THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

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

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

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PETITION FOR REHEARING

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Introduction

Pursuant to Rule 221(a), SCACR, Appellant Frances A. Oxner respectfully petitions for a rehearing of Opinion No. 5725 (S.C. Ct. App. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 135) ("the Opinion") and/or the issuance of a new opinion. The basis for the requested rehearing is that certain facts, points, and arguments were overlooked and misapprehended as discussed below.

Argument

I. Deprivation of Procedural Due Process.

Rehearing is first warranted because the Court misapprehended Appellant's due process argument. The Opinion solely addressed the broad question of whether permitting SVP proceedings against an incompetent person violates due process.[1] Appellant's argument, however, was a more nuanced assertion that his inability to assist counsel was fundamentally at odds with the Constitutional guarantee of the effective assistance of counsel during PCR proceedings as recognized by *In re Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), which resulted in a deprivation of due process. The Opinion overlooks this point.

A. Importance of *Chapman*.

Chapman supports a finding that S.C. Code Ann. § 44-48-100(B) improperly deprives accused SVPs of their right to procedural due process. In *Chapman*, the Supreme Court unequivocally held that "persons committed as ***SVPs have a right to the effective assistance of***

[1] In doing so, the Opinion relied on a handful of cases from other states addressing the general question of whether SVP proceedings against someone who is incompetent to stand trial in a criminal matter violates due process. None of those cases addressed the specific issue of whether a Constitutional guarantee to the effective assistance of counsel coextensive with the same guarantee in criminal proceedings renders such proceedings improper. Moreover, the Court is, of course, permitted to make its own finding as to whether this violates the procedural due process guarantees of ***our*** State's Constitution without regard to these other decisions.

counsel, and may effectuate that right by seeking a writ of habeas corpus." *Id.* at 175, 796 S.E.2d at 844 (emphasis added). As the Court explained, "given the significant due process implications inherent in civil commitments," the right to counsel afforded by section 44-48-90(B) of the SVP Act "is not merely a statutory right, but is also ***a constitutional one*** arising under the Fourteenth Amendment and South Carolina Constitution." *Id.* at 179, 796 S.E.2d at 846 (emphasis added). Therefore, "[l]est this right ring hollow," the Court held that this right is "necessarily a right to effective counsel." *Id.* at 180, 796 S.E.2d at 847. The Court reasoned that because the General Assembly provided SVPs with a right to counsel, it "cannot be merely a superficial right." *Id.* at 184, 796 S.E.2d at 849. To evaluate and effectuate this right, the Court adopted the standard from *Strickland v. Washington*, 466 U.S. 668, 689 (1984) to determine effectiveness. *Chapman*, 419 S.C. at 185, 796 S.E.2d at 849 In doing so, the Court explained that "[a]n SVP's right to counsel arises from a constitutional right to ***due process similar to the rights attendant to a criminal trial***." *Id.* (emphasis added).

The right to effective counsel in SVP matters is, therefore, essentially coextensive with the right to effective counsel in criminal matters. To remove any doubt on this issue, the Court expressly adopted the same standard for gauging effectiveness of counsel in a criminal matter.

B. *Chapman*'s interplay with Appellant's lack of competency to stand trial.

There are a number of reasons why the State may not proceed with criminal charges against a person who is incompetent to stand trial. The central reason, however, is that the defendant is unable to assist counsel in preparing a defense, understand and contribute to the proceedings, or testify in their own defense if they so choose. Counsel cannot be truly effective without these tools in the toolkit. *See, e.g.*, *Sims v. State*, 313 S.C. 420, 423, 438 S.E.2d 253, 254 (1993) (explaining that the purpose of requiring a defendant to be competent is to "ensure that he has the capacity to

understand the proceedings and ***to assist counsel***." (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993)) (emphasis added)); *State v. Bell*, 293 S.C. 391, 396, 360 S.E.2d 706, 708 (1987) (noting that the applicable test for competency focuses on "whether the defendant has the sufficient present ability to ***consult with his lawyer with a reasonable degree of rational understanding*** and whether he has a rational, as well as a factual, understanding of the proceedings against him" (emphasis added)).

The Kansas Court of Appeals recently examined the analogous right to effective assistance of counsel in probation revocation proceedings. *See State v. Gonzalez*, 457 P.3d 938, 943 (Kan. Ct. App. 2019). As that court explained, legal representation alone "is not really an adequate due process substitute for competency in this context." *Id.* The court noted that the right to a lawyer entails the concomitant right to effective representation, and "[n]o matter how sharp a lawyer's litigation skills, he or she can seldom fashion an effective case for the client without a thorough grounding in the facts." *Id.* at 944. Moreover, "***oftentimes a client will be a critical source of information*** in constructing a narrative of the relevant events, identifying knowledgeable witnesses, and gathering other evidence." *Id.* Finally, "[d]uring an evidentiary hearing, the client can point out possible errors in witness testimony and may provide his or her own (sometimes) persuasive testimony." *Id.* The incompetent client, however, "can do none of those things," and a lawyer representing an incompetent client "will be ***hamstrung in disputing the State's evidence and marshalling any sort of contrary defense case***." *Id.* (emphasis added).

Those same concerns are strikingly present in this case. It is undisputed that Appellant is entirely unable to assist counsel. The capacity evaluation determined that he did not understand the criminal process and he demonstrated an inability to "formulate a clear plan as to what he wished his attorney would do for him." (Court Ordered Capacity Evaluation dated Sept. 11, 2014

at 5, Court's Ex. 1; R. p. 223.) Moreover, the evaluator found that Oxner's mental capacity "make[s] his ability to work with the attorney in preparation of defense ***difficult, if not impossible***." (*Id.* at p. 6; R. p. 224 (emphasis added).)

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

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

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

The Opinion overlooks whether Appellant's complete inability to assist counsel and ensure counsel's effectiveness resulted in a deprivation of due process. As Appellant explained, the proceeding below essentially amounted to a quasi-criminal trial. Appellant was afforded all of the constitutional rights available to defendants at criminal trials except for the right not to be tried while incompetent and there was a finding of guilt beyond a reasonable doubt. Yet, appellant was incompetent and unable to meaningfully participate in his defense.

The need for assistance from the defendant is particularly important in a child sex abuse case. These cases often have no physical evidence or witnesses other than the complainant and the accused—as was the case here—and it reduces the case to a swearing match between the complainant and the defendant. *See State v. Stukes*, 416 S.C. 493, 500 & n.4, 787 S.E.2d 480, 483

& n.4 (2016). The defendant is typically the only person who can explain why a child might be "coached" into making an accusation. Here, Oxner's knowledge of the family history would be required in order to mount a proper defense.

Therefore, under the factors articulated in *Mathews v. Edwards*, 424 U.S. 319, 334 (1976), as applied to the South Carolina Constitutional guarantees of due process and the effective assistance of counsel, the Opinion should have reversed the lower court. As a result, the Court should grant rehearing.

II. The Opinion overlooked that Appellant's unconstitutional delay arguments were preserved.

Respectfully, the Opinion relies on findings that are not supported by the record in finding that Appellant's unconstitutional delay argument was unpreserved.[2] First, the Opinion highlights that Appellant's initial counsel failed to raise lack of timeliness. The Record, however, is silent on the length of time that the initial attorney represented Oxner. Although he was appointed in 2011, the Record does not reflect ***why*** the case stalled for several years. The docket does not reflect any activity by this attorney after the first two months following his appointment. In fact, for nearly five years, the case file reflects no activity on Oxner's behalf by ***any counsel***. Counsel's representation necessarily terminated at some point though, as new counsel had to be appointed to represent Appellant at the evidentiary hearing.

The Opinion improperly seeks to penalize Appellant for the record's silence. The State—not Appellant—bears the responsibility of justifying the delay between the charge and trial. *State v. Langford*, 400 S.C. at 443, 735 S.E.2d at 483. As noted, Appellant was and remains incompetent

[2] Appellant's primary argument on this issue contended that the State violated his right to a speedy trial, which is guaranteed by the SVP Act, due to an inexplicable five year gap between the initiation of the SVP proceedings and the hearing pursuant to S.C. Code Ann. § 44-48-100(B).

to stand trial and thus could not be expected to unilaterally raise an objection to the delay except through counsel. The Record's silence as to the reason for the lack of activity should have been construed in favor of the Appellant rather than the State. *See, e.g.*, *Newell v. State*, 175 So. 3d 1260, 1270 (Miss. 2015) ("Because the record is silent as to the reason for this delay, this period of delay must count against the State."); *cf. Harper v. State*, 567 S.W.3d 450, 459 (Tex. App. 2019) ("If the record is silent regarding the reason for the delay, it weighs against the State but not heavily, because courts do not presume that the State has tried to prejudice the defense."). Instead, the Opinion construed this against Appellant. In any event, Appellant's failure to raise the speedy trial issue sooner is not dispositive of the question. *See State v. Hunsberger*, 418 S.C. 335, 349, 794 S.E.2d 368, 375 (2016).

Furthermore, the Opinion relied on facts not supported by the Record to bolster the State's justification for the delay. Here, the ***only*** justification given by the State for the delay was that "there's no time limit in the statute for the actual hearing" under § 44-48-100(B). (Tr. p. 80:25-81:21, R. 196-97.) The Opinion, however, notes that "[c]ases involving individuals found incompetent to stand trial rare complex and difficult, and our courts often have no clear mechanism for addressing the varied questions these cases present." (Op. No. 5725, Shearouse Adv. Sh. No. 18 at 143.) The Opinion further states that the "procedural and constitutional considerations are problematic, as is coordination among the various state agencies that may be involved." (*Id.*) Although this may be accurate in the Court's general experience, there is nothing in the Record of ***this case*** supporting that these issues were the cause of the delay. *Cf. Hunsberger*, 418 S.C. at 347, 794 S.E.2d at 374 (finding that the Court improperly relied on the case's complexity in finding that the delay was justified). Respectfully, the Court should grant rehearing to correct the Opinion's improper reliance on these issues.

Finally, the Opinion alternatively contends that the Court did not rule on the timeliness question either at the hearing or in its order. The Court, however, overlooked the following argument by counsel and the Court's subsequent oral ruling:

> MS. ZMROCZEK: So obviously my concern goes back to my initial constitutional concern is if this was filed in 2011, certainly this hearing wouldn't be timely and I'm just now noticing that because these were supposed to be held within a certain time frame within the program.
>
> Now, if they thought, if this went through the multidisciplinary team in 2011 which was five years ago almost, four years and ten months ago and they thought that he was about to be released then, Your Honor, and it's 2016 and he's still - I still don't think that they meet the qualifications to have him fall within this portion of the statute, in addition to all of my other constitutional arguments. Thank you, Your Honor.
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> . . .
>
> THE COURT: All right. I am prepared to rule. I have heard the evidence. I have heard the testimony presented by Ms. Cindi Floyd and her son Cody Floyd. I have heard also from the detective who investigated this matter. I have reviewed the petition and I have reviewed the evaluation, the latest evaluation of Mr. Oxner and I believe that this hearing has complied with the procedures specified in this section and the section, of course, is 44-48-100 as well as the other parts of the section of the violent predator statute.

(Tr. p. 80:17-24, 85:23-86:7; R. p. 196, 201-02.) Counsel, therefore, properly raised timeliness and the Court explicitly rejected this argument in its oral ruling finding compliance with all of the requirements of the SVP Act. This was sufficient to preserve the issue and provide this Court with a "platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (noting that issue preservation is not a "gotcha" game and that "[i]nstead of being hyper-technical," the Court should "approach preservation with a practical eye").

Because Appellant properly preserved the unconstitutional delay issue, the Court should grant rehearing. As Appellant detailed in his merits briefing, each of the *Langford* factors weighs in his favor and, therefore, his speedy trial rights were violated by the length of the delay between the charges and § 44-48-100(B) hearing.

III. The Opinion overlooked the impact of *State v. Mackey* in analyzing whether the State complied with the SVP Act's prerequisites.

Finally, the Court should grant rehearing because the Opinion overlooked two critical facts in determining that Appellant met the statutory definition of "convicted of a sexually violent offense" because he had "been charged but determined to be incompetent to stand trial." S.C. Code Ann. § 44-48-30(6).

First, the Court overlooked the key statement in *Mackey v. State*, 357 S.C. 666, 595 S.E.2d 241 (2004) that *nolle prossed* charges are treated as if they "***never existed***." *Id.* at 699, 595 S.E.2d at 243 (emphasis added). Other courts are in accord as to the effect of a *nolle prosequi*. *See, e.g.*, *People v. Hughes*, 983 N.E.2d 439, 448 (Ill. 2012) (explaining that a *nolle prosequi* "leaves the matter in the same condition ***as before the prosecution commenced***" (emphasis added)); *Kenyon v. Commonwealth*, 561 S.E.2d 17, 20-21 (Va. Ct. App. 2002) ("After a nolle prosequi of an indictment, the slate is wiped clean, and the situation is the same as if 'the Commonwealth [had] chosen to make no charge.'" (quoting *Burfoot v. Commonwealth*, 473 S.E.2d 724, 727 (Va. Ct. App. 1996))). Therefore, although Appellant was previously charged with sexually violent offenses, once those charges were *nolle prossed* it restored him to the same condition as before the prosecution commenced—*i.e.*, as if he had never been charged—as a matter of law.

The second fact that the Opinion overlooked is that the State ***agreed*** that Oxner did not meet this statutory definition until 2014 when it re-charged him with sexually violent offenses. As the State explained at the hearing:

> So what we have is, when we got the case, the multidisciplinary team had done their thing. The prosecutor review committee had done their thing, we filed our petition, then we discovered in the file that way back in 2004 or 2005 when he was found not competent back then and unlikely to regain competence, the Solicitor did what all Solicitors do, they nolle prossed the charges.
>
> So the way the law reads is for this section to go forward, and by section I'm talking about 44-48-100(b) it talks about a case where the guy is charged. So we had him re-indicted last year.

(Tr. p. 5:8-19; R. p. 121.) Notably, the State's interpretation of the effect of the *nolle prossed* charges is consistent with *Mackey*.

In light of this, 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 of "convicted of a sexually violent offense." Although Appellant was re-indicted in 2014, the State did not restart the SVP process and obtain findings by the Multi-Disciplinary Team, the Prosecutor's Review Committee, or the trial court that were premised on the operative charges as required by the Act. Because the Court overlooked these deficiencies, rehearing is warranted.

Finally, the Court also overlooked Appellant's argument that the *nolle prossed* charges deprived the lower court of jurisdiction to hear the SVP proceedings and that, as a result, all proceedings up until the State re-indicted Appellant are void. *See Mackey*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004) (explaining that "all proceedings following an entry of a nolle prosequi are void because the indictment [i]s no longer valid."); *see also In re Brown*, 294 S.C. 235, 237, 363 S.E.2d 688, 689 (1988) (explaining that a *nolle prosequi* prevents the court from taking jurisdiction over the matter, which is what renders the subsequent proceedings void). This further supports rehearing.

Conclusion

For the reasons discussed above, as well as those set forth in Appellant's opening and reply briefs, which are incorporated herein, this Court should grant rehearing and issue a new Opinion reversing the judgment of the trial court and ordering that this matter be dismissed. Failing that, the Court should grant rehearing and issue a new Opinion reversing and remanding with instructions that the State must amend its petition and obtain the statutorily mandated findings based on the 2014 indictments, with a new § 44-48-100(B) hearing to follow.

Respectfully submitted,

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June 11, 2020

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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Diane Schafer Goodstein, Circuit Court Judge

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

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, do hereby certify that on June 11, 2020, I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court's May 29, 2020 Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Petition for Rehearing

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June 11, 2020

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From: Blake Williams
Sent: Thursday, June 11, 2020 8:51 AM
To: awilson@scag.gov; Deborah Shupe
Cc: Dudek, Robert; Alexander, David
Subject: In re Oxner, Appellate Case No. 2016-001125
Attachments: Oxner - Petition for Rehearing.pdf

Good morning,

Attached for service please find Appellant's petition for rehearing in the above matter, which we will send for filing shortly. Service is made via email pursuant to subsection (g)(3) of Supreme Court Administrative Order 2020-05-29-02.

Thank you,

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