THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2016-001125
Case No. 2011-CP-32-02607

In the Matter of the Care and Treatment of Frances Arthur Oxner, Appellant

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FINAL REPLY BRIEF OF APPELLANT

A. Mattison Bogan
Blake T. Williams
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Robert Michael Dudek
David Alexander
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorneys for Frances Arthur Oxner

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Attorneys for Frances Arthur Oxner

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I. *In re Chapman* Supports Oxner's Procedural Due Process Argument.

A. The *Chapman* Decision and its Impact.

The Supreme Court's recent opinion in *In re Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), supports a finding by this Court that S.C. Code Ann. § 44-48-100(B) improperly deprives accused SVPs of their right to procedural due process. In *Chapman*, the Court unequivocally held that "persons committed as SVPs have a right to the effective assistance of counsel, and may effectuate that right by seeking a writ of habeas corpus." *Id.* at 175, 796 S.E.2d at 844. This appeal presents the a logical extension of *Chapman*—if SVPs are entitled to the effective assistance of counsel, how can counsel be effective when his or her client is incompetent and unable to assist in the defense?

Chapman concerned an appeal from a final SVP hearing on the merits. A jury found that Jeffrey Chapman met the statutory definition of an SVP and, as a result, the trial court signed an order to civilly commit Chapman. On appeal, Chapman argued that the Supreme Court should recognize that persons committed as SVPs have a right to the effective assistance of counsel. The Court agreed that there is such a right, and found that such claims may be asserted via a writ of habeas corpus.

The Supreme Court made several key findings in *Chapman* that have an impact on this matter. First, the Court acknowledged that, "given the significant due process implications inherent in civil commitments," the right to counsel afforded by section 44-48-90(B) of the SVP Act "is not merely a statutory right, but is also a ***constitutional*** one arising under the Fourteenth Amendment and South Carolina Constitution." *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (emphasis added). As the Court explained, "[l]est this right ring hollow, we further hold this right

to counsel is necessarily a right to effective counsel." *Id.* at 180, 796 S.E.2d at 847. The Court reasoned that because the General Assembly provided SVPs with a right to counsel, it "***cannot be merely a superficial right***." *Id.* at 184, 796 S.E.2d at 849 (emphasis added). Finally, the Court found that the familiar standard from *Strickland v. Washington*, 466 U.S. 668, 689 (1984) should apply to determine effectiveness, explaining that "[a]n 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 (emphasis added).

The Court rejected Chapman's argument that SVPs should be permitted to raise ineffective assistance of counsel claims on direct appeal, finding that such claims are properly asserted in a subsequent common law habeas proceeding.[1] *Id.* at 180-81, 796 S.E.2d at 847. The Court explained that although there is typically no right to counsel in state habeas proceedings, it "would be not only inequitable, but also the ***functional equivalent of denying SVPs the right to effective assistance of counsel***" to require SVPs to assert ineffective assistance of counsel claims without the assistance of counsel. *Id.* at 183, 796 S.E.2d at 848 (emphasis added). Therefore, the Court determined that SVPs have a right to counsel during their first habeas proceeding. *Id.*

B. *Chapman* Provides Direct Support for Oxner's Argument that the S.C. Code Ann. § 44-48-100(B) Proceeding Violated his Due Process Rights in Light of his Inability to Assist Counsel.

The Supreme Court broke new ground in *Chapman*, officially recognizing that the right to counsel afforded by the SVP Act is akin to the right to counsel afforded in criminal proceedings,

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[1] In light of the Court's finding that ineffective assistance of counsel claims cannot be raised on direct appeal of an SVP proceeding, Oxner hereby withdraws Grounds 4 and 5 of his appeal. These grounds asserted that trial counsel was ineffective for: (1) failing to seek dismissal on procedural grounds and (2) failing to challenge the SVP Act's deprivation of Oxner's constitutional right to a jury trial. Because both of these grounds were premised on a showing of trial counsel's ineffectiveness, they are properly reserved for a subsequent habeas petition pursuant to *Chapman*.

and that SVPs are entitled to the effective assistance of counsel. The Supreme Court reasoned that effective representation of counsel is critical to an accused SVP. This matter presents an important issue directly stemming from this essential right. Oxner is incompetent to stand trial and is unable to assist his counsel in preparing a defense or take the stand to testify on his own behalf. Therefore, how could counsel effectively represent his interests? This problem is precisely why our nation's courts do not force incompetent persons to stand trial in criminal matters. Because the right to effective counsel guaranteed in criminal proceedings is now recognized in SVP matters, the same rule should apply to the circumstances presented in this case.[2]

As Oxner explained in his opening brief, the purpose of requiring a defendant to be competent is 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)) (emphasis added). Moreover, the applicable test for determining competency to stand trial focuses on "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, 396, 360 S.E.2d 706, 708 (1987) (emphasis added). Therefore, competency is directly tied to the effective exercise of one's right to counsel. As the Supreme Court of the United

[2] It is important to reiterate the unique facts of this case. In a typical SVP action, the accused was already tried and convicted of a sexually violent offense, and is nearing the end of his sentence and release back into the general public. The accused SVP was and remains competent to stand trial, and is able to assist counsel in the SVP action and take the stand to testify on his own behalf if he so desires. Here, however, Oxner is incompetent to stand trial and has never been convicted of a sexually violent offense. Moreover, he has been in the custody of the Department of Mental Health since 2005 and will remain in their custody, even if the proposed transfer to a less restrictive facility—which was the impetus for this SVP matter—occurs. Despite the SVP Act being enacted in 1998, *see* 1998 S.C. Act No. 321, this case presents the first instance of the State proceeding under § 44-48-100(B) against a person previously found incompetent to stand trial. (*See* Trial Transcript ("Tr.") p. 4:18-20; R. p. 120.)

States explained in *Drope v. Missouri*, 420 U.S. 162 (1975), the prohibition on subjecting incompetent persons to trial can be viewed "as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Id.* at 171 (quoting Caleb Foote, *A Comment on Pre–Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 834 (1960)) (emphasis added).

Oxner's opening brief explained in detail his complete inability to assist counsel with his defense. Oxner had a limited understanding of the nature of the proceedings and the grave nature of the charges he faced, and he was not self-protective in his competency interview. Additionally, his understanding of the criminal process was marginal, and he demonstrated an inability to "formulate a clear plan as to what he wished his attorney would do for him." (Court Ordered Capacity Evaluation dated Sept. 11, 2014 at 5, Court's Ex. 1; R. p. 223.) The evaluator found that Oxner's mental capacity "make[s] his ability to work with the attorney in preparation of defense ***difficult, if not impossible***." (*Id.* at p. 6; R. p. 224 (emphasis added).)

In line with this assessment, Oxner had several outbursts at the hearing and was eventually removed from the proceedings. (Tr. p. 82:4-25, 84:19-21, 85:9-12, 86:15-16, 87:13-25, 88:11-25; R. 198, 200-04.) In its oral ruling at the hearing, the trial court specifically found Oxner's "ability to consult with and assist counsel to testify on his own behalf and to assist counsel ***to be zero***." (Tr. p. 91:20-92:10; R. p. 207-08.) Additionally, the trial court's Order for Evaluation found that:

> As to the extent to which Respondent's incompetence or developmental disability affected the outcome of the hearing, including its effect on his ability to consult with and assist counsel and to testify on his own behalf, the Court finds that Respondent's ability to perform these functions with his attorney was ***essentially non-existent***.

(Order for Evaluation at p. 4; R. p. 6 (emphasis added).)

Chapman unequivocally proclaimed that accused SVPs have the right to effective assistance of counsel under the *Strickland* standard. Where an SVP is incompetent to stand trial, counsel categorically cannot meet this standard. In this case, Oxner was not able to assist trial counsel in identifying any mitigating evidence or favorable witnesses. Moreover, trial counsel could not risk having him take the stand in his own defense due to his lack of understanding and the likelihood that he would not be self-protective. Therefore, in light of Oxner's inability to ensure his counsel could effectively represent his interests, the Court should find that the § 44-48-100(B) hearing violated Oxner's due process rights.

C. The State's Argument Lacks Merit in Light of *Chapman*.

The State contends that Oxner fails to acknowledge the difference between SVP proceedings, which it correctly notes are civil matters, and criminal proceedings. However, as Oxner pointed out in his initial brief, although SVP cases are civil in nature, the lines are blurred in several respects. This is particularly true regarding the right to effective assistance of counsel recently recognized by *Chapman*. Although SVP proceedings are civil in nature, Oxner's right to the effective assistance of counsel is coextensive with the criminal right and is guided by the same analysis under *Strickland*.

Therefore, Oxner is not improperly conflating competency to stand trial in a criminal matter with competency in an SVP proceeding. After *Chapman*, they ***must*** be conflated since the right to effective counsel is the same in both situations.[3] The policy rationale for the prohibition

[3] In its brief, the State contends that the effect of a finding that the accused SVP committed the charged offenses beyond a reasonable doubt "is not, and will never be, a criminal conviction for any purpose outside the confines" of this SVP case. (*See* Resp. Br. at 19.) In fact, this finding could be much worse. If Oxner was criminally convicted of the charged offenses, he would receive a sentence with a definite end date and would be released at the end of his sentence. However, with this finding, the State may ultimately lock Oxner up and throw away the key. Although the State draws a distinction between being civilly committed and criminally imprisoned, from

against forcing defendants to stand trial in light of their incompetency in a criminal proceeding is equally present for § 44-48-100(B) hearings. The due process right to effective assistance of counsel is fundamentally intertwined with a person's ability to assist counsel in preparing a robust defense. Where, as here, the person is incompetent, counsel cannot be effective since the client cannot assist in the defense or testify on his own behalf.

The State's assertion that requiring competency would undermine legislative intent regarding SVP proceedings raises an irrelevant point. If a provision violates due process and is unconstitutional, it is improper regardless of what the legislature intended. Finding that § 44-48-100(B) proceedings violate the due process rights of accused SVPs found incompetent to stand trial on criminal charges would not lead to an absurd result. Rather, it would lead to a ***constitutional*** result.

Finally, contrary to the State's claim, Oxner is not advocating that any person who unilaterally claims that he is incompetent, without a medical or judicial finding, may avoid having SVP proceedings brought against them. Oxner simply requests the Court recognize that under the narrow circumstances presented in this case—where the accused SVP was previously found incompetent to stand trial in a criminal proceeding—the Court should hold that the SVP Act's

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Oxner's perspective it is a distinction without a difference. If he is found to be an SVP, he will be housed in a special unit at Broad River Correctional Institution—*i.e.*, in prison. As one news report explained, approximately twenty new SVP "residents" are "admitted" to the program each year, but "far fewer ever leave the program," and "[m]any remain inside the Broad River Correctional Institution until their death." Gordon Dill, *To Cure A Predator: SC Program For Sexual Predators Goes Private*, 7 News WPSA (Nov. 3, 2015, 11:00 PM), http://wspa.com/2015/11/03/to-cure-a-predator-sc-program-for-sexual-predators-goes-private/.

guarantee of the right to effective assistance of counsel renders § 44-48-100(B) unconstitutional. Otherwise, the accused SVP's due process rights are violated.[4]

Accordingly, for the reasons stated in Oxner's opening brief and herein, the trial court erred in finding that Oxner's due process rights were not violated. This Court should reverse the trial court and order that this SVP proceeding be dismissed.

II. Oxner Preserved the Procedural Deficiency Argument and the State has not Demonstrated that it Complied with the Procedural Requirements of the SVP Act.

A. Oxner Preserved this Appellate Ground.

As Oxner detailed in his opening brief, the State failed to comply with key requirements of the SVP Act and, therefore, the trial court should have dismissed the proceedings. The State first raises a preservation challenge to this ground, asserting that Oxner "conceded" his argument was not properly preserved. This is patently incorrect. Oxner specifically noted that trial counsel raised the procedural deficiencies at the § 44-48-100(B) hearing, where trial counsel contended that the State did not "meet the qualifications to have [Oxner] fall within . . . the statute." (Tr. p. 80:17-24; R. p. 196.) Oxner asserted in a ***separate*** appellate ground that trial counsel was ineffective for failing to raise the issue ***sooner***—*i.e.*, prior to the state attempting to remedy the procedural deficiencies by re-indicting Oxner in 2014. Oxner in no way suggested that trial

[4] Oxner acknowledges that after he filed his opening brief, one of the cases he relied on to support "changing attitudes" towards SVP programs in other jurisdictions was reversed by the Sixth Circuit. *See Karsjens v. Piper*, 845 F.3d 394 (6th Cir. 2017). However, the *Karsjens* appellants recently filed a petition for a writ of certiorari with the Supreme Court of the United States. *See* Pet. for Writ of Certiorari, *Karsjens v. Piper*, No. 16-1394 (S. Ct. May 19, 2017), *docket information available at* https://www.supremecourt.gov/search.aspx?filename=docketfiles/16-1394.htm. Regardless of the ultimate result in that matter, it does not change the due process analysis in this case, particularly in light of *Chapman*. Additionally, Oxner would note that there is nothing in the Record supporting the State's assertion that South Carolina's SVP program is any better than the programs in Minnesota and Missouri. The State provides no support for its claims that South Carolina has a "lower rate" of SVP commitments and a "high rate of releases." (*See* Resp. Br. at 24 n. 12.)

counsel failed to raise the issue entirely. The State mischaracterizes the two-fold argument presented by Oxner.

Oxner's trial counsel raised the procedural deficiencies to the trial court via objection. (Tr. p. 80:17-24; R. p. 196.) Moreover, the trial court ruled on this objection by finding that the statutory prerequisites were met. (Tr. p. 85:23-86:7; R. pp. 201-02.) Accordingly, this ground was properly preserved for appellate review.

Additionally, even if the issue was not preserved, this case is akin to a criminal matter where proceedings continued after charges were *nolle prossed.* The Supreme Court is unequivocal in recognizing that "all proceedings following an entry of a *nolle prosequi* are void because the indictment was no longer valid." *Mackey v. State*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004); *see also State v. Charles*, 183 S.C. 188, 190 S.E. 466, 470 (1937) ("[A]ll of the proceedings in the trial which followed the entry of the nolle prosequi were nugatory"). As *Mackey* explained, where charges are *nolle prossed*, the State must re-indict a defendant if it wishes to proceed with prosecution. *See* 357 S.C. at 668, 595 S.E.2d at 242. The Supreme Court did not expressly address preservation in *Mackey*, but the clear implication was that the bright-line rule applies regardless of whether the issue is raised to the trial court. The Court was explicit in finding that any time a *nolle prosequi* is entered, subsequent proceedings are void. As Oxner detailed in his opening brief, these SVP proceedings are analogous to criminal proceedings following the charges being *nolle prossed.* Therefore, the Court should adopt the analysis from *Mackey* and find that preservation is not at issue.

B. The State has not Complied with the SVP Act and thus the Trial Court Erred by Failing to Dismiss this Matter.

As Oxner explained in his opening brief, the State wrongly instituted this action in 2011, incorrectly asserting that Oxner met the definition of a person convicted of a sexually violent

offense. The State's petition stated that Oxner met this statutory definition because in 2005 he had been "charged with a Sexually Violent Offense, but found incompetent to stand trial." (Petition p. 1; R. p. 12.) This was erroneous in light of the *nolle prosequi* entered in connection with those charges, which results in the charges being treated as if they never existed.

The inaccurate information in the State's Petition led the Multi-Disciplinary Team to incorrectly find that Oxner "satisfies the definition of a sexually violent predator," and the Prosecutor's Review Committee to incorrectly determine that there was probable cause to believe that "Oxner has been convicted of a sexually violent offense." (Sexual Predator Referral Form, Ex. A to Petition; Probable Cause Determination, Ex. B to Petition; R. pp. 19, 21.) Additionally, based on these incorrect findings, the trial court improperly issued an Order finding that there was probable cause to believe Oxner "meets the criteria of [a] sexually violent predator." (Probable Cause Order p. 1; R. p. 10.) The State's Petition was never amended and these inaccurate findings were never remedied. They continue to relate to the 2005 charges that were *nolle prossed.* Although the State re-indicted Oxner in 2014, it did not complete the statutory prerequisites for the new charges. Therefore, the procedural defects remain.

Furthermore, even if these findings were proper, the required hearing entitling Oxner to challenge probable cause was not held within the seventy-two hour time frame mandated by the SVP Act and the trial court's initial Probable Cause Order. Thus, this procedural deficiency also remains.

1. Oxner did not meet the Statutory Definition of a Person "Convicted of a Sexually Violent Offense."

The State contends that SVP proceedings were properly initiated against Oxner in 2011 despite Oxner having any pending charges because the SVP Act simply refers to a person who "has been charged." *See* S.C. Code Ann. § 44-48-30(6)(c). The State asserts that because Oxner

was charged at some point in the past, he meets this criteria. This conclusion ignores that the prior charges were *nolle prossed* and are thus treated as if they never existed under South Carolina law.

The SVP Act defines a person "convicted of a sexually violent offense" as someone who "has been charged but determined incompetent to stand trial for a sexually violent offense." *See* S.C. Code Ann. § 44-48-30(6)(c). The State's position disregards the effect of the *nolle prosequi* entered by the solicitor in relation to those charges. As *Mackey* unequivocally explains, "when a solicitor enters a *nolle prosequi*, charges are ***extinguished***." 357 S.C. at 668, 595 S.E.2d at 242 (2004) (emphasis added). Moreover, South Carolina law "treats charges *nol prossed* ***as if they never existed***." *Id.* (second emphasis added). Although it is technically correct that Oxner was charged with sexually violent offenses in 2005, the Court must treat these charges as if they never existed. In the eyes of the law, at the time the State filed the Petition, Oxner had never been charged with a sexually violent offense.[5]

In re Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010), *aff'd*, 398 S.C. 149, 728 S.E.2d 32 (2012) does not support the State's position that the SVP proceedings may be instituted where charges were *nolle prossed.* In *Manigo*, the issue before the Court was whether the SVP Act "is triggered only if a person is ***currently serving a sentence*** for a sexually violent offense." *Id.* at 100, 697 S.E.2d at 631 (emphasis added). Therefore, that case presented a very different set of circumstances. In *Manigo*, the accused SVP was (1) charged with a sexually violent offense, (2) convicted of that offense, and (3) served his sentence for that offense in its entirety. *See id.* at 99-100, 697 S.E.2d at 630-31. As the Court explained, the SVP Act only requires that the person

[5] By relying on *Mackey*, Oxner is not attempting to assert that these are criminal proceedings. Rather, Oxner pointed to *Mackey* as an analogous situation which the Court should extend to the present circumstances. There is nothing in the *Mackey* decision which indicates its bright-line rule for the treatment of *nolle prossed* charges applies only in the criminal context.

have been convicted of a sexually violent offense, and nothing in the Act suggests that the person must be serving an active sentence. *Id.* at 101, 697 S.E.2d at 631. Therefore, the accused SVP in *Manigo* met the statutory definition.

As a result, *Manigo* is distinguishable on its face. There was no question that the accused SVP in *Manigo* had been convicted of a sexually violent offense. The accused's charges were still viable and his conviction was still on his record. The only wrinkle was that he had completed his sentence. It was abundantly clear though that the accused met the SVP Act's definition of a person convicted of a sexually violent offense. In this case, however, Oxner was deemed to have never been charged with a sexually violent offense at the time the petition was filed due to the *nolle prosequi*. Accordingly, Oxner did not meet the statutory definition when these proceedings were bought. The State's reliance on *Manigo* is misplaced.

2. The Court did not Hold the Required Probable Cause Hearing within the Statutory Mandated Deadline.

These SVP proceedings are also procedurally improper because a probable cause hearing was not held within the time contemplated by the SVP Act. The Act provides that upon filing of a petition, "the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator." S.C. Code Ann. § 44-48-80(A). Then, "[i]f the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility." *Id.* Finally, once the person is in custody, he "must be provided with notice of the opportunity to appear in person at a hearing to contest probable cause as to whether the detained person is a sexually violent predator." S.C. Code Ann. § 44-48-80(B). This hearing must occur within seventy-two hours after a person is taken into custody. *Id.*

The State contends that the SVP Act only imposes a seventy-two hour requirement where the accused SVP is actually taken into custody. The State fails to explain, however, why the seventy-two hour time limit should not be afforded to accused SVPs who are already housed in a Department of Mental Health facility.

The State does not appear to contest that Subsections (B) and (C) of § 44-48-80 provide various due process protections to ***all*** accused SVPs. Subsection (B) affords the accused SVP with the opportunity to "contest probable cause as to whether the detained person is a sexually violent predator," and subsection (C) provides the accused SVP with the right to: (1) be represented by counsel, (2) present evidence on the person's behalf, (3) cross-examine witnesses who testify against the person, and (4) to view and copy all petitions and reports in the court file. S.C. Code Ann. § 44-48-80(B) and (C). These statutory protections are equally important to both accused SVPs who are taken into custody and those in Oxner's position, as they each face the same challenges in preparing a defense to the SVP petition.

Additionally, if the court finds that there is probable cause, § 44-48-80(D) requires the court to direct that "upon completion of the criminal sentence, the person must be transferred to a local or regional detention facility pending conclusion of the proceedings under this chapter." S.C. Code Ann. § 44-48-80(D). This detention requirement appears to also apply where an SVP is about to be transferred to a less secure facility. This section further requires that, upon finding probable cause, the court order "the person be transported to an appropriate facility of the South Carolina Department of Mental Health for an evaluation as to whether the person is a sexually violent predator." *Id.* Therefore, the consequences of a probable cause finding is the same for all SVPs. Thus, the same rules should apply regardless of whether the accused SVP was taken into custody or prohibited from being transferred to a less restrictive facility. Why should accused

SVP's in Oxner's position not be afforded the same guarantee to challenge probable cause within the seventy-two hours after being served with the SVP Petition?

Finally, refusing to recognize the applicability of the seventy-two hour requirement under these circumstances would lead to an absurd result. The State does not dispute that the probable cause hearing occurred in this matter on April 21, 2016. This was nearly ***five*** years after the Petition was filed. It would defy logic to require a highly expedited hearing on probable cause for some SVPs while permitting other SVP matters to languish for years without even a preliminary determination on probable cause. Accordingly, this procedural defect also warrants reversal.

3. The State's Re-indictment of Oxner in 2014 did not Remedy the Procedural Deficiencies.

Although the State re-indicted Oxner in 2014, this did not remedy the procedural defects because the State did not begin the SVP process anew in order to obtain the required findings in relation to the new charges. Rather, the allegations of the Petition and findings of the Multi-Disciplinary Team, the Prosecutor's Review Committee, and the trial court in its Probable Cause Order are still effective and remain grounded on the 2005 charges which were *nolle prossed.* Therefore, because the State failed to complete several fundamental prerequisites in this matter, the trial court should have dismissed this matter.

Contrary to the State's assertion, Oxner does not take issue with the state re-charging him. Oxner's argument challenges the State's institution of SVP proceedings against him pursuant to charges that were *nolle prossed*, and its failure to re-charge him until nearly three years later. Oxner is not contending that the State was required to keep the charges pending indefinitely, although this was conceivably an option. Instead, the proper procedure in this case would have been for the State to ***first*** re-indict Oxner and ***then*** bring the SVP proceedings to obtain the

necessary findings on those charges. The State improperly reversed the steps in this matter. The statutory prerequisites simply have not been met.

Therefore, for all of these reasons, this Court should reverse and order that this matter be dismissed due to the continuing procedural defects. Barring dismissal, the Court should remand with a directive that the State amend its petition and obtain the statutorily mandated findings based on the 2014 indictments, with a new § 44-48-100(B) hearing to follow.

III. The State Violated Oxner's Right to a Speedy Trial.

The SVP Act affords "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent" for § 44-48-100(B) proceedings. Therefore, the SVP Act recognizes, and the State does not dispute, that Oxner had the right to a speedy trial under § 44-48-100(B). Nearly five years passed between the filing of the SVP petition and the § 44-48-100(B) hearing. As Oxner detailed in his opening brief, under the applicable factors his right to a speedy trial was violated and he suffered prejudice.

First, the Court should find that the filing of the petition was the starting date for the speedy trial clock. The State contends that the re-indictment date should control, but this would lead to an illogical result. Oxner's right to a speedy trial must necessarily relate to his right to a speedy trial ***under the SVP Act***. Oxner is not attempting to assert his right to a speedy criminal trial pursuant to the criminal indictments as the state suggests. Because Oxner is asserting this right with regard to the SVP proceedings, the logical starting point for the speedy trial clock would be the filing of the petition since that is when he was formally "accused" under the SVP Act. *Cf. United States v. MacDonald*, 456 U.S. 1, 6 (1982) (noting that the clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused"). The filing of the petition was analogous to the filing of the indictment in a criminal case.

In its brief, the State contends that "circumstances outside of [its] control" resulted in the lengthy delay between the filing of the SVP petition and the § 44-48-100(B) hearing. The State first cites to the need to re-indict Oxner in 2014 and have him re-evaluated for competency before the SVP hearing could proceed. This situation was clearly within the State's control. If the State had followed the proper procedure, it would have refrained from bringing the SVP petition until after Oxner was properly facing charges. Moreover, nothing prohibited the State from re-indicting Oxner much earlier than 2014. The Record is silent as to why the State waited for three years to complete this step. Ultimately, the delay was self-inflicted by the State.

The State also contends that Oxner is incorrect in asserting that no activity occurred in the SVP proceedings for four years because of the steps taken to re-indict him in 2014. As Oxner explained, however, this had no bearing on the SVP proceedings. It was a completely accurate statement to say that no activity occurred in the docket of ***this SVP matter*** from September 20, 2011 to September 10, 2015. The 2014 charges were filed in separate criminal matters, and none of the activity in connection with those matters showed up on the docket for this case.

Next, the State cites a "lack of communication and/or cooperation" with Oxner's counsel regarding setting a hearing. This is unsupported by anything in the Record on Appeal. Therefore, it is pure conjecture on the State's part. Likewise, there is nothing in the Record supporting the State's assertion that Oxner's counsel failed to actively or aggressively represent his interests. It is unclear from the Record why the case sat for so long, and it is speculative to place the blame solely on Oxner's counsel.

Finally, the State pointed to the need to obtain evidence and prepare a case involving circumstances from ten and twenty years ago. Again, however, it should not have taken the State nearly five years to prepare its case. The SVP Act contemplates that proceedings will move at a

brisk pace, with the evaluation occurring within sixty days after the probable cause determination and the final merits hearing occurring within ninety days after the expert issues his evaluation, or at the next available term of court if there is no term during that ninety day period. *See* S.C. Code Ann. § 44-48-80(D) and -90(B). Therefore, if the probable cause hearing was held within the proper time frame the State would have had ***considerably*** less time to prepare its case. The SVP Act contemplates a pace of months, not multiple years.

Accordingly, the State has not sufficiently demonstrated that the delay was justified under the *Langford* factors. *See State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) ("These factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered."). First, the delay was very lengthy, as nearly five years transpired between the filing of the Petition and the § 44-48-100(B) hearing. Next, the State failed to provide a sufficient reason for the delay. Although the State has attempted to provide some justification for the delay between the re-indictment in 2014 and the § 44-48-100(B) hearing, the State tellingly fails to provide any concrete explanation supported by the Record for the delay between the filing of the SVP petition in 2011 and the re-indictment in 2014. Instead, the State tried to get around this problem by claiming that the speedy trial clock did not start until the re-indictment.

Oxner's assertion of his speedy trial right is unclear. Although trial counsel raised the issue at the § 44-48-100(B) hearing, she did not raise it prior to then. At the time, however, she had only been representing Oxner for seven months. The Record is unclear regarding Oxner's prior counsel and his level of involvement in the case. He did not make any filings or court appearances on Oxner's behalf aside from making a few cursory filings in the few weeks after the State filed the SVP Petition in 2011. Therefore, the Record simply does not answer whether counsel had any

continuing substantive involvement in Oxner's representation. Regardless, it is not a prerequisite that every factor weigh in Oxner's favor, as the factors must be weighed together along with any other relevant circumstances. *See Langford*, 400 S.C. at 440, 735 S.E.2d at 481

Finally, Oxner suffered prejudice. Right before the State filed the SVP Petition, Oxner was poised to be transferred to a less restrictive facility within the Department of Mental Health. The delay has prohibited Oxner from realizing that increased freedom for many years. Furthermore, as Oxner explained in his opening brief, it can be presumed that he suffered prejudice due to the long delay. *See State v. Hunsberger*, 418 S.C. 335, 351, 794 S.E.2d 368, 376 (2016) ("When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim."). As the *Hunsberger* Court explained, excessive delay "presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Id.* The nearly five year delay in this matter between the filing of the petition and the probable cause/§ 44-48-100(B) hearing is simply inexplicable. The State's primary justification for the delay was that there is no statutory time requirement. This is not sufficient to overcome the presumption of prejudice due to the unnecessarily long delay.

Therefore, because each of the speedy trial factors weighs in Oxner's favor, this Court should reverse and dismiss the SVP proceedings.

CONCLUSION

For the reasons stated herein and in Appellant's opening brief, this Court should reverse the judgment of the trial court and order that this matter be dismissed. Failing this, the Court should reverse and remand with instructions that the State must amend its petition and obtain the statutorily mandated findings based on the 2014 indictments, with a new § 44-48-100(B) hearing to follow.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Blake T. Williams

A. Mattison Bogan
S.C. Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Robert Michael Dudek
S.C. Bar No. 1767
E-mail: rdudek@sccid.sc.gov
David Alexander
S.C. Bar No. 68632
E-mail: dalexander@sccid.sc.gov
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorneys for Frances Arthur Oxner

June 29, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2016-001125
Case No. 2011-CP-32-02607

In the Matter of the Care and Treatment of Frances Arthur Oxner, Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Signature on Following Page

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Blake T. Williams

A. Mattison Bogan
S.C. Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Robert Michael Dudek
S.C. Bar No. 1767
E-mail: rdudek@sccid.sc.gov
David Alexander
S.C. Bar No. 68632
E-mail: dalexander@sccid.sc.gov
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorneys for Frances Arthur Oxner

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