STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Diane Goodstein, Circuit Court Judge
Appellate Case No. 2016-001125

IN THE MATTER OF THE CARE AND TREATMENT OF
FRANCIS ARTHUR OXNER,

Appellant.

FINAL BRIEF OF RESPONDENT

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IV. Appellant's allegations of ineffective assistance of counsel are not properly before this Court in this direct appeal. (Appellant's Issues IV and V).

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Appellant Frances Arthur Oxner in 2005 on one count of first degree criminal sexual conduct with a minor under the age of eleven, one count of assault with intent to commit first degree criminal sexual conduct with a minor under the age of eleven, one count of assault with intent to commit criminal sexual conduct, and one count of buggery. After indictment, Appellant was evaluated, determined to be mentally incompetent to stand trial, and committed to a South Carolina Department of Mental Health ("DMH") secure forensic unit. (Petition filed July 11, 2011 [SVPA Petition] with Exhibits; Record on Appeal [R.], pp. 0012-0116).

In 2011, prior to Appellant's transfer from DMH secure forensic unit to a less restrictive placement, the State commenced this action pursuant to the South Carolina Sexually Violent Predator Act ("SVPA"), seeking Appellant's commitment as a sexually violent predator. In light of Appellant's continuing incompetence, the Honorable Diane Schafer Goodstein, Circuit Court Judge, conducted a hearing in accordance with the SVPA to determine whether the State could show beyond a reasonable doubt Appellant committed the charges offenses.

The circuit court determined there was sufficient evidence to show Appellant committed the offenses beyond a reasonable doubt, and ordered Appellant be evaluated pursuant to the SVPA. This appeal followed.

STATEMENT OF FACTS

In 2005, Appellant was charged with sexually assaulting three minor children, and having anal intercourse with a Shetland pony, between 1979 and 2005. SVPA Petition, pp. 1-3 & Exhibit E; R., pp. 0012-0014, 0055-0104). Post-indictment, a competency evaluation concluded Appellant was incompetent to stand trial, and not likely to become competent. (SVPA Petition, Exhibit C; R., pp. 0022-0054). Under the applicable statutes, Appellant was committed through the probate court to DMH's secure forensic facility for treatment, and the pending charges against him were *nolle prossed* in December 2005.

Subsequently, DMH sought to transfer Appellant from the secure forensic facility to a less restrictive facility, which triggered the SVPA review process. After the Multidisciplinary Team and the Prosecutor's Review Committee found probable cause to believe Appellant was a sexually violent predator, the State commenced this action on July 11, 2011, seeking Appellant's commitment for long term control, care and treatment as a sexually violent predator. (SVPA Petition, pp. 1-2 & Exhibits A and B; R., pp. 0012-0013, 0018-0019, 0020-0021).

By Order filed August 16, 2011, the Honorable William P. Keesley, Circuit Court Judge, found the SVPA Petition established probable cause to believe Appellant met the criteria for commitment as a sexually violent predator. The court further found the case should proceed under the provision of the SVPA applicable to persons found to be incompetent to stand trial and not likely to become competent. (Probable Cause Order filed August 16, 2011; R., pp. 0010).

The clerk of court appointed counsel to represent Appellant on August 16, 2001, and Appellant was served with the SVPA Petition and Probable Cause Order on September 9, 2001. (Order Appointing Counsel filed August 16, 2011, Affidavit of Service filed September 13,

2011; R., pp. 0008-0249). Appellant's counsel filed a discovery motion on September 20, 2011. (Brady Motion filed September 20, 2011; R., pp. 0245).

In order for the State to proceed with the next step in the SVPA proceeding, the Eleventh Circuit Solicitor's Office re-indicted Appellant in 2014 on one count of assault with intent to commit first degree criminal sexual conduct with a minor, and one count of first degree criminal sexual conduct with a minor. (Court's Exhibits 2 & 3; R., pp. 0225-0226). As a result, Appellant was evaluated for competency, and again found incompetent to stand trial and not likely to become competent. (Court's Exhibit 1; R., pp. 0218).

Another attorney was appointed to represent Appellant in this action on May 18, 2015. Thereafter, in light of Appellant's incompetency, the SVPA required hearing to determine whether Appellant committed the alleged offenses ("charges hearing") took place on April 21, 2016, before the Honorable Diane Schafer Goodstein, Circuit Court Judge.

Prior to taking testimony, Appellant challenged the constitutionality of the SVPA section requiring the charges hearing on the grounds he could not assist in his defense on the criminal charges, and it deprived him of his right to a jury trial. In a very well-reasoned decision, the circuit court found the statute was constitutional because it was a civil commitment rather than a criminal matter, and the court's decision would not constitute a criminal conviction on which a sentence could be imposed. The court further found the only thing triggered by a determination Appellant committed the alleged offenses was a probable cause determination and possible evaluation under the SVPA, and the statute provided more protection of Appellant's rights than a probate court civil commitment process. (Hearing Transcript [HT], pp. 4-24; R., pp. 0120-0140).

The victim in the assault with intent to commit criminal sexual conduct ("Victim 1") testified she was seven to eight years old in 1979-80, she lived with her father, and Appellant

was her uncle. Appellant lived on property next to Victim 1 and her family, and he had animals and other things at his home that attracted children. (HT, pp. 26-30; R., pp. 0142-0146).

In August 1979, when Victim 1 was seven years old, she went over to Appellant's house to feed his rabbits and ducks. Appellant told her to come inside the house because he had some Little Debbie Cakes. After they went inside, Appellant told Victim 1 to go upstairs to see some baby chickens and ducks he had up there. When they got upstairs, Appellant grabbed Victim 1 in a "real rough" manner, and removed her pants and underwear. Victim 1 tried to get away from him and told him to leave her alone, but Appellant removed his clothes and tried to penetrate Victim 1 with his penis. Victim 1 continued struggling and was eventually able to get away. She testified this type of attack continued through June 1980. (HT, pp. 30-41; R., pp. 0146-0157).

The victim in the first degree criminal sexual conduct with a minor charge (Victim 2), testified he is Victim 1's son, and in the summer of 2004, he was ten years old and living with Victim 1's parents (his grandparents) next to Appellant's property. He related an incident when he and his half-brother went over to Appellant's house to borrow a bicycle, and Appellant asked them to perform oral sex on him. When they refused and started running away, Appellant chased them with a whip and struck Victim 2's brother on the back. (HT, pp. 50-55; R., pp. 0166-0171).

On another occasion, Victim 2 went over to Appellant's to borrow a bicycle tire pump, and Appellant told him the only way he could get it was to "suck [Appellant's] dick." Appellant then exposed his penis and forced Victim 2's head down on it. Victim 2 stated he did not know what to do, so he "just did it." He testified the oral sex occurred twice, and he eventually told his aunt, who took him to the police to file a report. (TT, pp. 55-63; R., pp. 0171-0179).

Lieutenant Eric Russell of the Lexington County Sheriff's Department testified he investigated the allegations against Appellant when they were reported in 2004. Based on the victims' statements, he obtained a search warrant for Appellant's premises. While executing the search warrant, they found pornography and he had one of the officers take pictures of Appellant's house . (HT, pp. 70-74, State's Exhibits 1-8; R., pp. 0186-0190, 0227-0241).

After the State rested its case, the circuit court inquired about the history of the case and how it came before the court for the charges hearing. The State advised the court the case was referred to the Multidisciplinary Team (MDT) by DMH before Appellant was released from the secure facility in which he was housed. The MDT found probable cause to believe Appellant met the criteria for commitment under the SVPA, and referred it to the Prosecutors Review Committee, which also found probable cause. The State then filed the Petition initiating the proceeding in court. (HT, pp. 79-80; R., pp. 0195-0196).

Appellant contended the hearing was not timely because the MDT referred the case in 2011, and the charges hearing did not occur until four years and ten months later. The State acknowledged there was a delay in getting the hearing scheduled, but noted the statute did not set a deadline for having the charges hearing. All statutorily mandated deadlines prior to the charges hearing were met, and further deadlines would be triggered if the court found probable cause and ordered an evaluation. (HT, pp. 80-81; R., pp. 0196-0197).

The court conducted an *ex parte* hearing with Appellant and his counsel. After that hearing, the court found the charges hearing complied with the procedures set forth in the SVPA, Appellant's constitutional rights were protected in accordance with the statute, and he remained incompetent to stand trial in criminal court. (HT, pp. 85-86; R., pp. 0201-0202). Before the court proceeded with its findings on the charges, Appellant was removed from the courtroom at

his attorney's request because he continually made outbursts in the courtroom, and the attorney was "concerned about what else he might say." (HT, pp. 86-88; R., pp. 0202-0204).

The court found beyond a reasonable doubt that Appellant committed the alleged sexual acts as to Victim 1 and Victim 2. The court further found the records indicated DMH had done everything possible to treat Appellant with medication, but he needed sex offender treatment. (HT, pp. 89-91; R., pp. 0205-0207).

The court then found Appellant's ability to assist his attorney was "zero," but the attorney's cross-examination of the State's witnesses was "expertly done" in spite of that limitation. (HT, pp. 91-93; R., pp. 0207-0209). As to the strength of the State's case, the court found both victims were "absolutely compelling," "credible," and "believable." They both remembered details of the incidents, which were clearly articulated in their testimony. In addition, the court found Lt. Russell's memory of the case was strong, including the fact there were other unnamed victims. (HT, pp. 93-94; R., pp. 0209-0210).

Based on those findings, the court found probable cause to believe Appellant is a sexually violent predator, and ordered an evaluation. (HT, pp 94-95, Order for Evaluation filed May 18, 2016; R., pp. 0210-0211, 0003). In accordance with the SVPA, this appeal of the court's findings followed.

ARGUMENT

I. Appellant's procedural issue is not preserved for appellate review, but even if the issue was preserved, the State complied with all statutory requirements of the SVPA.

Appellant contends this action was procedurally improper because when the State filed the Petition, the charges against him had been *nolle prossed*, and therefore, he did not meet the statutory definition of a sexually violent predator. As a threshold matter, this issue is not preserved for appellate review. *See* Issue IV below. Even if preserved, however, Appellant's contention ignores the plain, unambiguous language of the applicable SVPA provisions.

A. Preservation

"'It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'" Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282, 286 (2012) (*quoting* Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 [1998]). "'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.'" *Id.* at 285 (*quoting* Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 919 [Ct.App.2006]).

Appellant concedes this procedural issue was not raised in the circuit court. *See* Brief of Appellant, Issue IV. Thus, it is not properly before this Court.

B. Statutory Provisions

Even if preserved, Appellant's contention fails on the merits. The cornerstone of Appellant's procedural contention is S.C. Code §44-48-30(6)(c), which defines "convicted of a sexually violent offense" as someone who has "been charged but determined to be incompetent to stand trial for a sexually violent offense." Relying on cases regarding the effect of *nolle*

prossed charges **in criminal cases**, he asserts he did not meet this definition because the charges against him were *nolle prossed* after he was found to be incompetent and not likely to become competent.

Appellant relies primarily on Mackey v. State, 357 S.C. 666, 595 S.E.2d 241 (2004). In Mackey, the charges against the defendant were *nolle prossed*, and the solicitor failed to re-indict him before proceeding to a **criminal** trial **on the *nolle prossed* charges**. The defendant was convicted, and the Supreme Court reversed his convictions, finding the solicitor had to re-indict him before proceeding to trial on the previously *nolle prossed* criminal charges. *Id.*; *see also* In re Brown, 294 S.C. 235, 363 S.E.2d 688 (1988) (trial court lacked jurisdiction to entertain third party motions in *nolle prossed* criminal case).

Unlike Mackey and Brown, this is a civil case, and the State is not seeking criminal convictions on the *nolle prossed* charges, or even the re-indicted offenses. It cannot be disputed Appellant was indicted on multiple sexual offenses against minors in 2005. After Appellant was found to be incompetent and unlikely to become competent, in accordance with applicable statutes, the solicitor initiated involuntary commitment proceedings through the probate court. *See* S.C. Code § 44-20-430 (Supp. 2016) (upon finding of incompetence, solicitor responsible for prosecution "shall initiate judicial admission proceedings"). Rather than keep the charges on the criminal docket indefinitely, the solicitor *nolle prossed* them after Appellant was committed to DMH for treatment.[1]

[1]Appellant's reference to State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), is telling. The solicitor controlled docket and the length of time cases remained on the docket between indictment and resolution were primary issues in Langford. In this case, Appellant seeks to use the solicitor's effort to prevent the charges from remaining on the criminal docket indefinitely as a sword to preclude SVPA review.

Contrary to Appellant's contention, the SVPA does **not** require that the charges be actively pending in order to trigger the SVPA, merely that the person "**has been charged**" with a sexually violent offense. *See* In the Matter of the Care and Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629, 631 (2010) (SVPA language "**has been** convicted of a sexually violent offense" does not require the person to be "**currently** serving an active sentence for a sexually violent offense" in order to be reviewed under the SVPA because use of the past tense language is unambiguous) (emphasis added). In 2011, DMH's decision to move Appellant from its secure forensic medical facility to a less restrictive facility triggered SVPA review. At that point, Appellant was a person who "**has been charged**" with a sexually violent offense and determined to be incompetent. Therefore, he was properly reviewed and referred under the SVPA, and the Petition was properly filed.

Appellant's characterization of his subsequent re-indictment as the State's attempt to remedy the purported procedural defects is likewise inaccurate, and ignores the specific language of §44-48-100(B), which governs the charges hearing. Unlike the "has been charged" language of §44-48-30(6)(c), §44-48-100(B) provides the court must "hear evidence and determine whether the person committed the act or acts with which he **is charged,**" "make specific findings on whether the person committed the act or acts with which he **is charged,**" and find "beyond a reasonable doubt the person committed the act or acts with which he **is charged**." (emphasis added). The present tense verb "is" indicates a circumstance existing at the time something occurs, rather than something that occurred previously. *See* In the Matter of the Care and Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462, 465-466 (2015) (State's burden of proof in a sexually violent predator proceeding requires proof at trial the person "is **presently** a sexually

violent predator") (emphasis added); Manigo, 697 S.E.2d at 633 (analysis would be different if SVPA used present tense language, such as "is" or "are," rather than the past tense "has been").

Consequently, there must be pending active charges before a charges hearing can proceed. Appellant's re-indictment on two charges (rather than the multiple charges filed in 2005) provided the court with specific criminal charges on which to hear evidence and determine whether Appellant committed the alleged offenses.

Finally, Appellant contends the circuit court failed to conduct a probable cause hearing as required by S.C. Code §44-48-80(B), which he asserts had to take place within seventy-two hours of the initial probable cause determination.[2] Again, Appellant ignores significant language in both the statute and the Probable Cause Order.

Section 44-48-80(A) provides the circuit court must review the State's petition and determine if it sufficiently establishes probable cause to believe the person is a sexually violent predator. If the court finds probable cause, "the person must be taken into custody **if he is not already confined in a secure facility**." If the person is "**taken into custody**" under the probable cause order, the court must hold a probable cause hearing within seventy-two hours. §44-48-80(B) (emphasis added).

The Probable Cause Order in this case provided Appellant was to be taken into custody "[i]f [Appellant] **is not in custody in a secure facility"** It further provided a hearing "shall be held before the Court within 72 hours after [Appellant] has been taken into custody, **if he is not already in custody**." ." (Probable Cause Order filed August 16, 2011; R., p. 0010-0011).

[2]Appellant cites §44-48-70 in his Brief, but the context of his argument clearly indicates he is discussing §44-48-80.

It is undisputed Appellant was already "in custody" in a secure DMH facility pursuant to probate court proceedings when the Probable Cause Order was filed in this case. Therefore, the seventy-two hour requirement in §44-48-80(B) and the Probable Cause Order did not apply.

When interpreting statutes, courts must presume the legislature did not intend to do a futile act, and construe the statutes such that no word, clause, sentence, provision or part is rendered superfluous. Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 789 S.E.2d 756, 760 (Ct. App. 2016). Further, the courts must avoid a statutory construction that effectively reads a provision out of a statute, or leads to an absurd result. *Id.*

Appellant's assertion the circuit court never conducted a probable cause hearing at all is likewise unavailing. As the Order for Evaluation makes clear, the circuit court considered probable cause in conjunction with the charges determination, and expressly found probable cause for an evaluation. (Order for Evaluation filed May 18, 2016; R., pp. 0003-0007). Nothing in the SVPA prohibits consideration of the two issues in one hearing, and Appellant had ample opportunity to challenge probable cause at the hearing.

Taking Appellant's procedural argument to its logical conclusion, no one determined to be incompetent and not likely to become competent would ever be subject to SVPA review, even in the most egregious sexual offense cases, unless the State left the pending charges on the criminal docket indefinitely. Interpreting the statute as Appellant suggests would undermine the clear legislative intent to include such persons in the SVPA process, and lead to an absurd result. Therefore, even if the Court reaches the merits of this issue, Appellant's argument must fail.[3]

[3]The 2014 indictments against Appellant remain on the Eleventh Circuit criminal court docket, and will remain there until the SVPA case is resolved.

II. The statutory provision at issue does not set a deadline for conducting the charges hearing, and the delay between the Petition and the hearing was the result of factors outside the State's control, including problems with Appellant's original appointed attorney and issues associated with attempting to reconstruct a criminal case involving incidents that took place more than twenty years prior to the hearing.

Appellant also contends the circuit court erred in finding the delay between filing the Petition and the charges hearing violated his right to a speedy trial on the criminal charges. Contrary to Appellant's contention, the delay at issue was in large part the result of circumstances outside the State's control. In addition, Appellant did not timely assert a speedy trial issue.

Appellant accurately summarizes case law involving a criminal defendant's right to a speedy trial. His application of that law to the circumstances of this case is flawed.

In analyzing whether a defendant was deprived of his right to a speedy trial, the court should consider four factors: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. State v. Palmer, 415 S.C. 502, 783 S.E.2d 823, 832 (2016). The factors "are related and must be considered together with any other relevant circumstances." *Id.* (*citing* Barker v. Wingo, 407 U.S. 514, 530 [1972]). The court's determination "'is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.'" *Id.* (*quoting* State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 [2007]).

A. Length of Delay & Reason for Delay

In this case, a true analysis of the factors and relevant circumstances amply supports the circuit court's determination Appellant's right to a speedy trial was not violated. Appellant concedes the case proceeding quickly in the initial stages, and the attorney appointed to represent him in August 2011 filed a discovery motion in September 2011. Thereafter, all

communications regarding the case were appropriately directed to Appellant's appointed attorney.

Appellant's assertion nothing occurred in the case between September 2011 and the charges hearing in April 2016 is belied by the record. As discussed above in Issue I, the State had to work with the Eleventh Circuit Solicitor's Office to get Appellant re-indicted on charges before the charges hearing could proceed. Once that was accomplished in March 2014, Appellant had to be re-evaluated regarding his competency to stand trial.[4]

After Appellant was again determined to be incompetent and not likely to become competent in September 2014, the State started working toward the charges hearing, but any effort to schedule it was hampered by lack of communication and/or cooperation from Appellant's attorney. Further, the State had to prepare a case involving offenses occurring ten to twenty years before the sexual predator proceeding, including contacting victims and law enforcement, obtaining evidence collected during the original investigation, and helping the victims prepare to testify in court about some of the worst experiences of their lives.

After Appellant's new attorney was appointed in September 2015, the State worked to help her get all documentation available, including the 2014 indictments and competency evaluation report, and get the hearing scheduled after she was up to speed on the case and was

[4]Appellant's asserts the 2014 re-indictments and competency evaluation "were entirely unrelated to this SVP matter and were designed solely to correct the procedural deficiencies with the Petition." Brief of Appellant, p. 16. As discussed in Issue I above, however, the 2014 re-indictments and competency evaluation were directly related to the pending SVP case, and there were no procedural deficiencies with the Petition. Appellant's acknowledgement of the 2014 re-indictments and evaluation directly contradicts his assertion nothing occurred in the case for four years.

available. The hearing occurred in April 2016, **twenty-five months** after Appellant was re-indicted, and **seven months** after the court appointed his new attorney.[5]

These facts indicate much of the delay in this case was caused by circumstances out of the State's control. The State cannot dictate a timetable to a solicitor's office for indicting a case. Further, the State certainly cannot force a party's attorney to take a case seriously and aggressively represent his client's interest. The mere fact the charges hearing occurred only seven months after the new attorney was appointed demonstrates the State did not act in any way to purposely delay the charges hearing, but any effort to move the case forward, particularly after the 2014 re-indictments and competency evaluation activity, was hampered by the previous attorney's failure to actively represent Appellant's interests.

As the Supreme Court noted in Palmer and Pittman, when analyzing a speedy trial claim the court must balance the conduct of both the prosecution **and the defense**. The State should not be penalized for an attorney's failure to act on his client's behalf. Thus, for speedy trial analysis, even assuming the delay was partially due to the State's conduct, which the State disputes, the length of the delay and the reasons for the delay favor the State. *See* State v. Cooper, 386 S.C. 210, 687 S.E.2d 62, 67 (Ct. App. 2009) (forty-four month delay did not violate defendant's right to a speedy trial even though it was due to some degree of prosecutorial and governmental negligence).

[5] Appellant's contention the Petition filing date started the clock is specious. The right to a speedy trial arises in connection with a pending criminal charge, and as Appellant repeatedly points out, there were no active criminal charges pending against him when the Petition was filed. The active charges arose when Appellant was re-indicted in 2014, which started the clock for speedy trial purposes.

B. Assertion of the Right

Appellant's failure to timely assert the speedy trial right also weighs heavily in the State's favor. Contrary to Appellant's contention the charges hearing was the first opportunity to raise the speedy trial issue, Appellant's attorneys could have filed a speedy trial motion **any** time after Appellant was re-indicted in 2014. While his first attorney was not actively involved in the case, his new attorney could have filed a motion after she was appointed in September 2015, because the charges hearing was not scheduled at that time. Rather than filing an appropriate pre-trial motion, however, Appellant attempted to sandbag the State by raising it for the first time at the hearing, which weighs in the State's favor.[6]

C. Prejudice to Appellant

Finally, Appellant claims he "undoubtedly suffered prejudice due to the delay." (Brief of Appellant, p. 18). Other than conclusory statements of prejudice, and citation to case law regarding what constitutes prejudice, Appellant cites no specific legitimate way the delay in this case prejudiced his ability to proceed at the hearing.

While his mental state was a problem, it did not change from 2011 to 2016, and the statute expressly provides his lack of mental capacity did not affect the SVPA proceedings. Further, there were only two charges involving two victims at issue at the hearing, rather than the multiple charges and victims he originally faced in 2005, so the time actually worked to his benefit. *See* Cooper, 687 S.E.2d at 67 (State's withdrawal of death penalty notice during the delay before re-trial actually acted to defendant's benefit). Further, Appellant was already

[6]Raising the issue for the first time at the hearing significantly hampered the State's ability to respond in full by recalling and demonstrating all the difficulties associated with the first attorney's involvement, or lack thereof, in the case. The State did accurately respond that unlike other sections of the SVPA, §44-48-100(B) does not set any deadline for holding the charges hearing.

located in a secure facility, and as Appellant concedes in his Brief, he was not going to be released into the public regardless of what happened in the SVPA proceeding, so his continued stay in a secure DMH facility did not prejudice him in any way. (Brief of Appellant, p. 3, n. 2).

Finally, the evidence and witnesses presented at the hearing were the same evidence and witnesses from the relevant 2005 charges, and the circuit court expressly found Appellant's attorney "conducted cross-examination of each of the State's witnesses with precision and in an expert and effective manner." (Order for Evaluation filed May 18, 2016, p. 4, ¶10; R., p. 0006). In short, any prejudice to Appellant from the "delay" was minimal at best.

III. The circuit court properly found Appellant's due process rights were not violated.

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

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

Procedural due process requires notice and a meaningful opportunity to be heard. Mathews, 424 U.S. at 333. What process is due depends on what is fair in a particular context. *Id.* at 334; *see also* In re Detention of Morgan, 330 P.3d 774, 779 (2014) (same); In re Commitment of Weekly, 956 N.E.2d 634, 644-645 (Ill. App. Ct. 2011) (same); Moore v. Superior Court, 237 P.3d 530, 539 (Cal. 2010) (balancing test required to determine what process

is due to a potential civil committee); Commonwealth v. Burgess, 878 N.E.2d 921, 928 (Mass. 2008) (deprivation of liberty interest must be balanced against governmental interest in protecting citizens); Commonwealth v. Nieves, 846 N.E.2d 379 (Mass. 2006) (same).

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. Contrary to Appellant's repeated attempts to conflate the charges hearing with a criminal trial, the circuit court's finding Appellant committed the alleged sexual acts against the victims **is not**, and **never will be**, a criminal conviction for any purpose outside the confines of this SVPA case.[7] The hearing was **not** a criminal trial, the court's findings will **not** be reported to, or reflected in, the National Crime Information Center ("NCIC") or any other crime statistics database, no criminal penalty will ever be imposed, and the court's conclusions **cannot** be used to enhance any future criminal sentence. The **only** effect of the court's findings and conclusions is moving the SVPA case forward.

Further, while Appellant's liberty will be significantly impacted if he is committed, he will not just be confined as he would with a criminal sentence. Rather, he will be housed in a separate, secure facility, where he will receive appropriate medical and psychological treatment throughout his commitment.

[7]The circuit court's determination is only intended to meet the statutory requirement that the person be "convicted of a sexually violent offense" under S.C. Code §44-48-30(1), which defines "sexually violent predator" as a person who "has been convicted of a sexually violent offense," and has a relevant mental abnormality or personality disorder.

B. Risk of Erroneous Liberty Deprivation

Assuming the liberty factor, standing alone, weighs in Appellant's favor, his remaining analysis is fundamentally flawed. His overriding premise regarding the risk of erroneous liberty deprivation is his incompetency.[8] Again, Appellant conflates the requirement of competency in a criminal trial with the charge hearing in a SVPA case. Further, he uses the numerous procedural safeguards in the SVPA as a sword to undermine the SVPA, and to argue the criminal case competency standard should also apply in SVPA cases.

Other jurisdictions analyzing the issue of mental incompetency in sexual predator proceedings based on statutes similar to the SVPA in general, and §44-48-100(B) in particular, have uniformly determined the risk of an erroneous deprivation of liberty is minimal in light of the numerous procedural safeguards and heightened burden of proof in sexual predator cases. *See* Morgan, 330 P.3d at 779 (the robust statutory guaranties provide substantial protection against an erroneous deprivation of liberty); Weekly, 956 N.E.2d at 645 (procedural safeguards of the sexual predator act ensure the risk of erroneous deprivation of liberty is slight); Moore, 237 P.3d at 543-544 (same); Burgess, 878 N.E.2d at 929 (same). The procedural safeguards identified in those cases include: 1) assistance of counsel (at public expense when appropriate); 2) ability to retain experts (at public expense when appropriate); 3) use of process to compel attendance of witnesses; 4) cross-examination of adverse witnesses; 5) right to appeal final determination; 6) right to have hearing conducted according to the rules of evidence applicable in criminal cases; and 8) determination of whether the criminal acts were committed be beyond a reasonable doubt. Burgess at 929.

[8]The State does not dispute, and never has disputed, Appellant's mental incompetence.

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford the mentally incompetent person due process at the charges hearing. In addition to the numerous levels of review prior to the charges hearing, the person has; 1) the right to counsel; 2) the right to present evidence; 3) the right to cross-examine witnesses; 4) the right to retain experts; 5) the right to have criminal rules of evidence apply at the charges hearing; 6) the right to all constitutional rights available to a criminal defendant, except the right not to be tried while incompetent; 7) the right to have the determination made beyond a reasonable doubt; 8) the right to appeal the final decision; and 9) the State bears the beyond a reasonable doubt burden of proof at all stages of the proceedings. S.C. Code §§44-48-50, -60, -70, -80, -90, -100(A), and -100(B). Contrary to Appellant's assertion this factor weighs in his favor, these safeguards make the risk of an erroneous deprivation of liberty under the SVPA minimal, and the factor weighs in the State's favor.[9]

C. Governmental Interest

Appellant acknowledges the State's "compelling interest in protecting society from sexual predators," but again conflates a criminal trial and the charges hearing by arguing "there is no governmental interest in subjecting an incompetent person to what essentially amounts to a criminal trial." He further contends the State's "interest is not served when an incompetent person suffering severe mental deficiencies is referred to the SVP program" because some research suggests the person will not be able to participate in SVP treatment. (Brief of Appellant, p. 24).

The effectiveness, or even availability, of treatment is not relevant if a goal of a sexual predator statute is to provide treatment. Kansas v. Hendricks, 521 U.S. 346, 365 (1997).

[9]As discussed below, the only additional safeguard Appellant identifies is the right to be competent, which is expressly excluded in the SVPA.

> [W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. . . . [I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

Id. 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).

The SVPA does require treatment, and Appellant recognizes there is a SVP treatment program. Therefore, even assuming Appellant's actual participation in treatment at the SVP program would be minimal at best, the State's interest in protecting the public from sexual predators is paramount to his liberty interest under the circumstances of this case.[10]

Appellant also argues requiring the person to be competent before moving forward with the SVPA proceeding "would be beneficial to the SVP process as a whole," and ensure those detained as predators are the proper ones for purposes of receiving treatment. (Brief of Appellant, p. 24). To the contrary, requiring competency before a SVP case can proceed undermines the clear legislative intent of §44-48-100(B), and effectively writes that section out of the SVPA.

The unambiguous statutory language expresses the legislative intent that commitment proceedings go forward against an incompetent person, even if the person may have limited comprehension of the proceedings. S.C. Code §44-48-100(B); *see also* Burgess, 878 N.E.2d at

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[10]Experts can consider Appellant's history, the arrest records, his treatment records while in DMH, and interview him to the extent possible, in order to reach conclusions regarding his mental diagnosis and risk to reoffend sexually. *See* Moore, 237 P.3d at 543 (nature of issues, evidence and findings in sexual predator proceeding prevents person from playing much more than a supporting role; any chance the person's mental incompetence would significantly impair his contribution to his defense is relatively attenuated).

927 (same). Requiring competency before a SVPA case can move forward effectively writes §44-48-30(6)(c) and §44-48-100(B) out of the statute, which flies in the face of well-established rules of statutory construction. *See* Buscemi (court must avoid interpretation that effectively reads a provision out of the statute).

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

Finally, relying on the dissents in two state court cases and decisions from two federal district courts, Appellant contends "the winds of change are swirling around SVP programs." (Brief of Appellant, p. 25). As a threshold matter, the majority opinions in both state court cases Appellant cites concur with the opinions from other jurisdictions finding no due process violation in allowing sexual predator cases to proceed against persons found to be incompetent. *See* Morgan, 330 P.3d at 780-781 (six to two decision); Moore, 237 P.3d at 543-547 (five to two decision). Therefore, those dissents hardly represent "winds of change."

As to the federal court cases, one cited by Appellant was overturned by the Eighth Circuit Court of Appeals, which held the Minnesota sexual predator program did **not** violate due process

on its face, or as applied. Karsjens v. Piper, 845 F.3d 394 (2017). In Karsjens, the plaintiffs filed suit challenging the conditions of their confinement as sexual predators, and certain treatment program policies and practices. The district court had entered extensive injunctive relief after finding the Minnesota program violated due process facially and as applied, because it was punitive in nature as evidenced by the fact no one had ever been fully discharged from the program since its inception in 1994, and only three had been conditionally discharged. *Id.* at 399-403. The Court of Appeals reversed the district court's order and vacated all the injunctive relief. 845 F.3d at 406-411.

The other federal case Appellant cites, Van Orden v. Schafer, 129 F.Supp.3d 839 (E.D. Mo. 2015), is an on-going class action case involving much the same issues addressed in Karsjens. The district court found the risk assessment and release procedures of the Missouri sexual predator program were unduly lengthy, and violated substantive due process because they resulted in the continued confinement of persons who were no longer likely to commit sexually violent offenses. *Id.* at 865-870.

Neither Karsjens nor Van Orden apply to this case, or represent "winds of change."[11] The efficacy of South Carolina's SVP treatment program is not at issue, and there is no allegation the risk assessment and release procedures of the SVPA and the treatment program are constitutionally infirm.[12]

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[11]The allegations in both cases had nothing to do with the plaintiffs' initial commitment proceedings, much less whether their cases could proceed if a particular plaintiff was incompetent. Therefore, citing the cases as bellwethers of change in sexual predator law is disingenuous at best.

[12]Unlike Minnesota or Missouri, South Carolina has a low rate of SVP commitments since its 1998 inception, and the treatment program has a high rate of releases.

The State interest at issue in SVPA proceedings outweighs Appellant's private liberty interest, and the statute provides ample procedural safeguards intended to protect the rights of persons subject to it, including Appellant. Therefore, the circuit court's findings and conclusions should be affirmed, and the SVPA case allowed to move forward.

IV. Appellant's allegations of ineffective assistance of counsel are not properly before this Court in this direct appeal. (Appellant's Issues IV and V).

Appellant contends his trial counsel was ineffective for failing to seek dismissal based on procedural grounds, and for failing to challenge the statutory deprivation of his right to a jury trial on the charges against him. As he concedes, none of these issues are preserved for appellate review.

The South Carolina Supreme Court recently held ineffective assistance of counsel claims in SVPA proceedings are not reviewable in a direct appeal from the person's commitment absent an objection at trial, but should be asserted in a common law habeas corpus petition. *See* In the Matter of the Care & Treatment of Jeffrey Allen Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017).

> "Because there is no existing statutory procedure providing for [an evidentiary hearing similar to a post-conviction relief hearing], we find Chapman's claims regarding ineffective assistance of counsel akin to other habeas claims, in that the existing relief for the claims is either inadequate (due to the lack of a fully developed record) or unavailable (due to the absence of a specified procedure in which to assert the claims). Thus, we agree with the State that persons committed under the Act may pursue their unlawful custody claims, including ineffective assistance of counsel claims, in habeas proceedings."

Id. at 849.

As in Chapman, none of the alleged ineffective assistance of counsel claims in this case were raised in the circuit court, and are not preserved for appellate review.[13] Appellant may seek relief in the circuit court pursuant to an appropriately filed habeas corpus petition. Therefore, they are not properly before the Court for review.

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[13]While this is an appeal from the charges hearing determination rather than the final commitment trial, the Chapman rational still applies. There was no evidentiary hearing, and there is no fully developed record on the ineffective assistance of counsel claims Appellant raises.

CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court determination should be affirmed, and the underlying SVPA proceeding be allowed to move forward.

Respectfully submitted,

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June 30, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Diane Goodstein, Circuit Court Judge
Appellate Case No. 2016-01125

IN THE MATTER OF THE CARE AND TREATMENT OF
FRANCIS ARTHUR OXNER,

Appellant.

CERTIFICATE OF COUNSEL

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

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