

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Should this matter be dismissed on procedural grounds?**
- II. Did the trial court err by finding that no unconstitutional delay occurred between the filing of the petition and the hearing pursuant to S.C. Code Ann. § 44-48-100(B)?**
- III. Did the trial court err by finding that Oxner's procedural due process rights were not infringed despite his incompetency and resulting inability to assist counsel with his defense?**
- IV. Was trial counsel ineffective for failing to seek dismissal of this matter on procedural grounds prior to the State re-indicting Oxner in 2014?**
- V. Was trial counsel ineffective for failing to object to S.C. Code Ann. § 44-48-100(B)'s deprivation of Oxner's constitutional right to a jury trial?**

STATEMENT OF THE CASE

The State initiated these proceedings against Appellant Frances Arthur Oxner (“Oxner”) pursuant to the South Carolina Sexually Violent Predator Act (“SVP Act”), S.C. Code Ann. § 44-48-10, *et seq.* on July 11, 2011. (Petition; R. pp. 12-116.) This matter is before the Court on an issue of first impression—an appeal from the trial court’s finding beyond a reasonable doubt, after conducting a hearing pursuant to S.C. Code Ann. § 44-48-100(B), that an SVP respondent committed the acts for which he was charged despite his incompetency to stand trial.

The State originally indicted Oxner for sexually violent crimes in 2005. (2005 Indictments, Ex. E to Petition; R. pp. 56-57, 60-63, 67-68, 72-73, 76-77.) The general sessions court ordered an evaluation of Oxner to determine his capacity to stand trial. (*See* Trial Transcript (“Tr.”) p. 4:18-25; R p. 120.) On April 24, 2005, Dr. Richard L. Frierson, M.D. issued an initial report finding that Oxner was incompetent to stand trial but likely to become fit to stand trial in the foreseeable future. (Report of Findings, Ex. C to Pet; R. pp. 31-34.) On June 14, 2005, the court issued an order for Oxner to be admitted to the hospital for 60 days, during which he would be treated and reevaluated. (Court Ordered Capacity Evaluation dated Oct. 31, 2005; R. pp. 250-53.) Oxner was admitted to the South Carolina Department of Mental Health on September 9, 2005. (*Id.*; R. p. 256.) From that date to the present, Oxner has been hospitalized in the Department of Mental Health system. (*See* Tr. p. 4:22-25; R. p. 120.) On October 31, 2005, Dr. Frierson conducted another evaluation whereby he determined that Oxner remained incompetent to stand trial. (Court Ordered Capacity Evaluation dated Oct. 31, 2005; R. pp. 250-53.) Soon after, the State *nolle prossed* all charges pending against Oxner.¹ (Tr. p. 5:8-15; R. p. 121.)

¹ The public index for Lexington County confirms that all charges were *nolle prossed* as of December 20, 2005.

Oxner continued to be evaluated over the years to determine whether he required further hospitalization. (See Probate Court Records, Ex. C to Petition; R. pp. 22-52.) At some point prior to May 2011, a Department of Mental Health physician recommended that Oxner be discharged from the forensic unit and transferred to a structured residential care facility.² (Petition p. 1; R. p. 12.) As the State explained, “release” meant Oxner was about to be “released from the facility where he was,” which is what initiated the SVP review. (See Tr. p. 4:25-5:7, 79:19-80:2; R. pp. 120-21, 195-96.)

Despite Oxner having no pending charges or convictions for any sexually violent offense, the Department of Mental Health referred the matter to the SVP Multi-Disciplinary Team for assessment pursuant to S.C. Code Ann. § 44-48-50. (See Petition p. 1; R. p. 12.) On May 19, 2011 the Multi-Disciplinary Team found that Oxner “satisfies the definition of a sexually violent predator” and referred the matter to the Prosecutor’s Review Committee for a probable cause determination under S.C. Code Ann. § 44-48-60. (Sexual Predator Referral Form, Ex. A to Petition; R. pp. 18-19.)

The Prosecutor’s Review Committee received the matter from the Multi-Disciplinary Team on May 24, 2011, and issued a probable cause determination on June 20, 2011. (Probable Cause Determination, Ex. B to Petition; R. pp. 20-21.) The Committee determined that there is “probable cause to believe that [Oxner] has been convicted of a sexually violent offense,” and that he suffered from a mental abnormality or personality disorder making him “likely to engage in acts of sexual violent if not confined in a secure facility for long-term control, care, and treatment.”

Id.

² It is critical to note the Department of Mental Health never recommended that Oxner be released out into general public. Rather, the Department solely recommended that Oxner be transferred to a less restrictive facility, but still one where he would still continue to receive structured care.

On July 11, 2011, in light of this determination, the State filed the present Petition pursuant to the SVP Act. (Petition p. 2; R. p. 13.) In the Petition, the State requested that the court conduct a hearing under S.C. Code Ann. § 44-48-100(B), conduct a probable cause hearing, order that a qualified expert evaluate Oxner if probable cause is found, and hold a trial under the SVP Act if appropriate. (*Id.*)

On August 15, 2011, the trial court issued a Probable Cause Order. (Probable Cause Order; R. pp. 10-11.) The trial court explained that it appeared there was probable cause to believe Oxner met the statutory criteria for a sexually violent predator, that there was sufficient evidence to require that Oxner be taken into custody and confined in a secure facility, and that a hearing should be held to allow Oxner to contest probable cause. (*Id.*) However, the Order noted that it “further appear[ed]” the case should proceed under S.C. Code Ann. § 44-48-100(B). (*Id.*) Therefore, the court ordered that Oxner be taken into custody if he was not already in a secure facility; that Oxner be served with the Petition and Order; that a hearing be held **within 72 hours** after respondent was taken into custody, if he was not already in custody, under S.C. Code Ann. § 44-48-100(B) and thereafter to contest probable cause; and that counsel be appointed to represent Oxner. (*Id.*)

On August 16, 2011, the Clerk of Court appointed Geoffrey Michael Clemens, Esq. to represent Oxner. (Order Appointing Counsel, R. p. 8.) The filed Affidavit of Service shows that Oxner was served with the Petition and Probable Cause Order on September 9, 2011. (Affidavit of Service; R. p. 249.) Attorney Clemens then filed a Motion for Brady and Other Favorable Material on September 20, 2011. (*Brady* Motion; R. pp. 244-48.)

The SVP case record reflects no further activity until 2015. However, as Assistant Attorney General James Bogle explained at the S.C. Code Ann. § 44-48-100(B) hearing, “the way the law reads . . . it talks about a case where the [Respondent] is charged.” (Tr. p. 5:16-19; R. p.

121.) Thus, to correct the fact that Oxner was not charged with any offenses, the Attorney General's office "had [Oxner] re-indicted" in 2014. (*Id.*; 2014 Indictments, Court's Exs. 2 and 3; R. pp. 121, 225-26.) Because Oxner was re-indicated, the Solicitor's office had to obtain another competency evaluation. (*See* Court Ordered Capacity Evaluation dated Sept. 11, 2014, Court's Ex. 1; R. pp. 218-24.) On September 8, 2014, Dr. Richard L. Frierson, M.D. issued an evaluation, again finding that Oxner lacked the capacity to stand trial and was unlikely to gain the capacity to stand trial in the foreseeable future. (*Id.*) These charges remain pending in Lexington County under separate criminal proceedings.

The next item of activity in Oxner's SVP action, however, did not occur until September 10, 2015, when the Clerk of Court issued an order appointing Aimee Zmroczek, Esq. as Oxner's new counsel. (Order Appointing Counsel; R. p. 9.) On April 21, 2016, the trial court finally held the S.C. Code Ann. § 44-48-100(B) hearing. (Tr. p. 1; R. p. 117.) During the hearing, Oxner's counsel raised objections to the constitutionality of the statute, the delay between the filing of the petition and the evidentiary hearing under § 44-48-100(B), and Oxner's inability to assist her with the defense due to his incompetence. However, the trial court rejected each of these arguments and proceeded with hearing the merits.

The court heard testimony from three live witnesses and also conducted an in-camera, ex-parte discussion with Oxner and his counsel. After hearing brief summation arguments from counsel, the court made an oral finding on the record that Oxner committed the charged offenses beyond a reasonable doubt. (Tr. p. 89:1-24; R. p. 205.) Subsequently, the trial court issued a written Order for Evaluation Pursuant to the Sexually Violent Predator Act, filed on May 18, 2016. (Order; R. pp. 1-7.) In the Order, the trial court found beyond a reasonable doubt that Oxner committed the acts with which he was charged, that he remains incompetent to stand trial, and that

probable cause exists to have him evaluated under the SVP Act. (*Id.* at 4-5; R. pp. 6-7.) Therefore, the trial court ordered that an evaluation be conducted by a court appointed expert, Amy C. Swan, Psy. D., to determine if Oxner is a sexually violent predator. (*Id.* at 5; R. p. 7.) On May 27, 2016, Oxner timely filed a notice of appeal of the trial court's Order pursuant to § 44-48-100(B).

STATEMENT OF THE FACTS

The 2014 indictments allege: (1) that in August 1, 1979 through June 1, 1980, Oxner committed assault with intent to commit criminal sexual conduct with a minor less than eleven years of age and (2) that on or about the summer of 2004, Oxner committed sexual battery upon a minor less than eleven years of age. (2014 Indictments, Court's Exs. 2 and 3; R. pp. 225-26.) At the § 44-48-100(B) evidentiary hearing, the State presented live testimony from each of the alleged victims. Both victims were relatives of Oxner.

The first alleged victim identified Oxner at the hearing and testified that sometime between August 1979 and June 1980, he attempted to take her clothes off, exposed himself to her, and tried to sexually assault her. (Tr. p. 32:16-34:20, 40:24-41:4; R. pp. 148-50, 156-57.) She admitted, however, that she did not report this information to law enforcement until 2004 when her son, the second alleged victim, came forward. (Tr. p. 36:14-22, 42:21-25; R. pp. 152, 158.) She agreed on cross examination that some of the information she testified about was not included in her initial statement to police, but stated that she had remembered additional details over the years. (Tr. p. 48:23-49:5; R. pp. 164-65.) During her testimony, the State introduced several photographs of Oxner's home into evidence. (*See* Photographs, State's Exs. 1, 2, 3, 4, and 5; R. pp. 227-34.)

The second alleged victim also identified Oxner at the hearing and testified that sometime during the summer of 2004, Oxner sexually assaulted him. (Tr. p. 53:1-4, 53:13-20, 55:20-22; R. pp. 169, 171.) He stated that not long after the incident, he told his aunt about what happened and

she brought him to speak with the Lexington County Sheriff's Department. (Tr. p. 56:17-22; R. p. 172.) During this meeting, he gave a written statement to a detective detailing the allegations. (Tr. p. 56:23-57:12; R. pp. 172-73) During his testimony, the State introduced into evidence additional photographs showing pornography found in Oxner's home. (*See* Photographs, State's Exs. 6, 7, and 8; R. pp. 237-42.) The second victim admitted that some of the information he testified about at the hearing may have been omitted from his initial statement, but noted that he was ten years old at the time of the statement. (Tr. p. 66:8-67:5; R. 183-83.)

The State's final witness was Lieutenant Eric Russell with the Lexington County Sheriff's Department. (Tr. p. 68:19-22; R. p. 184.) Lieutenant Russell testified that he conducted the initial interviews with the alleged victims, and that their written statements were made in connection with his investigation. (Tr. p. 69:1-16; R. p. 185.) He also testified that he obtained a search warrant for Oxner's property after completing the interviews, and that he and another officer served the search warrant. (Tr. p. 70:1-18; R. p. 186.) Russell explained that the pictures introduced into evidence at the hearing were taken by one of the other officers at the scene. (Tr. p. 70:1-18, 74:12-19; R. pp. 186, 190.)

ARGUMENT

This case presents a matter of first impression, as the hearing below was the first instance of an SVP proceeding under S.C. Code Ann. § 44-48-100(B). (Tr. p. 4:18-20; R. p. 120 (noting that this section had "never been used until" Oxner's hearing).) The trial court's order warrants reversal for several reasons. First, this SVP action should be dismissed on procedural grounds because the proceedings were instituted while Oxner did not meet the statutory definition of a person "convicted of a sexually violent offense." Moreover, even if the trial court had the power to continue with the case, an unconstitutional delay occurred between the filing of the petition and

the § 44-48-100(B) hearing. Finally, these proceedings violated Oxner's procedural due process rights, as the § 44-48-100(B) proceedings are analogous to trying a criminal defendant while he or she is incompetent to stand trial.

Additionally, in addition to the direct challenges above, Oxner should be entitled to raise ineffective assistance of counsel claims in this appeal, as there is no other mechanism for asserting such claims under South Carolina law. Assuming Oxner may assert such arguments in this direct appeal, reversal is also warranted due to trial counsel's ineffectiveness in handling this matter. First, trial counsel was ineffective for failing to seek dismissal of the proceedings despite the clear procedural deficiencies. Second, trial counsel was ineffective for failing to object to § 44-48-100(B)'s deprivation of Oxner's constitutional right to a jury trial, as guaranteed by Article I, § 14 of the South Carolina Constitution. S.C. Const. art. I, § 14.

I. Dismissal is Warranted because the Statutory Prerequisites have not been Met.

The State wrongly instituted this action in 2011, contending that Oxner met the definition of a person convicted of a sexually violent offense. The State's petition asserted that Oxner met the statutory definition because he had been "charged with a Sexually Violent Offense, but found incompetent to stand trial." (Petition p. 1; R. p. 12.) This was erroneous. Although the State did charge Oxner with sexual crimes in 2005, each of the charges was *nolle prossed* later that same year. Thus, Oxner did not meet any of the statutory definitions of a person convicted of a sexually violent offense. Despite this, the State proceeded with filing a Petition pursuant to the SVP Act. Based on the incorrect information contained in the Petition, the trial court improperly permitted this matter to proceed by issuing 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.) This was reversible error. Additionally, even if the trial court's probable cause determination was

proper, the required hearing entitling Oxner to challenge probable cause was not held within the time mandated by the SVP Act and the trial court's Probable Cause Order. As a result, reversal is warranted.³

The SVP Act sets forth four different situations that may warrant the filing of a petition under the Act. The relevant portion of the statute for the present Petition states that "if a person has been convicted of a sexually violent offense," the agency with jurisdiction must give written notice to the Multi-Disciplinary Team, the victim, and the Attorney General within 270 days of the person's anticipated release from total confinement. S.C. Code Ann. § 44-48-40(A)(1). Critically, the SVP statutes define "convicted of a sexually violent offense" to mean that a person has:

- (a) pled guilty to, pled nolo contendere to, or been convicted of a sexually violent offense;
- (b) been adjudicated delinquent as a result of the commission of a sexually violent offense;
- (c) *been charged but determined to be incompetent to stand trial for a sexually violent offense*;
- (d) been found not guilty by reason of insanity of a sexually violent offense; or
- (e) been found guilty but mentally ill of a sexually violent offense.

S.C. Code Ann. § 44-48-30(6) (emphasis added).

Once the Multi-Disciplinary Team receives the matter, they must assess whether or not the person satisfies the definition of a sexually violent predator within thirty days. S.C. Code Ann. § 44-48-50. If such a finding is made, then the matter is referred to the Prosecutor's Review

³ As detailed below, the State's subsequent re-indictment of Oxner in 2014 did not cure the procedural defects because the mandatory statutory prerequisites *still* have not been met.

Committee. *Id.* The Prosecutor's Review Committee has thirty days after referral to make a determination as to whether or not probable cause exists to believe the person is a sexually violent predator. S.C. Code Ann. § 44-48-60.

If the Committee determines that probable cause exists, the Attorney General's Office must file a petition within thirty days "with the court in the jurisdiction where the person committed the offense," alleging that the person is a sexually violent predator and requesting the court make a probable cause determination. S.C. Code Ann. § 44-48-60. Upon the 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). If the court makes such a finding, it must order that the person be taken into custody if he or she is not already confined in a secure facility. *Id.*

Upon being taken into custody, the person must immediately be given an opportunity to appear at a hearing, represented by counsel, to contest probable cause. S.C. Code Ann. § 44-48-80(B). This hearing must occur within seventy-two hours after the respondent is taken into custody. *Id.* If the court determines there is probable cause then it must direct that the person be evaluated to determine whether he is a sexually violent predator within sixty days after completion of the probable cause hearing. S.C. Code Ann. § 44-48-80(C). The matter then proceeds to a trial on the merits, with the circuit court determining whether the person is a sexually violent predator. S.C. Code Ann. § 44-48-100(A). For persons charged with sexually violent offenses found incompetent to stand trial, however, the court must first conduct a hearing under S.C. Code Ann. § 44-48-100(B) to determine if the person committed the charged offenses beyond a reasonable doubt prior to proceeding to the trial on the merits. S.C. Code Ann. § 44-48-100(B).

Oxner's case was referred to the Multi-Disciplinary Team despite the fact that he did not fall into any of the five enumerated definitions of a person "convicted of a sexually violent offense." Although the State charged Oxner with sexually violent offenses in 2005 and he was found incompetent to stand trial, those charges were *nolle prossed* that same year. Nevertheless, the Multi-Disciplinary Team *still* found that Oxner "satisfies the definition of a sexually violent predator." (Sexual Predator Referral Form, Ex. A to Petition; R. p. 19.) Likewise, the Prosecutor's Review Committee found that there *was* probable cause to believe that Oxner "has been convicted of a sexually violent offense." (Probable Cause Determination, Ex. B to Petition; R. p. 21.) The State's petition also alleged that Oxner was a "sexually violent predator" as defined by the SVP Act. (See Petition p. 2; R. p. 13.) Finally, even the trial court's Probable Cause Order, issued upon review of the Petition, stated that it appears "there is probable cause to believe that the Respondent meets the criteria of sexually violent predator pursuant to the statute." (Probable Cause Order p. 1; R. p. 10.)

Pursuant to South Carolina precedent, *nolle prossed* charges are treated as if they never existed. *Mackey v. State*, 357 S.C. 666, 595 S.E.2d 241 (2004). In *Mackey*, the Supreme Court explained that a "*nolle prosequi* is an entry by the prosecuting officer indicating that he has decided not to prosecute a case," and "all proceedings following an entry of a *nolle prosequi* are void because the indictment [i]s no longer valid." *Id.* A *nolle prosequi* prevents the court from taking jurisdiction over the matter, which is what renders the subsequent proceedings void. *In re Brown*, 294 S.C. 235, 237, 363 S.E.2d 688, 689 (1988).⁴

⁴ However, as the *Mackey* Court explained, this is not a subject matter jurisdiction issue. 357 S.C. at 668, 595 S.E.2d at 243.

The *Mackey* Court articulated a specific, bright-line rule regarding entry of a *nolle prosequi*. As the Court explained, “a *nolle prosequi* upon charges extinguishes the State’s prosecution upon those charges.” *Id.* at 669, 595 S.E.2d at 243. Moreover, it treats the *nolle prosequi* charges as if they “never existed.” *Id.* Finally, a court is **required** to dismiss charges when a solicitor has *nolle prosequi* the charges and failed to re-indict a defendant upon those charges. *Id.* Because the petitioner in *Mackey* was convicted on a *nolle prosequi* indictment, the Court vacated his sentences and convictions. *Id.*

The highly unique circumstances of this case demonstrate that this action should have been dismissed. The trial court undoubtedly had subject matter jurisdiction over the SVP proceedings, as the Supreme Court has held that the language of the SVP statute “clearly vests subject matter jurisdiction over cases brought pursuant to the Act with the court of common pleas,” *In re Matthews*, 345 S.C. 638, 643-44, 550 S.E.2d 311, 313-14 (2001). Instead, this case presents the unusual circumstance where it was improper for the trial court to continue with the SVP proceedings in light of the fact that Oxner was not facing charges. *See In re Brown*, 294 S.C. at 237, 363 S.E.2d at 689. As *Mackey* explained, in a criminal case any subsequent proceedings pursuant to *nolle prosequi* charges are rendered void. This principle should be equally applicable to this situation. The State should not be permitted to pursue SVP proceedings grounded on *nolle prosequi* charges. The court was prevented from proceeding with the case since the criteria for bringing an SVP petition was not met. Accordingly, all subsequent proceedings are null and void and dismissal is warranted.⁵

⁵ The State seemingly acknowledged that it was procedurally improper to have filed the petition while Oxner did not meet the statutory criteria. As the Assistant Attorney General noted, the State had to re-indict Oxner in 2014 for him to meet the SVP statute’s definition of a person “convicted of a sexually violent offense.” (Tr. p. 5:16-19; R. p. 121.)

The procedural defects were not remedied by the State's re-indictment of Oxner in 2014. The Multi-Disciplinary Team, the Prosecutor's Review Committee, the Petition, and the trial court all made incorrect findings in 2011 that Petitioner met the SVP Act's definition. Petitioner was not re-indicted until several years later. Additionally, despite having re-indicted Petitioner, the State did not re-start the SVP process and seek another review by the Multi-Disciplinary Team and Prosecutor's Review Committee to determine if Oxner met the definition in light of the new 2014 charges. Likewise, the State did not seek another probable cause determination under § 44-48-80(A) to remedy the faulty Probable Cause Order from 2011. Instead, the State continued to rely on the procedurally improper determinations from 2011, which were erroneous under the plain language of the statute. Because critical statutory requirements were never met in this matter, the court should not have entertained the petition under these unusual facts.

Furthermore, the trial court erred by failing to adhere to the SVP Act's requirement that a hearing be held to allow Oxner to contest probable cause. Although the trial court conducted an ex-parte review of the Petition and rendered a probable cause determination pursuant to § 44-48-80(a), the trial court never conducted the hearing required by § 44-48-80(B). Under the SVP Act's requirements, the § 44-48-80(B) hearing must be held within seventy-two hours of the respondent being taken into custody and given notice of the hearing. Oxner has been in the custody of the Department of Mental Health since 2011 and was served with the Petition on September 9, 2011. Nevertheless, despite the plain language of the statute and the trial court's explicit direction in the Probable Cause Order that a § 44-48-80(B) hearing would take place, Oxner was not given an opportunity to challenge probable cause until almost five years later at the § 44-48-100(B) hearing.

Finally, regardless of whether the court had the power to proceed with the case, the trial court's probable cause finding was erroneous considering Oxner did not meet the statutory

definition of a “sexually violent predator” at the time it was made. Therefore, at the very least, this Court should reverse the trial court and remand for a new probable cause determination. The matter should only be permitted to proceed if the court determines that probable cause exists as required by S.C. Code Ann. § 44-48-80(A).

II. The Trial Court Committed Reversible Error by Finding that no Unconstitutional Delay Occurred Between the Filing of the SVP Petition and the Hearing Pursuant to S.C. Code Ann. § 44-48-100(B).

Section 44-48-100(B) of the SVP Act provides that “all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply” for hearings under that section. S.C. Code Ann. § 44-48-100(B). One of the critical rights afforded criminal defendants is the right to a speedy trial, which is guaranteed by both the United States and South Carolina Constitutions. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”); S.C. Const. art. I, § 14 (“Any person charged with an offense shall enjoy the right to a speedy . . . trial.”). “The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused’s defense.” *State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012).

As the Supreme Court has acknowledged, the right is vague, “which makes it nearly impossible to determine when it has been violated.” *Id.* Accordingly, “[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.” *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Stated differently, “[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.” *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). In light of this, the Supreme Court has

acknowledged that it “can do little more than identify some of the factors” for courts to examine. *Barker v. Wingo*, 407 U.S. 514, 519 (1972). “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.” *Langford*, 400 S.C. at 440, 735 S.E.2d at 481.

“The Supreme Court has counseled further that none of these factors is ‘either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.’” *Id.* (quoting *Barker*, 407 U.S. at 533). Instead, they are all related and must be considered along “with such other circumstances as may be relevant.” *Barker*, 407 U.S. at 533. Thus, the Supreme Court created a balancing test which is a rejection of “inflexible approaches” and weighs “the conduct of both the prosecution and the defense.” *Id.* at 529-30.

The analysis begins with the “triggering mechanism” of a speedy trial claim, which is the length of the delay. *Barker*, 407 U.S. at 530. The court should not reach the remaining factors “[u]ntil there is some delay which is presumptively prejudicial.” *Id.* The clock starts running on a defendant’s speedy trial right when he is “indicted, arrested, or otherwise officially accused.” *United States v. MacDonald*, 456 U.S. 1, 6 (1982). “[E]ven the length of time necessary to trigger the full inquiry, however, ‘is necessarily dependent upon the peculiar circumstances of the case.’” *Langford*, 400 S.C. at 440, 735 S.E.2d at 481 (quoting *Barker*, 407 U.S. at 530-31). If a court concludes that this right has been violated, dismissal of the charges ‘is the only possible remedy.’” *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) (quoting *Barker*, 407 U.S. at 522).

An inexplicable delay of nearly five years occurred in this matter just to reach the § 44-48-100(B) hearing stage. As noted above, when the State first began the SVP process, the case moved very quickly. The Multi-Disciplinary Team issued its report in May of 2011, the Prosecutor’s

Review Committee issued its report in June of 2011, and the State filed the Petition in July of 2011. The very next month, the trial court issued a Probable Cause Order finding probable cause to believe that Oxner met the definition of a sexually violent predator. (Probable Cause Order; R. pp. 9-10.) The court noted that this proceeding appeared to fall under § 44-48-100(B), and found that a hearing under that section must be conducted prior to continuing with the SVP proceedings. The trial court's Order was dated August 15, 2011, and directed that a § 44-48-100(B) hearing be held before the court "*within 72 hours* after Respondent has been taken into custody, if he is not already in custody" and requiring the State to prove the required elements of § 44-48-100(B). (Probable Cause Order, R. p. 11.) The court also directed that counsel be appointed for Oxner. (*Id.*) The next day, August 16, 2011, the Clerk of Court appointed Geoffrey Michael Clemens to represent Oxner. (Order Appointing Counsel; R. p. 8.) At the time of the Order, Oxner was already in the custody of the Department of Mental Health, and he was served with the Petition on September 9, 2011. (Affidavit of Service; R. p. 249.) Soon after, on September 20, 2011, his appointed counsel filed a *Brady* motion. (*Brady* Motion; R. pp. 244-48.) This was the end of activity in the case for approximately *four years*.

In the interim, Oxner was re-indicted and re-evaluated for competency. However, those proceedings were entirely unrelated to this SVP matter and were designed solely to correct the procedural deficiencies with the Petition. The State should not benefit from delaying the § 44-48-100(B) hearing to fix its mistakes. After the trial court appointed new counsel for Oxner in September of 2015, the proceedings moved more quickly. However, by the time of the § 44-48-100(B) hearing this matter had been pending for nearly *five years*.

The court appointed Ms. Zmroczek on September 10, 2015. She raised the timeliness issue at the first opportunity, which was at the § 44-48-100(B) hearing. As she argued at the hearing,

there are constitutional concerns about the timeliness of this matter since it has been pending since 2011. (Tr. p. 80:12-24; R. p. 196.) The Assistant Attorney General acknowledged that there “has been a delay,” but countered that the statute articulated no specific time for holding the § 44-48-100(B) hearing.

Whether the statute articulates a time limit, however, is irrelevant. First, the trial court’s August 15, 2011 order specifically stated that the § 44-48-100(B) hearing would occur within 72 hours of Oxner being taken into custody, if he was not already in custody. In other words, if he was already in custody, the hearing would occur within 72 hours. The record shows that this order went unheeded. Nearly five years passed before the hearing was held. The SVP Act specifically guarantees Oxner all rights enjoyed by criminal defendants, aside from the right to not be tried while incompetent. Therefore, Oxner was guaranteed a speedy trial, which indisputably did not occur.

Each of the speedy trial factors warrants dismissal. First, the length of the delay was approximately 57 months, tipping that factor in Oxner’s favor. The filing of the Petition is akin to an initial arrest or indictment, and is the point where Oxner “became the accused” for purposes of starting the clock. *See United States v. MacDonald*, 456 U.S. 1, 6-7 (1982). Nearly five years passed between the filing of the petition and the evidentiary hearing. Therefore, the length of delay was significant and triggers review of the remaining three factors. *See State v. Robinson*, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (Ct. App. 1999) (five year delay warranted consideration of the other factors); *see also State v. Brazell*, 325 S.C. 65, 75-76, 480 S.E.2d 64, 70 (1997) (a three-year and five-month delay was sufficient to trigger review); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978) (two-year and four-month delay in prosecution was sufficient to trigger speedy trial analysis).

Next, the State's lack of reason for the delay also tips in Oxner's favor. The State admitted that there was a delay between the filing of the Petition and the § 44-48-100(B) hearing. (Tr. p. 80:25-81:21.) However, its justification was simply that "there's no time limit in the statute for the actual hearing" under § 44-48-100(B). (*Id.*) The State bears the responsibility of justifying the delay between charge and the trial. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483. As the *Langford* Court explained, when the State's justification is based on negligence or overcrowded dockets, it weighs less heavily against the State, but it still ultimately bears responsibility. *Id.* Additionally, Oxner bore no responsibility for the delay as he did not request continuances or extensions. Therefore, this factor also weighs against the State.

The next factor is the defendant's assertion of the right. The record reflects that Oxner's counsel raised this issue at the first hearing opportunity, which was the § 44-48-100(B) hearing. Admittedly, trial counsel did not file a formal motion prior to the hearing. However, she was appointed only a few months prior and the case had already sat for over four years prior to her appointment.⁶ Therefore, Oxner had already endured a considerable delay.

Finally, Oxner undoubtedly suffered prejudice due to the delay. Under this prong, a defendant may either show actual or presumptive prejudice. "Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." *State v. Hunsberger*, 418 S.C. 335, 351, 794 S.E.2d 368, 376 (2016). Additionally, excessive delay can result in presumptive prejudice, as it "compromises the reliability of a trial in ways that neither party can prove or even identify[,] . . . [as] 'time's erosion of exculpatory evidence and testimony can rarely be shown.'" *Id.* (quoting *Doggett v.*

⁶ Oxner's prior counsel, Mr. Clemens, participated in the case at the very beginning but had no meaningful participation past 2011.

United States, 505 U.S. 647, 655 (1992)). Although presumptive prejudice alone cannot support a speedy trial claim, “it is part of a mix of relevant facts, and its importance increases with the length of time.” *Id.* In this matter, Oxner already faced the difficult task of essentially being prosecuted for crimes despite being incompetent and unable to assist his attorney. Moreover, the delay between the filing of the petition and the § 44-48-100(B) is simply inexplicable. The State’s sole 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, each of the speedy trial factors weighs in Oxner’s favor. Because the SVP Act affords Oxner with the all of the constitutional rights enjoyed by criminal defendants, aside from the right to be competent to stand trial, he was entitled to a speedy trial. This right was flagrantly violated by the five year delay. Accordingly, the only available remedy is to dismiss this matter.

III. The Trial Court Erred by Finding that Oxner’s Procedural Due Process Rights were not Violated.

Even for persons charged with a sexually violent offense but found incompetent to stand trial, the SVP Act nevertheless provides an avenue for the State to proceed. Section 44-48-100(B) contemplates a hearing before the circuit court where the court determines whether the person committed the acts charged beyond a reasonable doubt. For these hearings, the SVP Act affords the accused all of the constitutional rights available to defendants at criminal trials, except for the right not to be tried while incompetent. Under this statutory scheme, Oxner’s procedural due process rights were violated by what essentially amounted to quasi-criminal trial, complete with a “verdict” beyond a reasonable doubt, while he was incompetent and unable to meaningfully participate in his defense.

“Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the

situation demands.” *State v. Legg*, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016). “Procedural Due Process contemplates a fair hearing before a legally constituted impartial tribunal.” *Id.*; see also *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (“[A] guarantee of fair procedure, sometimes referred to as ‘procedural due process’: the State may not execute, imprison, or fine a defendant without giving him a fair trial.”).

“To establish a procedural due process claim, a person must show deprivation of his liberty or property interests due to the government’s failure to provide notice, an opportunity to be heard in a meaningful way, or judicial review.” *Clemmons v. Lowe’s Home Centers, Inc.--Harbison*, 412 S.C. 366, 378, 772 S.E.2d 517, 524 (Ct. App. 2015)). To determine whether a particular procedural protection is warranted in a given context, courts apply the test articulated in *Mathews v. Edwards*, 424 U.S. 319, 334 (1976). The *Mathews* test has three elements: (1) the liberty interest at stake; (2) the risk of erroneous deprivation of that liberty interest with the existing procedures and probable value, if any, of additional safeguards; and (3) the government interest, including costs and administrative burdens of additional procedures. *Id.* at 370.

The first factor undoubtedly weighs heavily in Oxner’s favor. “Civil commitment deprives [the offender] of significant liberty interests.” *In re Detention of Morgan*, 253 P.3d 394 (Wash. Ct. App. 2011); see also *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (“A person’s interest in freedom from bodily restraint is ‘at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.’” (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992))). This is particularly true due to the high burden for demonstrating that release from the SVP program is appropriate. The Department of Mental Health must determine “that the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual

violence” to even begin the process of releasing the offender from the SVP program. S.C. Code Ann. § 44-48-120. Additionally, there are several other procedural hurdles, including judicial hearings, before release is ever a possibility.

The second element also weighs in Oxner’s favor. There is a considerable risk of erroneous deprivation of liberty under the existing procedures. As Oxner’s most recent competency evaluation details, he has a very limited grasp on the nature of the court proceedings and even the acts for which he was indicted. For example, he “state[d] the charges are not serious and they are ‘not even a crime,’” and that he believed if “the children borrowed money from him, it made it okay to have sexual contact with them.” (Court Ordered Capacity Evaluation dated Sept. 11, 2014 at 5, Court’s Ex. 1; R. p. 223.) In the evaluation, Oxner was also unable to state the legal name of the charges against him. (*Id.*)

Likewise, his understanding of the criminal process was rudimentary at best. As the evaluation noted, although Oxner has “some factual understanding of the legal system,” he has “numerous areas of knowledge deficits.” (*Id.*) He understood things like the fact that his attorney was “supposed to be on [his] side,” that a jury consists of 12 people who would decide if he was guilty, that the jury’s decision had to be unanimous, and what a plea of “not guilty” means. (*Id.*) However, he also improperly believed that if convicted he could potentially be “executed or crucified,” that the judge “goes along with the doctor to do evil stuff and he will be judged for his actions later,” and that the jury, not judge, renders the sentence. (*Id.*) He also had “difficulty formulating a clear plan as to what he wished his attorney would do for him.” (*Id.*)

Ultimately, the evaluating doctor found that Oxner would “not be self-protective if he were to testify,” as he freely made highly incriminating statements during the evaluation. (*Id.* at 6; R. p. 224.) Additionally, he was “likely to express delusional statements in court and to his attorney,”

and had “unrealistic expectation[s] about the likely legal outcomes.” (*Id.*) As the doctor explained, “[t]his would make his ability to work with the attorney in preparation of defense *difficult, if not impossible.*” (*Id.* (emphasis added).) Thus, due to his lack of “rational understanding of the legal system” and the “ability to assist his attorney,” the examining doctor found him lacking the capacity to stand trial. (*Id.*)

Oxner’s behavior at the evidentiary hearing was in line with this evaluation. For the first part of the hearing, Oxner was compliant. However, towards the end of the proceedings he had several outbursts which ultimately resulted in his removal from the courtroom. During the summation arguments of counsel, Oxner made several interjections, calling the State’s witnesses “liars,” claiming that they were “talking about something ain’t never happened,” and stating that the police told them what to say. (Tr. p. 82:4-25, 84:19-21, 87:13-15; R. p. 198, 200, 203.) Oxner also interrupted saying he “call[ed] for a retrial” to “[f]ind out what the truth is,” and that the proceeding “ain’t no hearing.” (Tr. p. 85:9-12, 86:15-16; R. pp. 201-02.) After these repeated interjections, trial counsel requested that Oxner be removed from the courtroom out of concern that he would say something that would negatively impact his defense. (Tr. p. 87:16-25; R. p. 203.) The trial court granted this request, agreeing that it was in Oxner’s best interest. (Tr. p. 88:11-25; R. p. 204.)

Oxner was not able to assist trial counsel in identifying any mitigating evidence or favorable witnesses. Moreover, it would have been useless for him to take the stand in his own defense due to his limited grasp on what was happening in the trial. This is in stark contrast with SVP offenders who were competent to stand trial in their criminal case, and were adjudicated by a jury of their peers. Those defendants could assist their attorneys in preparing and presenting a robust defense. This is simply not feasible with individuals like Oxner. Nevertheless, the SVP

Act permits what is essentially a criminal trial to determine whether the offender committed the charged acts beyond a reasonable doubt despite no meaningful participation from the accused.

As the Supreme Court has explained, the test to determine “competency” is “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.” *Sims v. State*, 313 S.C. 420, 423, 438 S.E.2d 253, 254 (1993) (quoting *Godinez v. Moran*, 509 U.S. 389, 396 (1993)). The aim of requiring a defendant to be competent is to “ensure that he has the capacity to understand the proceedings and to assist counsel.” *Id.* (quoting *Godinez*, 509 U.S. at 402.) Competency is therefore a necessary predicate to the effective exercise of one’s right to counsel. In *Drope v. Missouri*, 420 U.S. 162 (1975), the United States Supreme Court recognized the relationship between competency and the rights of the accused in a criminal context:

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . Some have viewed the common-law prohibition “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). The prohibition on subjecting an incompetent person to criminal proceedings, explained the *Drope* Court, “is fundamental to an adversary system of justice.” *Id.* at 172.

Granted, proceedings under the SVP Act are classified as civil, not criminal, in nature. *See In re Luckabaugh*, 351 S.C. at 135, 568 S.E.2d at 344. Nevertheless, the very language of the statute blurs the line between civil and criminal. Offenders are afforded the same constitutional

rights as criminal defendants and the court's findings must be beyond a reasonable doubt. Undoubtedly, the right to counsel is diluted by incompetency in an SVP proceeding to the same degree it is in a criminal proceeding. When the right to counsel—essential the very right to mount a defense—is diluted, the procedure for detaining individuals as SVPs loses its constitutional footing. The constitutional guarantees afforded by the statute are useless if they cannot be meaningfully exercised.

As a recent judicial opinion explained, the deeply embedded principle of prohibiting prosecution of incompetent persons, “arises from a repugnance, both legal and moral, in forcing a criminal defendant into a trial that may result in substantial loss of liberty when the defendant is incapable of understanding the proceeding, or assisting in the defense.” *Moore v. Sup. Ct.*, 237 P.3d 530, 547 (Cal. 2010) (Moreno, J., dissenting). If this is deemed repugnant, “it is equally repugnant to force an individual to stand trial as a sexually violent predator (SVP) and face a potential lifetime term of civil commitment when that person lacks the competence to understand, or participate meaningfully in . . . the proceeding.” *Id.*

Requiring an individual to be competent before being tried would be beneficial to the SVP process as a whole. It would ensure that individuals are not subjected to involuntary detention based on the results of what is essentially a trial in absentia. Likewise, it would ensure that the court is presented with an individual who can understand the nature of the proceedings against him. Finally, it ensures that persons detained as SVPs are the proper persons for receiving the treatments serving the goals of that scheme. In light of these concerns, the risk of erroneous deprivation of liberty is high when an incompetent person is made to stand trial. Therefore, this factor also weighs in Oxner's favor.

Finally, there is no governmental interest in subjecting an incompetent person to what essentially amounts to a criminal trial. The State certainly has a compelling interest in protecting society from sexual predators. However, this interest is not served when an incompetent person suffering severe mental deficiencies is referred to the SVP program. Scholarly research suggests that an incompetent person will not be able to participate in SVP treatment. As one journal explained, “attempting to curb the compulsively lurid behaviors of an SVP that precipitate within the matrix of a florid psychosis or severe cognitive impairments would likely prove futile. . . . [C]urrently available treatments for SVPs finds its provenance in rational, goal-directed, even insightful, cognition.” *In re Morgan*, 330 P.3d 774 (Wash. 2014) (Moreno, J., dissenting) (quoting Alan A. Abrams et al., *The Case for a Threshold for Competency in Sexually Violent Predator Civil Commitment Proceedings*, 28 Am. J. Forensic Psychiatry no. 3, 2007, at 7, 22-23). Because the State’s interest in effective treatment of SVPs is undermined when it seeks to have an incompetent person adjudicated an SVP, the third *Mathews* factor also weighs in Oxner’s favor.

Admittedly, many states that have addressed the issue have declined to recognize a right to competency during SVP proceedings. *See, e.g., Moore*, 237 P.3d 530; *In re Commitment of Weekly*, 956 N.E.2d 634 (Ill. 2011); *Nixon v. Kinder*, 129 S.W.3d 5 (Mo. Ct. App. 2003); *In re Detention of Morgan*, 330 P.3d 774 (Wash. 2014). However, recent cases have drawn strong dissents articulating very compelling reasons for recognizing such a right. *See, e.g., Moore*, 237 P.3d 530 (Moreno, J., dissenting); *In re Detention of Morgan*, 330 P.3d 774 (Stephens, J., dissenting). Moreover, several of the courts that have rejected a due process right relied on a flawed balancing of the *Mathews* factors. They ignored concerns about effective SVP treatment and the indisputable relationship between competency and the meaningful exercise of the right to counsel and other essential procedural safeguards. *See, e.g., Moore*, 237 P.3d at 543-47; *Morgan*,

330 P.3d at 779-80; *but see In re Commitment of Camper*, 933 So.2d 1271 (Fla. 2004) (finding that respondents under Florida’s SVP act, which does not make reference to competency, have a due process right to be competent “in order to consult with counsel and testify on his own behalf” where testimony is presented at trial regarding previously “untested factual allegations”).

Additionally, the winds of change are swirling around SVP programs. Two recent federal civil rights decisions have declared the SVP schemes of two states unconstitutional. First, in *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015), the District Court declared that Minnesota’s civil commitment statutes and sex offender program do not pass constitutional scrutiny, as the overwhelming evidence was that the scheme was punitive in nature, which “segregates and indefinitely details a class of potentially dangerous individuals without the safeguards of the criminal justice system.” *Id.* at 1144. The *Karsjens* court ordered the relevant decision makers to come together to try and fashion a suitable remedy. *See id.* Similarly, in another civil rights action, *Van Order v. Schafer*, 129 F. Supp. 3d 839 (E.D. Mo. 2015), the District Court found Missouri’s SVP Act unconstitutional both as written and as applied to the petitioners. The court explained that the Missouri program suffered from “systemic failures regarding risk assessment and release that have resulted in continued confinement of individuals who no longer meet the criteria for commitment.” *Id.* at 844. That court also ordered that it would work to craft a remedy after conducting additional proceedings.

A full examination of the *Mathews* factors supports finding that procedural due process requires that an accused SVP be competent to stand trial. Although other courts have reached the opposite conclusion, the analysis set forth in those decisions is not a sufficient justification for the result. The dissenters in *Morgan* cautioned against “parrot[ing] the reasoning of those courts as a substitute for a hard look of what the constitution expects of a justice system.” *Morgan*, 330 P.3d

at 786. Because the rights afforded to an accused SVP have little force if the accused is incompetent, the court should recognize that the SVP has a procedural due process right to be competent and reverse the trial court.

IV. Trial Counsel was Ineffective for Failing to Seek Dismissal on Procedural Grounds.

The question of whether persons accused under the SVP Act have a due process right to the effective assistance of counsel and, if so, whether ineffective assistance of counsel claims may be raised on direct appeal, is presently before the Supreme Court of South Carolina. *See* Final Brief of Appellant, *In re Chapman*, No. 2014-001181 (S.C. S. Ct. Apr. 14, 2015). Appellant incorporates those arguments by reference herein.

A. Oxner is Entitled to the Effective Assistance of Counsel.

Stated briefly, *Chapman* contends that he and others facing commitment under the SVP Act, including Oxner, have a due process right to the effective assistance of counsel. The Supreme Court has long recognized that the “right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397, U.S. 759, 771 n.14 (1970). The due process right flows from the United States and South Carolina Constitutions. *See* U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. The right is distinct from the Sixth Amendment right to counsel in criminal cases. *See In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001).

“[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979). “The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.” *Vitek v. Jones*, 445 U.S. 480, 492 (1980). Every justice who considered the merits in *Vitek* concluded that involuntary commitment implicates a liberty interest protected by the due process

clause. *Id.* at 482, 497-98 (a four justice plurality found that this would **require** counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill).

South Carolina's SVP Act stresses the right to counsel and the need to conform to constitutional requirements. Defendants have the right to counsel at the probable cause hearing. S.C. Code Ann. § 44-48-80(C)(1). If the defendant is going to be tried under the SVP Act, he is entitled, "[at] all stages of the proceedings under this chapter . . . to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-48-90(B). If a defendant is incompetent, they are entitled to "all constitutional rights available to defendants at criminal trials." S.C. Code Ann. § 44-48-100(B). Finally, the SVP Act contains an overarching provision to ensure constitutional protections for accused persons, which states, "[t]he involuntary detention and commitment of a person pursuant to this chapter must conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

"Once a State has granted prisoners a liberty interest . . . due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." *Vitek*, 445 U.S. at 488-89 (internal quotations omitted). South Carolina grants persons accused under the SVP Act a liberty interest in the right to counsel. This liberty interest would be meaningless if the right to counsel did not mean the right to effective assistance of counsel. Surely the Legislature did not intend to grant defendants an empty right to counsel that has no substantive meaning.

Many other states with SVP laws recognize the right to the effective assistance of counsel. *See, e.g., Maiming v. State*, 913 So.2d 37, 37-38 (Fla. Dist. Ct. App. 2005) (recognizing right to effective assistance of counsel in SVP cases); *Smith v. State*, 203 P.3d 1221, 1232 (Idaho 2009) ("[T]he legislature has granted a statutory right to counsel, which gives Smith the statutory right to effective assistance of counsel."); *People v. Rainey*, 758 N.E.2d 492, 502 (Ill. App. Ct. 2001)

(same); *In re Ontiberos*, 287 P.3d 855, 865 (Kan. 2012) (same); *Commonwealth v. Ferreira*, 852 N.E.2d 1086, 1090-91 (Mass. App. Ct. 2006) (noting that the right to counsel would be “of little value if there were no expectation that counsel’s assistance will be effective”); *Jenkins v. Dir. of the Va. Ctr. Behav. Rehab.*, 624 S.E.2d 453, 460 (Va. 2006) (recognizing right to effective assistance of counsel in SVP case); *In re Detention of Stout*, 150 P.3d 86, 97 (Wash. 2007) (same); *State ex rel. Seibert v. Macht*, 627 N.W.2d 881, 886 (Wis. 2001) (finding right to effective assistance of counsel even on appeal of SVP matter).

The Kansas Supreme Court’s decision in *Ontiberos* is particularly relevant because South Carolina’s SVP Act is modeled on the Kansas statute. *See In re Matthews*, 345 S.C. 638, 649, 550 S.E.2d 311, 316 (2001) (“South Carolina’s Act is modeled on Kansas’ Sexually Violent Predator Act.”). The Kansas court began by analyzing the relevant statute which provided that “at all stages” of the SVP proceedings a person “shall be entitled to the assistance of counsel. . . .” *Ontiberos*, 287 P.3d at 862-63 (emphasis in original). The court then stated that “when there is a right to counsel there is necessarily a correlative right to effective counsel—regardless of whether the right derives from a statute or the constitution.” *Ontiberos*, 287 P.3d at 863. Applying these principles, the court concluded that an SVP defendant is entitled to the effective assistance of counsel in light of the liberty interest implicated in SVP proceedings. *See id.*

As Chapman also contended, if there is a right to effective assistance of counsel, at the very least the standard articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 688 (1984), should be the floor. To prove that counsel was ineffective, *Strickland* requires an applicant show that: (1) counsel’s performance was deficient; and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Most states that have recognized a right to effective

assistance of counsel in SVP proceeding apply the *Strickland* standard. See *Ontiveros*, 287 P.3d at 866-68. However, Montana has applied an even higher standard in light of the difficulties faced by practitioners in representing defendants in involuntary commitment cases. See *In re Mental Health of K.F.G.*, 29 P.3d 485 (Mont. 2001). In *K.F.G.*, the Montana Supreme Court found that *Strickland* did not go far enough, finding that a higher standard for competence and lower standard for burden of proof should apply. See *id.* at 501.

B. Oxner Should be Permitted to Raise Ineffective Assistance Claims on Direct Appeal.

Chapman also contended that, if it recognizes a right to effective assistance of counsel, the Supreme Court should also recognize an exception to the general rule and permit these claims to be raised on direct appeal of SVP matters. This procedure would not conflict with the South Carolina precedent prohibiting ineffective assistance claims on direct appeal because that precedent applies to criminal cases, not civil actions under the SVP Act. See, e.g., *State v. Carpenter*, 277 S.C. 309, 309, 286 S.E.2d 384, 384 (1982) (noting that courts will usually not consider ineffective assistance claims on appeal “from a conviction”).

Oxner cannot raise his unpreserved claims and seek plain error review. The Supreme Court “has routinely held the plain error rule does not apply in South Carolina state courts.” *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). “Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review.” *Id.* Likewise, Oxner cannot avail himself of post-conviction relief procedures because that scheme only applies to criminal convictions. S.C. Code Ann. § 17-27-20. This matter is civil and despite the court’s finding that he committed the charged offenses beyond a reasonable doubt, he has not been convicted of or sentenced for a crime.

Moreover, Oxner may not utilize state habeas corpus as it also applies only to criminal matters. The South Carolina Code specifically states that habeas only applies to persons “committed or detained for any crime.” S.C. Code Ann. § 17-27-20. Additionally, after the passage of the PCR statute, the writ of habeas corpus was primarily limited to actions in the original jurisdiction of the Supreme Court. *See Simpson v. State*, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). Finally, habeas is not an adequate safeguard because the legal standard is too high. *See Pennington v. State*, 312 S.C. 436, 439, 441 S.E.2d 315, 316 (1994) (noting that the standard is whether the constitutional violation “constitutes a denial of fundamental fairness shocking to the universal sense of justice”).

Courts from other states have permitted ineffective assistance claims on direct review of an SVP matter. *See, e.g., Ontiveros*, 287 P.3d at 866 (finding that such claims could be heard on direct appeal with a remand, if necessary); *see also Smith v. State*, 203 P.3d 1221, 1232 (Idaho 2009) (allowing such claims on direct review of an SVP commitment because of the inadequacy of other state procedures); *In re Commitment of Dodge*, 989 N.E.2d 1159, 1167 (Ill. Ct. App. 2013) (considering ineffective assistance claims in direct appeal of SVP commitment); *In re Detention of Coe*, 250 P.3d 809, 838-40 (Wash. Ct. App. 2011) (considering ineffective assistance claim on direct appeal of an SVP case); *In re Commitment of Lombard*, 684 N.W.2d 103, 115-16 (Wis. 2004) (considering ineffective assistance claim on direct appeal of an SVP case in Wisconsin).

Because South Carolina lacks a proper procedural vehicle, Oxner should be permitted to raise his ineffective assistance of counsel claims on direct review. If the claim can be decided on the merits based on the trial record, the appellate court should do so. However, if further facts are necessary to adjudicate the ineffective assistance claim, the Court should entertain a motion to remand to the circuit court.

C. Trial Counsel was Ineffective for Failing to seek Dismissal on Procedural Grounds.

As detailed above in Part I, this matter has been fraught with procedural issues from the beginning that rendered these proceedings null and void. However, even if the trial court had the authority to proceed with hearing this matter, trial counsel was ineffective for failing to seek dismissal on procedural grounds prior to the § 44-48-100(B) hearing.

The Multi-Disciplinary Team, Prosecutor's Review Committee, and the Attorney General's Office all made incorrect determinations in 2011 that Oxner met the statutory definition of a person "convicted of a sexually violent offense." Likewise, the trial court made this same error in its Probable Cause Order. Despite this fact, Oxner's attorneys did not challenge the probable cause determination or seek have the petition dismissed. Particularly egregious is the fact that Oxner's case was not only procedurally improper at the outset, but also sat for four years in that state. This opened a door by allowing the State to attempt to remedy the procedural issues by re-indicting Oxner. However, despite re-indicting Oxner, the State *still* has not completed the proper steps required by the SVP Act notwithstanding having over five years to do so. Yet again, however, no counsel sought to have the petition dismissed due to the procedural deficiencies until the § 44-48-100(B) hearing, where Ms. Zmroczek noted that the State did not "meet the qualifications to have [Oxner] fall within . . . the statute." (Tr. p. 80:17-24; R. p. 196.)

It is apparent from the face of the record that trial counsel failed to effectively represent Oxner's interests. No remand on this issue is necessary to determine that trial counsel's failure to raise the procedural deficiencies violated Oxner's due process rights. If the procedural deficiencies were raised at some juncture between the filing of the Petition in 2011 and the § 44-48-100(B) hearing, dismissal would have been warranted. Likewise, Oxner suffered clear prejudice. There

is a reasonable probability that, but for counsel's deficiency, this action would have been dismissed in its entirety. Therefore, both *Strickland* prongs are satisfied and reversal is warranted.

V. Trial Counsel was Ineffective for Failing to Challenge the SVP Act's Deprivation of Oxner's Constitutional Right to a Jury Trial.

As previously noted, Section 44-48-100(B) of the SVP Act provides that "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply" for hearings under that section. S.C. Code Ann. § 44-48-100(B). One of these rights is the right to a trial by jury, which the South Carolina Constitution "preserve[s] inviolate." S.C. Const. art. I, § 14.

For the final determination of whether an accused is an SVP, the SVP Act permits either the accused or the Attorney General to request a trial by jury. *See* S.C. Code Ann. § 44-48-90(B). The portion of the SVP Act governing the § 44-48-100(B) hearing, however, does not make reference to a jury trial. *See generally* S.C. Code Ann. § 44-48-100(B). Although that section contains the language guaranteeing all constitutional rights afforded to criminal defendants, minus the right to competency, this section contemplates only "the court . . . hear[ing] evidence and determin[ing] whether the person committed the acts or acts with which he is charged." *Id.* This section mandates that the court make "specific findings on whether the person committed the act or acts with which he is charged," and only permits the SVP proceedings to proceed if the court finds "beyond a reasonable doubt that the person committed the act or acts with which he is charged." *Id.*

Therefore, the statute contains an inherent conflict. In one sweeping sentence it gives, only to take away in practice. The § 44-48-100(B) proceeding is essentially civil in name only. In every manner it resembles criminal trial, but the General Assembly designed it under a civil framework to avoid the constitutional prohibition against bringing criminal proceedings against an

incompetent person. Nevertheless, the plain language of the statute guarantees the right to a jury trial in the § 44-48-100(B) hearing.

This provision, therefore, cannot survive a constitutional scrutiny. Section 44-48-100(B) “is unconstitutional in all its applications.” *See State v. Legg*, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016). It grants accused SVPs the right to a jury trial for § 44-48-100(B) proceedings, but then provides no mechanism for the accused to exercise that right. Accordingly, there is no application of this statute which is constitutional. The wording of the statute makes it clear that under no circumstances is a jury to find whether the accused committed the charged act(s) beyond a reasonable doubt. The statute *only* contemplates the court making such a finding.

Even constitutional arguments such as this one, however, are subject to the preservation rules applicable in South Carolina appellate courts. The Supreme Court is clear that “a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review,” and this rule “also applies to constitutional claims.” *State v. Sheppard*, 391 S.C. 415, 706 S.E.2d 16 (2011). Accordingly, Oxner may not raise this issue via direct appellate ground. Nevertheless, as detailed above, Oxner should be entitled to raise this challenge via an ineffective assistance of counsel claim.

Trial Counsel did not object to the clear procedural inconsistency inherent in S.C. Code Ann. § 44-48-100(B). Because of this failure to object, Oxner waived the right to challenge the unconstitutional nature of this provision, which deprived him to a right to a trial by jury. This waiver of a critical constitutional right constituted deficient performance by trial counsel. Likewise, Oxner undoubtedly suffered prejudice. Oxner lost the ability to challenge the unconstitutional nature of § 44-48-100(B), and potentially have it declared invalid in its entirety. Moreover, at the very least he lost the ability to have a jury of his peers determine whether he

committed the acts beyond a reasonable doubt. Accordingly, both *Strickland* prongs are also met on this claim, and reversal is warranted.

CONCLUSION

Based on the forgoing, the Court should reverse the judgment of the trial court and dismiss this matter. Failing this, the Court should reverse and remand for a new § 44-48-100(B) hearing.

Respectfully submitted,

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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

CERTIFICATE OF COUNSEL

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

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