ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO 2018-001975

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was tried before the Honorable D. Craig Brown and a jury pursuant to the Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§ 44-48-10 – 44-48-170, from October 22 – 23, 2018, in Horry County. Tr. II, 1. James Falk represented appellant and Christopher Morrow represented the state. Tr. II, 1.

The jury found appellant was a sexually violent predator (SVP). Tr. II, 157, ll. 11-13. The court signed an order of commitment. R. *.

This appeal follows.

STANDARD OF REVIEW

On appeal from a case tried before a jury in an action at law, the appellate court's jurisdiction in cases "extends merely to the correction of errors of law." *In re Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014). "Questions of statutory construction are a matter of law." *Matter of Chapman*, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017) (quoting *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011)). The appellate courts of South Carolina review questions of law de novo. *Id.*

STATEMENT OF FACTS

Appellant had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. Tr. II, 86, ll. 5-14. Appellant also had a history of "decompensation," "becoming more psychotic when he is noncompliant with his medications." Tr. II, 86, ll. 11-13. Appellant did not suffer from hallucinations when properly medicated, but he still had some "delusional and disorganized thinking" (such as believing he was owed close to two million dollars in social security benefits). Tr. II, 99, ll. 17-20; Tr. II, 86, ll. 14-22.

In 1999, appellant pleaded guilty but mentally ill to the offense of assault with intent to commit criminal sexual conduct with a minor in the second degree, and he was sentenced to twenty years in prison. R. *(plaintiff's exhibit #1). When appellant's release date neared, the state sought his commitment pursuant to South Carolina's Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§ 44-48-10 – 44-48-170.

Dr. Marie Gehle, a chief psychologist at the South Carolina Department of Mental Health, evaluated appellant and diagnosed him with biastophilia and schizophrenia. Tr. II, 57, l. 24 – 58, l. 1; Tr. II, 62, ll. 18-20; Tr. II, 81, ll. 1-3. Appellant's mental health history included periods of "being on his medicine to decompensating and then being restored." Tr. II, 103, l. 23 – 104, l. 3. Appellant had been restored to competency more than once. Tr. II, 103, l. 23 – 104, l. 3. Appellant's medical records from the Horry County Detention Center, where he was held prior to trial, revealed that his medications had been discontinued on January 12, 2018 due to sporadic and then eventual noncompliance. Tr. II, 103, ll. 3-10.

On February 28, 2018, defense counsel moved for an evaluation to determine appellant's competency to stand trial. R. *(defendant's exhibit #1 at 7-9). On August 7, 2018, the parties

appeared before the Honorable William H. Seals for a hearing on the matter. Tr. I, 1. Judge Seals was the Chief Administrative Judge for the Horry County Court of Common Pleas. R. *(defendant's exhibit #1 at 1).

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

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

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

> **If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person's commitment is sought** pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and **all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply**. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. If, after the conclusion of the hearing on

> this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court must enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this chapter.

(emphasis added).

The court stated, "44-48-100(B) says that a hearing on this issue must comply with all the procedures specified in this section. In addition the Rules of Evidence applicable in criminal cases apply and all the constitutional rights available to defendants at criminal trials other than the right not to be tried while incompetent. So, I think that's dead on the money in the statute." Tr. I, 3, l. 22 – 4, l. 3.

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

Counsel argued that conducting an SVP trial when appellant lacked the ability to assist in his own defense was a violation of appellant's "due process protections under the V and XIV Amendments to the United States Constitution as well as Article 1, § 3 of the South Carolina Constitution." R. *(defendant's exhibit #1 at 2). Counsel posited that trying appellant under these circumstances would be a deprivation of procedural due process, as evidenced by the application

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[1] For clarification, appellant notes the original motion for a competency evaluation was taken under advisement by the Honorable George M. McFaddin in February of 2018. R. *(defendant's exhibit #1 at 1); Tr. II, 30, ll. 18-24. When the parties had not received a ruling by August 7, 2018, they agreed to have a hearing on the motion in front of the Honorable William H. Seals, who, as discussed above, denied the motion. R. *(defendant's exhibit #1 at 1); Tr. II, 31, ll. 2-8. However, after that hearing but before appellant's trial, the parties received a written ruling from Judge McFaddin granting the motion. R. *(defendant's exhibit #1 at 1; 11-12); Tr. II, 31, l. 12 – 32, l. 3. However, Judge McFaddin's ruling was not enforced since the parties had in the meantime agreed to argue the motion before Judge Seals.

of the three-pronged test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to his case. R. *(defendant's exhibit #1 at 3-5).

Counsel submitted to the trial court that per *Matter of Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), a respondent in a sexually violent predator trial had the right to effective assistance of counsel, and that he was unable to "be effective counsel when I can't communicate with my client." Tr. II, 35, l. 11 – 37, l. 1. Counsel offered that appellant's "mental state has significantly deteriorated," that appellant was "in no condition to testify," and that he was unable to put appellant on the stand because he found appellant to be incapable of "making a logical response to questions." Tr. II, 39, ll. 3-10; Tr. II, 38, ll. 14-25.

Counsel noted that in his experience trying SVP cases, "The only times I have won these cases is when I've been able to put my client up on the stand . . . I cannot put this client on the stand because I have no anticipation that he would answer my questions truthfully or would even make a, a logical response to the questions that I've asked." Tr. II, 38, ll. 15-25. Counsel said he had "not been able to speak with him, do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." Tr. II, 38, l. 25 – 39, l. 10. Counsel offered that over the course of his representation, appellant's handwritten letters to him had gone from being articulate to looking like they had been "scratch[ed]" out, and that conversations with appellant had gone from "iffy" to not "making any sense." Tr. II, 39, ll. 12-20.

The state argued that appellant did not have the right to be competent at trial based on the language of S.C. Code Ann. § 44-48-100(B), and since the requisite mental abnormality or personality disorder for SVP commitment might prevent competency in these cases anyway. Tr.

II, 32, l. 14 – 33, l. 1. The state also cited *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004), in support of its position. Tr. II, 40, ll. 4-5.

Defense counsel countered that appellant had a "track record" of "being able to be returned to competency when he stays on his psychiatric medications." Tr. II, 38, ll. 3-5. Counsel also pointed out that § 44-48-100(B) "does not provide that [appellant is] not entitled to a competency evaluation to stand trial." Tr. II, 35, ll. 21-24.

The court stated, "I don't disagree with you [counsel] at all. The statute doesn't specifically address competencies in these types of cases." Tr. II, 37, ll. 2-4. However, the court ruled that, "even if for argument sake I agreed with you . . . I don't think I have authority to overrule what Judge Seals has done. He's already decided." Tr. II, 37, ll. 5-8. "Judge Seals had the final say so . . ." Tr. II, 33, ll. 18-22. And so, the trial went forward.

After the state rested, defense counsel said he would not be putting up a case since appellant was unable to testify due to his lack of competency to stand trial. Tr. II, 127, ll. 15-25. The court noted that a sidebar discussion had occurred wherein counsel informed the court that appellant "attempted to try to talk to [counsel] today and [counsel] certainly told me at side bar . . . that [counsel] didn't necessarily understand what he was saying. It was not in a coherent manner." Tr. II, 128, ll. 1-6. Counsel agreed that "none of" what appellant said to him during the trial was coherent. Tr. II, 128, l. 7.

The jury deliberated for only twenty-five minutes before it found that appellant was a sexually violent predator. Tr. II, 156, ll. 9-12; Tr. II, 157, ll. 11-13. The court signed an order of commitment. R. *(order of commitment).

ARGUMENT

1.

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

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

A respondent in an SVP proceeding has a "right to effective assistance of counsel" which is statutory right contained in S.C. Code Ann. § 44-48-90,[2] and a constitutional right "arising under the Fourteenth Amendment and the South Carolina Constitution." *Matter of Chapman*, 419 S.E.2d 172, 179, 796 S.E.2d 843, 846 (2017). "[T]he General Assembly provided SVPs with a right to counsel, which cannot be merely a superficial right." *Id.* at 184, 796 S.E.2d at 849. Appellant's right to effective assistance of counsel was denied here, since he was tried without the ability to assist in his defense due to his incapacity to converse with his counsel in a logical manner.

"An SVP's right to counsel arises from a constitutional right to due process similar to the rights attendant to a criminal trial." *Chapman*, 419 S.C. at 185, 796 S.E.2d at 849. "The test for

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[2] S.C. Code Ann. § 44-48-90(B) provides in relevant part, "At all stages of the proceedings under this chapter, a person subject to this chapter is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person."

competency to stand or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

As counsel observed, appellant was unable to "participate in his defense." Tr. I, 3, ll. 14-17. Counsel correctly argued that he was unable to "be effective counsel when I can't communicate with my client." Tr. II, 35, l. 11 – 37, l. 1. Counsel, an experienced trial lawyer, explained that he had "not been able to speak with [appellant], do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted" due to appellant's apparent lack of fitness to stand trial. Tr. II, 38, l. 25 – 39, l. 3.

"[T]he aim of requiring a defendant to be competent [i]s 'to ensure that he has the capacity to understand the proceedings and to assist counsel.'" *Sims v. State*, 313 S.C. 420, 423, 438 S.E.2d 253, 254 (1993) (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993)). A person who is incompetent to stand trial is unable to assist his attorney in preparing his defense. As the United States Supreme Court noted, a "mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no chance to defend himself." *Drope*, 420 U.S. at 171 (internal quotations omitted). Due to his inability to communicate with and assist counsel, appellant was essentially tried in absentia through no fault of his own.

"We cannot construe the Act in a manner that does not recognize an SVP's constitutional right to the effective assistance of counsel." *Chapman*, 419 S.C. at 187, 796 S.E.2d at 850. In

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

As counsel explained, "it's very difficult for me to be effective counsel when I can't communicate with my client." Tr. II, 36, l. 25 – 37, l. 1. The court erred when it found appellant barred from being evaluated for competency to stand trial, since this construction of the SVPA did not recognize appellant's right to the effective assistance of counsel. *Chapman*, 419 S.C. at 187, 796 S.E.2d at 850.

2.

The court erred where it denied appellant's motion to be evaluated for competency to stand trial, where appellant was unable to logically communicate and thus to testify, but he had history of successful restoration to competency, since procedural due process forbids the significant deprivation of an individual's liberty without giving him the opportunity to be heard in a meaningful way.

As counsel correctly argued to the court, appellant should not be deprived of his liberty where he could not even testify in his own defense or discuss his case with counsel. Tr. I, 3, ll. 12-18; Tr. II, 38, ll. 14-15; Tr. II, 37, ll. 16-24.

"The United States Supreme Court 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Matter of Chapman*, 419 S.E.2d 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A civil commitment is a "significant deprivation of liberty." *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425).

"The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, **the opportunity to be heard in person**, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008) (emphasis added). "Procedural due process requires notice, **the opportunity to be heard in a meaningful way**, and

judicial review." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (emphasis added). Here, counsel explained, "I cannot put this client on the stand because I have no anticipation that he would answer my questions truthfully or would even make a, a logical response to the questions that I've asked." Tr. II, 38, ll. 15-25. Counsel said, I have "not been able to speak with him, do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." Tr. II, 38, l. 25 – 39, l. 3. Thus, appellant was left without the opportunity to be heard in person and to be heard in a meaningful way.

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

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. at 334 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972) (alterations omitted)). Due process requires that "procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." *Eldridge*, 424 U.S. at 349 (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

"The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." *McLaughlin v. State*, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). It was undisputed that appellant had been previously deemed not competent to stand trial but he had been successfully restored to competency. The failure to allow appellant such flexibility here, to ensure a meaningful opportunity to present his case, was error.

Due process requires the consideration of three factors.

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

Eldridge, 424 U.S. at 335.

As counsel correctly argued, an application of the three above factors from *Eldridge* validates appellant's position. R. *(defendant's exhibit #1 at 3-5). As to the first factor, civil commitment constitutes a "significant deprivation of liberty." *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425). *See also In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2012) (a person's interest in the freedom from bodily restraint is at the core of due process protections) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *In re Taft*, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015) ("A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy").

The second factor also weighs in appellant's favor, as there was a considerable risk of an erroneous deprivation of liberty under existing procedures. Appellant was unable to be heard in a meaningful way, in that he was unable to tell his side of the story to anyone—neither his counsel nor the jury—due to his lack of competency. The additional procedural safeguard of allowing competency evaluation and restoration would have been highly valuable.

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

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

The Supreme Court therefore held that, "the default rule is that PCR hearings must proceed even though a[n] [applicant] is incompetent." *Id.* at 130, 597 S.E.2d at 787. However, the Court recognized that even a party in such a civil case may need to be competent to assist his

attorney with fact-based issues. "For issues requiring the [applicant's] competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until [the applicant] regains his competence." *Id.* Here, appellant was unable to assist counsel with fact-based issues. As his counsel explained, he had "not been able to speak with [appellant], do the type of preparation that I would need in order to talk to him about some of these victims that he was alleged to have assaulted." Tr. II, 38, l. 25 – 39, l. 10. Appellant's counsel was unable to converse with appellant in a way that "ma[de] any sense," therefore preventing him from obtaining even basic information about any helpful witnesses. Tr. II, 39, ll. 12-20.

Also, *Council* was not a civil commitment proceeding aimed at depriving a person of his liberty—Council had already been deprived of his liberty at a fair trial. In *Council*, the applicant was the party with the burden of proof, unlike here, where appellant was defending himself from the state, who had the burden of proof. Nor did there appear to be the need for any indefinite stay of proceedings here—appellant's competency had been successfully restored multiple times previously.

A civil commitment is a "significant deprivation of liberty." *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425). Here, appellant's counsel correctly asserted that due process protections mandated a competency evaluation. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Eldridge*, 424 U.S. at 334.

3.

The court erred where it denied appellant's motion to be evaluated for competency to stand trial where § 44-48-100(B) provided "the right not to be tried while incompetent" did not apply to an accused SVP who was charged with a predicate offense but found incompetent to stand trial for that offense, since appellant had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable.[3]

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

Appellant was convicted in 1999 of the offense of assault with intent to commit criminal sexual conduct with a minor (ACSCM) in the second degree, via his plea of guilty but mentally ill, and he was sentenced to twenty years in prison. R. *(plaintiff's exhibit #1).

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

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

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

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

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

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

> **If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person's commitment is sought** pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and **all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply**. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court must enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this chapter.

Therefore, while the General Assembly provided that the right not to be tried while incompetent did not apply to some hearings under the SVPA, it explicitly only extended this limitation to persons who are considered to have been "convicted of a sexually violent offense" per § 44-48-30(6)**(c)**—that is, persons who were incompetent to stand trial in the underlying criminal case, not persons like appellant.

Here, the state erroneously argued appellant did not have the right to be competent at trial based on the language of § 44-48-100(B), since he was never found incompetent to stand trial for the predicate offense. Tr. II, 32, l. 14 – 33, l. 1.

The state also argued that an offender's requisite mental abnormality or personality disorder might prevent competency anyway, but appellant's history was one of successful restorations to competency. Tr. II, 32, l. 14 – 33, l. 1; R. *(defendant's exhibit #1 at 2); Tr. II, 38, ll. 3-5. As discussed in Issue 2 above, due process requires that "procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)). Appellant's capacities and circumstances, as shown by his history of competency restoration, require a tailoring of procedures here.

Counsel correctly pointed out that subsection B did not bar appellant from receiving a competency evaluation. Tr. II, 35, ll. 21-24. However, the court ruled § 44-48-100(B)'s limitation on the right not to be tried while incompetent was "dead on the money" in any SVP case. Tr. I, 3, l. 22 – 4, l. 3. The court erred where it read the provision out of context. That provision did not limit appellant's right not to be tried while incompetent because appellant was not in the class of offenders to which it expressly applied.

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

4.

The court erred when it denied appellant's motion to be evaluated for competency to stand trial where it found the chief administrative judge's ruling on the matter months before could not be "overruled," where appellant's mental state had continued to deteriorate, and where appellant was found unfit to stand trial in connection with a prior case, since evidence of a defendant's irrational behavior and prior medical opinion on competence to stand trial may signal the need for further inquiry into competency.

Although it is true that one circuit judge may not overrule another,[5] the trial court here was not asked to overrule the prior judge, since competency is a fluid issue that changes over time and may require reevaluation in light of new facts and circumstances.

The seminal case of *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981), illustrates the changing nature of competency. In *Blair*, 275 S.C. at 531-32, 273 S.E.2d at 537, the defendant, who suffered from schizophrenia (like appellant), was ordered to undergo an evaluation for competency to stand trial by Judge Spruill in October 1977 and he was found incompetent. In June 1978, he was returned to court after his competency was restored. *Id.* In August 1979, Judge Harris ordered the defendant to undergo another competency evaluation, and he was found competent to stand trial by the Department of Mental Health. *Id.* at 532, 273 S.E.2d at 537.

Here, as in *Blair*, a different judge was asked to reevaluate competency at a later date, and there was nothing improper about this request—in fact, the South Carolina Supreme Court found the latter judge in *Blair* should have held a hearing on the matter of competency. *Id.* at 533, 273 S.E.2d at 538. The Supreme Court found of particular relevance that "Blair had a

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

history of mental disorders and past admissions to State Hospital in addition to a past adjudication of incompetence to stand trial in this case." *Id.* These facts are similar to appellant's own history.

Counsel first moved for a competency evaluation in February of 2018, although the motion was not ruled upon until August 7, 2018, when it was heard by the chief administrative judge. R. *(defendant's exhibit #1 at 7); Tr. I, 1. On October 22, 2018, during pretrial motions, counsel again moved for a competency evaluation before the trial judge and argued there was a "change in circumstances" since appellant's condition continued to deteriorate. Tr. II, 1; Tr. II, 39, ll. 8-10.

The fact that counsel was not dilatory in initially seeking an evaluation should not preclude the trial court's consideration of a subsequent motion. Counsel told the court he was unable to be "effective counsel when I can't communicate with my client." Tr. II, 36, l. 24 – 37, l. 1. The trial judge responded, "Right. And, I don't disagree with you at all. The statute doesn't specifically address competencies in these types of cases." Tr. II, 37, ll. 2-4. The court continued that, "even if for argument sake I agreed with you . . . I don't think I have authority to overrule what Judge Seals has done. He's already decided." Tr. II, 37, ll. 5-8. After the state rested, the court noted that counsel had informed him during the trial that appellant had "attempted to try to talk to" counsel during the trial but that appellant was incoherent. Tr. II, 128, ll. 1-6.

In *Drope v. Missouri*, 420 U.S. 162, 169 (1975), the question arose whether there was "reasonable cause to believe that a person who attempted to commit suicide in the midst of a trial might not be mentally competent to understand the proceedings against him." The United States Supreme Court asked, "whether, in light of what was then known, the failure to make further inquiry into [the defendant's] competence to stand trial, denied [the defendant] a fair trial," and

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

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may, in some circumstances, be sufficient [to signal] . . . the need for further inquiry to determine fitness to proceed . . ." *Id.* at 180.

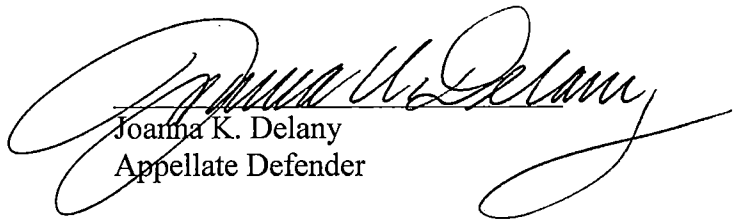
Drope illustrates that as late as during the trial, it may be necessary and proper to reevaluate competency since competency may change over time. *See State v. Lee*, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980) (competency to stand trial "relates to the time when the case would be submitted to the court and jury"); *State v. Motts*, 391 S.C. 635, 650-51, 707 S.E.2d 804, 812 (2011) (testimony by two expert witnesses that "competency can change over time"). Here, counsel noted that appellant had a history of psychotic disorder, and that he been found incompetent to stand trial a number of times previously. R. *(defendant's exhibit #1 at 2); Tr. II, 103, l. 23 – 104, l. 3. Counsel explained appellant's letters to him had gone from rational to gibberish, and that conversations with appellant over the course of his representation had gone from "iffy" to not "making any sense." Tr. II, 39, ll. 16-20; Tr. II, 39, ll. 12-16. These facts were relevant to reevaluating appellant's need for a competency evaluation.

"The test for competency to stand trial or continue trial is whether the defendant has the sufficient **present** ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (emphasis added). Here, the court's determination that it could not "overrule" the prior judge was

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

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable D. Craig Brown, Circuit Court Judge

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

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Thomas Griffin, #, at 4546 Broad River Road, , Columbia, SC 29210, this 19th day of September, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of September, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028