ordered that Petitioner be committed to the South Carolina Department of Mental Health for long term control, care and treatment. (R., pp. 162,178). This appeal followed.

By opinion filed July 21, 2021, the court of appeals affirmed Judge Brown's ruling on the motion for a competency evaluation and Petitioner's commitment as a sexually violent predator, finding "the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense," and the Legislature included "numerous safeguards to ensure the individual's constitutional right to procedural due process is not violated." In the Matter of the Care and Treatment of Thomas Griffin, 434 S.C. 338, 863 S.E.2d 346, 348 (Ct. App. 2021). The court denied Petitioner's Petition for Rehearing by order filed September 27, 2021. (Appendix, pp. 65-101). By Order filed September 12, 2023, this Court granted a writ of certiorari to review the court of appeals opinion.

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 court of appeals properly affirmed Judge Brown's denial of Petitioner's motion for a competency evaluation because as Judge Seals found, people subject to the SVPA do not have a due process or statutory right to be competent before SVPA proceedings can move forward, and as recognized in Matter of Oxner, 440 S.C. 4, 889 S.E.2d 586 (2023), the SVPA affords numerous procedural safeguards to protect the due process rights of individuals subject to its terms who may be incompetent as a result of their mental health status. (Petitioner's Issues I, II, III, and IV).

Introduction

In his "Introduction," Petitioner attempts to distinguish this case from Matter of Oxner, 440 S.C. 5, 889 S.E.2d 586 (2023), in which this Court held the SVPA provides adequate safeguards to satisfy the due process rights of an incompetent person who was charged with a sexually violent offense but never convicted of the offense in a criminal court because of his incompetence to stand trial. The distinction Petitioner asserts reveals the crux of his ultimate argument – his case is different because he had a history of being restored to competency, and his SVPA trial could not proceed until he was evaluated and restored to competency. This purported distinction is discussed below.[3]

Argument

Petitioner asserts Judge Brown 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 mandates the requested evaluation because the SVPA

[3]Petitioner's "Relevant facts" section asserts arguments as "facts." By way of example, Petitioner states "[t]he circuit court denied the [competency evaluation] motion based on an incorrect reading of S.C. Code Ann. §44-48-100(B) (2023)," and "another circuit court judge also believed Petitioner should receive a competency evaluation." (Brief of Petitioner [BOP], pp. 7, 10) (emphasis added). Counsel's arguments and speculative interpretation of a judge's state of mind do not constitute "facts," relevant or otherwise. Respondent craves reference to the Record on Appeal, cited extensively in this Brief, for the "facts" of the case as established by the actual record.

constitutes a significant deprivation of Petitioner's liberty interest, and his history indicated he could be successfully restored to competency;[4] 3) Judge Seals incorrectly applied §44-48-100(B); and 4) Judge Brown erroneously ruled he could not overrule Judge Seals because Petitioner's mental condition had deteriorated since Judge Seals' order was entered. While set forth in Petitioner's Brief as four separate issues, all of the asserted errors are ultimately premised on a purported procedural due process violation based on Petitioner's history of restoration to competency.

A. Ineffective Assistance of Counsel (Petitioner's Issue I)

Just as trial counsel did in the circuit court, Petitioner makes repeated references to the right to effective assistance of counsel in SVPA proceedings recognized in In re Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017). This Court held in Chapman that 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.[5] 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 habeas proceedings).

While making it "clear" he is not asserting an ineffective assistance of counsel claim in this direct appeal, that is exactly what Petitioner asserts. He attempts to avoid that interpretation by contending the denial of a competency evaluation "prevented him from *accessing* his right to counsel." (BOP, p. 14) (emphasis in original). This assertion fails in the face of the fact that

[4]Petitioner does not assert a substantive due process claim.

[5]This habeas process has now been codified in S.C. Code §44-48-115 (2018) (as amended effective May 16, 2023).

Petitioner had a very capable attorney, who represented him throughout the SVPA proceeding and was able to communicate with Petitioner effectively at the probable cause hearing and thereafter, both verbally and by written communication, until Petitioner stopped taking his medication, as he had a history of doing, and as expected, decompensated mentally.[6]

Petitioner's trial counsel told Judge Brown "everything was fine" and he was able to communicate with Petitioner at the probable cause hearing (November 2016). The first time he talked with Petitioner in the detention center "was a little iffy," and it got worse each subsequent time he met with Petitioner. Counsel also received letters from Petitioner, and "the first ones are articulate and well lettered and well – good handwriting and to the end ones looks like they've been written with a pencil with your left hand, just kind of scratching it out." (R., p. 44).

At all stages of the SVPA proceedings, trial counsel vigorously protected Petitioner's interests. In addition to raising the competency issue at every opportunity, including pre-trial and closing argument, he aggressively cross-examined Dr. Gehle regarding the basis for her diagnoses and conclusions, and made a thorough and impassioned closing argument, which included reference to his inability to call Petitioner as a witness. Thus, trial counsel acted exactly how a seasoned, "experienced trial lawyer" would be expected to act under the circumstances, and effectively represented Petitioner at the trial.

Ultimately, Petitioner resorts to inflammatory rhetoric claiming "zero" prejudice to the State if a competency evaluation was granted, and characterizing the State's opposition to a

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[6]In his brief before the Court of Appeals, Petitioner referred to trial counsel as "an experienced trial lawyer," an apt description notably omitted from the Petition for Writ of Certiorari and the BOP before this Court even though the exact same portion of the Record on Appeal are cited. (Appendix, p. 16, 72, BOP, p. 16). Trial counsel was indeed an experienced trial attorney, who handled numerous SVPA cases as a SVP contract attorney for the Office of Indigent Defense.

competency evaluation as running "roughshod" over Petitioner's rights. (BOP, p. 14). Petitioner even asserts the State's opposition to a competency evaluation "should be considered in light of the Attorney General's refusal to concede that the right to effective assistance of counsel existed at all in Chapman." (BOP, p. 14). Resorting to a misstatement of what the State did or did not concede in Chapman is nothing more than an attempt to distract from the real issue in this case – whether a person subject to the SVPA has a due process right to be competent before SVPA proceedings can move forward.[7]

Petitioner's disclaimer notwithstanding, Petitioner relies on Chapman as a basis for finding his due process rights were violated because his trial counsel could not "effectively" represent him in light of his self-imposed incompetency at the time the case was called for trial. This is at least an indirect attempt to expand the right to effective assistance of counsel this Court found in Chapman, and allow the effectiveness of trial counsel issue to be raised in a direct appeal. The court of appeals properly declined to address the effective assistance of counsel argument in holding the SVPA does not encompass a right to competency in SVPA proceedings.

[7]Indeed, the State properly argued in Chapman that the SVPA statutory language did not include a right to effective assistance of counsel (which it did not), but if such a right was recognized, allegations of ineffective assistance of counsel should be asserted in a separate common law habeas proceeding rather than on direct appeal, which is what this Court ultimately held.

B. Competency and Procedural Due Process (Petitioner'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., 427 S.C. 305, 831 S.E.2d 429, 432 (2019) (*citing* Greene v. S.C. Election Comm., 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 what the Legislature says in the text of a statute is considered "the best evidence of the legislative intent." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000).

The legislative intent must be gleaned from the **entire** statute rather than clauses taken out of context. Singletary v. S.C. Dept. 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.*

To ascertain the legislative intent to encompass mentally incompetent persons within the SVPA's purview, 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) (emphasis added). The Legislature's express intent to protect the public from the increased danger posed by persons with

mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons, like Petitioner, whose mental abnormalities may also render them incompetent to participate in the court proceedings.

While not directly applicable to this case, the 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). That section, which was before this Court in Oxner, 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 ("charges hearing"), and all constitutional rights afforded a defendant at criminal trials apply to the charges hearing "**other than the right not to be tried while incompetent.**" S.C. Code Ann. §44-48-100(B) (2018) (emphasis added).[8] As this Court found in Oxner, '[w]ithout the exclusion of this right, the State is unable to protect the public from some dangerous sexually violent persons." 889 S.E.2d at 590.

If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt that the person actually committed the qualifying charged offenses before the court can even find probable cause to order an evaluation, it is disingenuous to argue, as Petitioner does, that the Legislature intended mental competency be required for all other SVPA proceedings. The fallacy of that argument is amply demonstrated by the express legislative finding that the existing civil commitment process, which is the exact process Petitioner contends is appropriate to return him to competency, is inadequate to address the special needs of violent sex offenders who are likely to reoffend sexually.

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[8]Notably, the incompetent and unlikely to become competent for a criminal trial category of persons encompassed within the SVPA is the only category that incorporates all criminal trial constitutional rights for purposes of one part of the SVPA proceedings (the charges hearing), and the Legislature expressly excluded the right to be competent from the constitutional rights afforded at that hearing.

Petitioner contends the fact he had been restored to competency "multiple times" in the past mandates that he be evaluated and restored to competency once again before he can be tried under the SVPA.[9] Taken to its logical conclusion, Petitioner's argument would require that a person be competent for even the initial SVPA probable cause hearing, which truly leads to a Kafkaesque result: **either** SVPA proceedings will be pending indefinitely while the person is detained in a mental health facility to be restored to competency under the existing civil commitment process without the "long term control, care and treatment" contemplated by the SVPA, and with no guarantee that a person restored to competency will still be competent by the time a SVPA probable cause hearing or trial can be scheduled; **or** potential sexually violent predators will be released under the existing civil commitment process with virtually no supervision and no treatment. Either alternative undermines the Legislature's ultimate goals of public safety and "long term control, care and treatment" of sexually violent predators.

Finally, Petitioner's contention the State would suffer "zero prejudice by allowing Petitioner a competency evaluation, since competency has to be restored to participate in SVP treatment" is unavailing. (BOP, p. 14). First, as held by the United States Supreme Court in Kansas v. Hendricks, 521 U.S. 346 (1997), a sexual predator statute is constitutional even if there is **no** possible treatment for the person's particular mental abnormality. *Id.* at 365. Second, the State is prejudiced in its effort to protect public safety if faced with a process that will potentially

[9]Taking a phrase from the dissent in a case from Washington, Petitioner even asserts he was "essentially tried *in absentia*" because he was unable "to engage in rational thought and communicate with and assist counsel." (BOP, p. 13). As evidenced by Petitioner's multiple citations to criminal cases, this assertion again attempts to apply a criminal law analogy to the civil proceedings at issue in the SVPA. The fact is Petitioner was present in the courtroom and represented by a capable, "experienced trial lawyer," who was familiar with Petitioner and his history, was well-versed in application of the SVPA, vigorously and aggressively cross-examined Dr. Gehle, and acted at all times to protect Petitioner as effectively as possible.

cycle repeatedly and indefinitely with the real possibility the person will get released through the existing civil commitment process with no sex offender treatment at all. Third, the State never disputed Petitioner's mental incompetence, which is all a competency evaluation would have established. Fourth, the SVPA treatment program would address both Petitioner's schizophrenia and his paraphilia, which will afford Petitioner the opportunity to both return to competency and engage in the full treatment program provided Petitioner complies with the required schizophrenia treatment regimen.

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. Hendricks, 521 U.S. at 364-365 (finding the inclusion in Kansas' sexual predator civil commitment statute of some safeguards applicable in criminal trials did not turn the civil commitment actions into criminal prosecutions); 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, and the abatement requirements of criminal process, do not apply. In re Sykes, 303 Kan. 820, 367 P.3d 1244, 1247 (2016).

The Kansas Supreme Court's thorough, well-reasoned analysis in Sykes regarding the interplay between a person's mental competency, due process and sexually violent predator civil commitment proceedings is instructive.[10] As in this case, Sykes contended his mental

[10]Petitioner's attempt to distinguish Sykes and other cases cited by the court of appeals by pointing to factual differences, such as competency evaluations in some cases and the appointment of a guardian *ad litem*, wholly fails for one clear reason: the importance of Sykes and other cited cases is the legal analysis of whether a person subject to consideration for civil commitment under

incompetence during 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 Kansas 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.[11] *Id.* The court then noted seven other jurisdictions had reached the same conclusion on the issue. *Id.* (*citing* In re Commitment of Weekly, 956 N.E.2d 634, 647 (Ill. App. 1st 2011) (establishing that incompetency does not affect ability to receive a fair sexual predator commitment trial because of numerous procedural safeguards against erroneous deprivation of liberty); Moore v. Superior Court, 237 P.3d 530 (Cal. 4th 2010) (due process does not require mental competence of individual subject to commitment under Sexually Violent Predators Act); 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); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) ("robust, adversary character" of commitment proceeding minimizes risk of

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a sexual predator statute has a due process right to be competent before the sexual predator case can proceed, and the uniform conclusion was they do not.

[11]The Mathews factors are discussed below in relation to this case.

erroneous commitment of person who is not sexually dangerous; due process is preserved through adversarial process); 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); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App. 2003) (sexually violent predator determination is not unconstitutional deprivation of liberty regardless of person's competency); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (lack of pretrial competence evaluation in sexual predator proceeding causes no deprivation of due process rights). *See also*, Oxner, 863 S.E.2d at 348 (the legislature included numerous safeguards to protect an incompetent individual's due process rights).[12]

The Sykes court expressed concerns about the alternatives if competency was required in sexual predator civil commitment proceedings, which are similar to the concerns at issue in this case. The 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 incapacitating mental illness, but the person is still institutionalized without being competent to represent himself at a commitment hearing, even if under a different statutory

[12]Oxner involved the SVPA provisions regarding a person who has been charged with a sexually violent offense but found incompetent to stand trial. As discussed above, those provisions are only relevant in this case to the extent they are pertinent to the legislative intent to include mentally incompetent individuals within the SVPA purview. Petitioner was competent when he was convicted of a sexually violent offense, he remained competent during much of his prison sentence, he was competent when Dr. Gehle interviewed him for purposes of the evaluation even though he had some delusional thinking, and he was able to effectively communicate with trial counsel verbally and in writing until he voluntarily stopped taking the prescribed schizophrenia medication, and as expected, decompensated.

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).

Petitioner attempts to distinguish all the cases cited above and by the court of appeals by noting that none of them involved the South Carolina Constitution. (BOP p. 20). Since the cases are from other jurisdictions, the failure to cite or discuss the South Carolina Constitution is an obvious, but unavailing, distinction. Other than that obvious distinction, Petitioner fails to explain how application of the South Carolina Constitution obviates the cases' legal analysis of the competency issue.

This case presents a prime example of why competency is not required in SVPA proceedings. Petitioner acknowledged to Dr. Gehle he has a history of auditory and visual hallucinations when he is not on his medication, and indicated he knows he is better when he takes the prescribed medication for his schizophrenia, which is the primary source of his incompetency. (R., p. 91). While Petitioner contends he was not receiving medication after he was transferred from the Department of Corrections, where he was medication compliant and competent, to the Horry County Detention Center, the records reveal the medication **was** initially prescribed at the Detention Center, but Petitioner would not take it consistently, and then stopped taking it at all. The prescription was eventually discontinued because of Petitioner's noncompliance. (R., pp. 107-108).

Given his long history and experience with the decompensating effect of not taking prescribed medication, as well as his statements about his medical history to Dr. Gehle during the interview, Petitioner knew his condition would deteriorate if he stopped taking the medication.[13] In short, any issue regarding Petitioner's competency at the time of trial was an issue created by Petitioner's own conduct in refusing to take prescribed medication he knew made his condition better.

Further, if Petitioner received a competency examination and was declared incompetent, he would receive medical treatment through the existing civil commitment process designed to address his incapacitating mental diagnosis (schizophrenia), with no sex offender treatment even offered, and would be housed with other persons involuntarily committed who are not subject to the SVPA. Assuming Petitioner took his schizophrenia medication while in treatment for that diagnosis, once Petitioner was "restored" to competency, 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.[14] Assuming Petitioner did take the prescribed medication at the Detention Center after his return, at any point he could simply stop taking the medication, as he did in January 2018, and once again decompensate, thus starting the

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[13]The Detention Center could not force medicate Petitioner absent a court order to do so, which was never even requested between February 2018 (first motion for competency evaluation) and October 2018 (second motion for competency evaluation) after trial counsel determined he was unable to communicate with Petitioner.

[14]The State presumes for argument purposes that Petitioner would be returned to the Detention Center, but there are no statutory provisions for such a situation. The lack of such provisions in the SVPA further indicates the Legislature intended SVPA proceedings involving incompetent persons to move forward in the circuit court rather than being sidetracked into the existing civil commitment process that the Legislature expressly found was inadequate. The Legislature also found that because of the dangers sexual predators present, they should be housed separate from persons involuntarily committed through the traditional civil commitment statutes. §44-48-20.

vicious cycle over again. That would seriously undermine the legislative intent to protect the public from sexual predators and create a separate process to address sexual predators' treatment needs.

3. Mathews Factors

Petitioner argues the circuit court and court of appeals erred in finding his procedural due process rights were not violated because his mental status deprived him of the opportunity to be heard in person in a meaningful way. He further contends the court of appeals erred in its due process analysis by failing to address Petitioner's history of "multiple" successful restorations to competency, which he argues mandated a competency evaluation and subsequent treatment to restore him to competency yet again.

Petitioner acknowledges the factors identified in Mathews v. Eldridge, 424 U.S. 319 (1976), are the benchmarks for determining whether procedural protection is warranted. Petitioner then 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 that all people subject to the SVPA be competent to participate in any stage of a SVPA proceeding, except a charges hearing pursuant to §44-48-100(B).

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, 237 P.3d at 539 (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); Nieves, 846 N.E.2d 379 (same).

The Mathews 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. 424 U.S. at 334-335. Contrary to Petitioner's conclusory assertion the Mathews factors weigh in his favor, the procedural due process afforded to Petitioner under the SVPA, combined with the State's compelling public safety interest, weigh in favor of the State.

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, however, including the purpose of the interest deprivation, which is public safety and long term control, care and treatment under the SVPA.

South Carolina courts have conclusively determined the SVPA created a civil process aimed at identifying and treating, not punishing, sexually violent predators. *See* Matthews, 550 S.E.2d at 315-317. While Petitioner's liberty will no doubt 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 only receive treatment for his schizophrenia in hopes of once again restoring him to competency.[15] Rather, he will be housed in a separate, secure facility, where

[15]Petitioner relies on inflammatory rhetoric rather than reality, claiming "SVP commitment is imprisonment in all but name," and "[i]n addition to physical restraint, opprobrium and indignities attach." (BOP, p. 17). The fallacy of Petitioner's claims is that much the same consequences attach to commitment under existing civil commitment procedures. Petitioner's claim that SVPA commitment "has no defined end" is also inaccurate. The SVPA specifically provides procedures for a committed person to seek release from the treatment program, and people committed under the SVPA have indeed been released when their mental status had so changed they were safe to be at large and no longer likely to commit future acts of sexual violence.

he will receive medical and psychological treatment throughout his commitment, including medications as needed, to appropriately address both his paraphilic and schizophrenic disorders.[16]

b. Risk of Erroneous Liberty Deprivation

Assuming for argument only that the liberty factor, standing alone, weighs in Petitioner's favor, his remaining analysis of the Mathews factors is fundamentally flawed. His overriding premise regarding the risk of erroneous liberty deprivation is his incompetency.[17] In support of his argument, Petitioner conflates the requirement of competency in a criminal trial with a SVPA civil commitment trial.

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

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See §44-48-110 (committed person may petition for release at annual review); §44-48-120 (petition for release upon authorization by DMH director).

[16]While in the sexually violent predator treatment facility, Petitioner can choose not to take the medication to address his schizophrenia, which will indeed impact his participation in the sex offender treatment available to him.

[17]The State does not dispute Petitioner's schizophrenia diagnosis impacts his mental competency, even when he takes his prescribed medication. The question of Petitioner's mental competency is not the issue. Rather, assuming Petitioner's incompetency, the issue is whether the SVPA proceedings can move forward even if he is mentally incompetent.

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 sexual predator statute is beyond a reasonable doubt. *E.g.*, Burgess at 929.

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford a mentally incompetent person appropriate due process. In addition to the numerous levels of review prior to a commitment trial, the person has; 1) the right to counsel (at public expense when appropriate); 2) the right to present evidence; 3) the right to cross-examine witnesses; 4) the right to retain experts (at public expense when appropriate); 5) the right to have the rules of evidence apply; 6) the right to have the civil commitment determination made beyond a reasonable doubt; 7) the right to petition for release, 8) reviews of their mental status after commitment; and 9) the right to appeal from a commitment verdict. S.C. Code §§44-48-50, -60, -70, -80, -90, -100(A), -110, -120.[18] This Court recognized those procedural safeguards in Oxner. 889 S.E.2d at 590, n. 6 (the SVPA grants a jury trial, permits additional expert witnesses paid for by the State, guarantees experts have access to the person, and if committed the person can petition for release at any time).[19] Thus, contrary to Petitioner's assertion this factor weighs in his favor,

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[18]Petitioner concedes there are multiple of procedural safeguards afforded by the SVPA, but asserts those safeguards somehow indicate the Legislature intended to provide persons subject to the SVPA the right to competency. This assertion is illogical and runs counter to this Court's analysis of the competency issue in Oxner.

[19]The Court's reference to these general procedural safeguards in Oxner indicates the Court's analysis of the competency issue was not limited to 100(B) hearings since these safeguards apply to all SVPA proceedings. The Court stated that the specific procedures in the SVPA "significantly reduced if not completely eliminated" the risk of "an erroneous deprivation of Oxner's – **any incompetent person's** – liberty interest by involuntary civil commitment." 889 S.E.2d at 590 (emphasis added). Notably and significantly, the Court remanded Oxner to the

these safeguards make the risk of an erroneous deprivation of liberty under the SVPA minimal, even when the person is mentally incompetent, 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 sexually violent predators with a mental abnormality or personality disorder causally related to their sex offending, which is the over-arching purpose of the SVPA. The effectiveness, or even availability, of treatment for a particular mental disorder is not relevant if a goal of a sexual predator statute is to provide treatment to the extent possible. 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 Petitioner'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. *See* Oxner, 889 S.E.2d at 590 ("the State has a significant interest in protecting the public from sexually violent people who threaten the health and welfare of the public"). Experts and counsel can review Petitioner's history, arrest records, previous mental health evaluations and treatment records, conduct collateral interviews as warranted, 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

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circuit court for "a trial to determine whether [Oxner] is a sexually violent predator as required by subsection 44-48-90(A)." *Id.* Section 44-48-90(A) applies to all SVPA trial proceedings, and given that Oxner is unlikely to become competent, he will undoubtedly be incompetent to assist counsel at a SVPA trial.

contribution to his defense is relatively attenuated). Requiring competency before a SVPA case can proceed undermines the State's interest in protecting public safety and well as the clear legislative intent of the SVPA.

Further, as discussed above, the record reveals Petitioner was on medication and able to communicate with his attorney at the probable cause hearing and thereafter, both verbally and in writing, and then with the court appointed evaluator during her almost four hour interview with him.[20] (R., pp. 44, 102-104). After he was transferred to the Horry County Detention Center, however, Petitioner stopped taking his prescribed anti-psychotic medication, and as expected, his mental status deteriorated. (R., pp, 44, 104-108). Per his statements to Dr. Gehle, Petitioner knew his condition was worse when he was not on his medication. (R., p. 91). Thus, Petitioner's mental status at the time of trial was created by his refusal to take the medication required to maintain his mental competency, a decision Petitioner can certainly make again any time he is "restored to competency."

The SVPA statutory language expresses the legislative intent that commitment proceedings go forward against a person who may be mentally incompetent and have limited comprehension of the proceedings. S.C. Code §44-48-30(6)(c)-(e) (convicted of a sexually violent offense includes persons who have been charged with a sexually violent offense but found to be incompetent to stand trial for the charged offense; been charged with a sexually violent offense but found not guilty by reason insanity; or been charged with a sexually violent offense and found guilty but mentally ill); §44-48-100(B) (person deemed incompetent to stand trial in criminal proceedings and not likely to become competent does not have right to be competent at a charges hearing).

[20]Indeed, during the interview Petitioner was able to repeat some answers and spell some words Dr. Gehle did not understand, and his spelling "was not terrible." (R., p. 103).

Clearly, including persons who are incompetent to stand trial in criminal court for their sexually violent offenses, persons found not guilty by reason of insanity, and persons found guilty but mentally ill within the scope of the SVPA indicates the Legislature intended that the SVPA encompass persons who may be incompetent to assist in their defense in SVPA civil commitment proceedings.

Petitioner asserts the statutory provisions regarding the timing of written notice to the multidisciplinary team for persons found not guilty by reason of insanity or incompetent to stand trial on the criminal charges anticipate the need for a competency hearing, and indicates the Legislature expected that a person found guilty but mentally ill would be competent to participate in the SVPA proceedings. Petitioner's conclusion fails to track the specific language of the statute sections he cites. Section 44-48-40(1) provides that the SVPA review process begins 270 days before "the person's anticipated release from total confinement." (emphasis added). When read in context, the references to hearings in §44-48-40(2) (unfit to stand trial) and (3) (not guilty by reason of insanity) are merely a legislative recognition that other statutory provisions require hearings before a person can be released from total confinement, and requiring that the SVPA process begins 270 days before those hearings take place. Rather than indicating the Legislature intended for persons to be competent, this evidences a legislative intent to prevent releases before the SVPA process can begin.[21]

Taken to its logical conclusion, Petitioner's contention that competency is required before a SVPA case can proceed would significantly impair the State's substantial interest in protecting the public if a person with a qualifying sexually violent offense can claim he is too incompetent to

[21]That is exactly how the SVPA process began in Oxner when a hearing was scheduled that could have released him to the public.

participate in SVPA proceedings because of his mental disorder and the proceedings cannot move forward. As in this case, 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.[22] *See* Moore, 237 P.3d at 544 (potential overlap exists between sexual predator type mental disorders and those making the person incompetent). Requiring competency restoration before SVPA proceedings can move forward could indefinitely, or permanently, delay the SVPA proceedings, a fact that 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).

[22]Dr. Gehle testified that Petitioner has some delusions that are sexual in nature, and some of his sexual offending was related to his schizophrenic delusional thinking. (R., pp. 115-117).

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

Petitioner contends Judge Seals incorrectly relied on §44-48-100(B) as the basis for denying Petitioner's motion for a competency evaluation because that section of the SVPA did not apply. As a threshold matter, when read in context, Judge Seals' reference to that section could reflect his determination that the language of §44-48-100(B) answered the question of the legislative intent regarding incompetent persons. (R., pp. 3-4). While §44-48-100(B) does not directly relate to Petitioner'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 court of appeals correctly found the Legislature contemplated the possibility that persons subject to the SVPA might well be mentally incompetent during SVPA proceedings, and did not intend that possibility to factor into the efficacy of SVPA proceedings. Accordingly, Judge Seals properly considered the language in §44-48-100(B) as instructive on the issue of Petitioner's right to a competency evaluation, and the court of appeals properly affirmed that ruling.

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

Finally, Petitioner contends Judge Brown erred in ruling he could not overrule Judge Seals' ruling at the August 7, 2018, hearing, but he "was inclined to grant" Petitioner's second motion for a competency evaluation. He argues this was error because Petitioner's mental health status was "fluid" and had deteriorated since the August hearing, and therefore, Judge Seals' ruling was not binding on Judge Brown. This argument is the ultimate red herring.

As a threshold matter, Petitioner's assertion that Judge Brown "was inclined" to order a competency evaluation misrepresents the record. The colloquy Petitioner cites was in the context of trial counsel's reference to Chapman and his assertion it would be difficult to be effective when he could not communicate with his client. After noting the SVPA does not specifically address competencies in "these types of cases" and referencing the status of Oxner, Judge Brown then stated he did not disagree with counsel's statement but "even if for argument sake I agreed with you, . . . I don't think I have authority to overrule when Judge Seals has done." (R., pp. 41-42) (emphasis added). Taken in context, Judge Brown's statements did not indicate he "was inclined" to grant Petitioner's motion and order a competency evaluation, but for argument sake, he merely agreed with trial counsel's statement regarding his inability to communicate with his client.

The issue at the hearing before Judge Seals was whether Petitioner was legally entitled to a competency evaluation at all under the SVPA, and that legal issue did not change between August and October. The fluidity or deterioration of Petitioner's mental health and competency was irrelevant in August 2018, and it remained irrelevant in October 2018. At the August 2018 hearing, Judge Seals ruled Petitioner was not legally entitled to a competency evaluation under the SVPA, and Judge Brown properly recognized the ruling on that legal issue was binding in subsequent circuit court proceedings. *See* Belton v. State, 313 S.C. 549, 443 S.E.2d 554, 557 (1994) (circuit

court judge has no authority to overrule another circuit court judge on a purely legal question) (*citing* Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 [1986]).

CONCLUSION

Based on the foregoing and the Final Brief of Respondent in the court of appeals, the State submits the court of appeals opinion affirming the judgment of the circuit court and Petitioner's commitment as a sexually violent predator pursuant to the SVPA should be affirmed.

Respectfully submitted,

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