THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit 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 A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Frances Arthur Oxner ("Oxner") petitions this Court to issue a writ of certiorari to review the decision of the Court of Appeals in *In re Care & Treatment of Oxner*, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020) ("the Opinion"). This Court should grant Oxner's petition and reverse the Court of Appeals' Opinion.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on August 24, 2020.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by finding that the § 44-48-100(B) hearing did not infringe Oxner's procedural due process rights despite his incompetency to stand trial on criminal charges and resulting inability to assist counsel with his defense?

2. Did the Court of Appeals err by finding that no unconstitutional delay occurred between the filing of the petition and the S.C. Code Ann. § 44-48-100(B) hearing?

3. Did the Court of Appeals err by finding that Oxner met the definition of "convicted of a sexually violent offense" despite the State having *nolle prossed* of all charges at the time the SVP proceedings began?

STATEMENT OF THE CASE

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 to determine Oxner's capacity to stand trial. (*See* Trial Transcript ("Tr.") p. 4:18-25; R p. 120.) Dr. Richard L. Frierson issued an initial report finding that he 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.) The court ordered that Oxner be admitted to the hospital for 60 days for treatment and evaluation. (Court Ordered Capacity Evaluation dated Oct. 31, 2005; R. pp. 250-53.) Oxner was admitted to the South Carolina Department of Mental Health ("DMH") on

September 9, 2005 and has been hospitalized with the DMH through the present day. (*Id.*; Tr. 4:22-25; R. p. 120, 256.) Another evaluation from Dr. Frierson dated October 31, 2005 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 of Oxner's pending charges. (Tr. p. 5:8-15; R. p. 121.)

Oxner continued to be evaluated yearly by the probate court 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 DMH physician recommended that Oxner be discharged from the forensic unit and transferred to a structured residential care facility. (Petition p. 1; R. p. 12.) This initiated review under the South Carolina Sexually Violent Predator Act ("SVP Act").[1] (*See id.*)

Despite Oxner having no pending charges or convictions for a sexually violent offense, the DMH 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.)

On June 20, 2011, the Prosecutor's Review Committee found 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." (Probable Cause Determination, Ex. B to Petition; R. pp. 20-21.)

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[1] The State asserted that this discharge would constitute "release" for purposes of the SVP Act even though the DMH was merely proposing transfer to a less restrictive facility, not release from DMH custody. (*See* Tr. p. 4:25-5:7, 79:19-80:2; R. pp. 120-21, 195-96.)

On July 11, 2011, the State filed a Petition pursuant to the SVP Act and requested that the court hold a hearing under S.C. Code Ann. § 44-48-100(B). (Petition p. 2; R. p. 13.) That subsection requires that the trial court first "hear evidence and determine whether the person committed the act or acts with which he is charged," and, if it finds the accused did so beyond a reasonable doubt, "enter a final order, appealable by the person." S.C. Code Ann. § 44-48-100(B). The statute provides that the court should "then consider whether the person should be committed pursuant to this chapter." *Id.*

On August 15, 2011, the trial court issued an Order finding there was probable cause to believe Oxner met the statutory criteria for a sexually violent predator. (Probable Cause Order; R. pp. 10-11.) The Order found that it "further appear[ed]" the case should proceed under S.C. Code Ann. § 44-48-100(B). (*Id.*) Therefore, the court ordered that a hearing be held under that statute 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.) Attorney Clemens filed a Motion for *Brady* and Other Favorable Material on September 20, 2011. (*Brady* Motion; R. pp. 244-48.) The SVP case record reflected no further activity until 2015.

As the State 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 when the State instituted the SVP proceeding, 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.) After the Solicitor's Office filed the charges, the court ordered 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 issued an evaluation 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 a separate criminal matter in Lexington County.

The SVP case, however, had no further activity 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 held the S.C. Code Ann. § 44-48-100(B) hearing. (Tr. p. 1; R. p. 117.) As the State noted at the outset, this was the first instance of such a hearing. (*See* Tr. p. 4:18-20; R. p. 120) 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.

On May 18, 2016, the trial court issued a written Order for Evaluation Pursuant to the Sexually Violent Predator Act. (Order; R. pp. 1-7.) In the Order, the trial court found beyond a reasonable doubt that Oxner committed the charged offenses, 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.) The trial court ordered that Oxner be evaluated by a court appointed expert, Amy C. Swan, Psy. D., to determine if he 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. Oxner initially raised five issues to the Court of Appeals, including the three presented herein for this

Court's review.[2] After consideration of the briefing and oral argument, the Court of Appeals issued an Opinion affirming the trial court.

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 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, 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 came forward with allegations against Oxner. (Tr. p. 36:14-22, 42:21-25; R. pp. 152, 158.)

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 told his aunt what happened soon after the incident. (Tr. p. 56:17-22; R. p. 172.) She brought him to the Lexington County Sheriff's Department where he spoke with a sheriff and gave a written statement detailing his allegations. (*Id.*)

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[2] The other two grounds were premised on ineffective assistance of counsel, which Oxner tentatively raised because the Court had not yet detailed the proper time to assert such claims. After the Court issued *In re Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017) ("*Chapman*") and held that they should be brought in a subsequent habeas action, Oxner withdrew those grounds.

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.)

Oxner's defense was limited to cross examination of the State's witnesses and argument from counsel.

SUMMARY OF REASONS TO GRANT CERTIORARI

The Court should grant certiorari because this case involves novel questions of law and implicates substantial constitutional issues. The proceeding below was the first instance of an evidentiary hearing conducted under S.C. Code Ann. § 44-48-100(B) of the SVP Act to determine whether an SVP respondent—who was criminally charged but found incompetent to stand trial—committed the charged acts beyond a reasonable doubt. This issue implicates the fundamental constitutional guarantees of due process and of the effective assistance of counsel during SVP proceedings as recognized by *Chapman*, and raises whether these rights are afforded where the accused is unable to assist counsel. This appeal also presents the novel question of the applicability of the constitutional right to a speedy trial, which the SVP Act guarantees for a § 44-48-100(B) hearing. Finally, this case raises the novel question of whether a person meets the statutory definition of being "charged" with a sexually violent offense where the relevant charges were *nolle*

prossed. Any one of these issues would warrant certiorari. Each represents an important question that this Court should address for benefit of the bench and bar.[3]

Here, the trial court and Court of Appeals' decisions resulted in a deprivation of Oxner's constitutional rights to the effective assistance of counsel and to a speedy trial. Moreover, the lower courts approved of a fundamentally flawed procedure where multiple levels of SVP findings incorrectly determined that Oxner met the definition of "convicted of a sexually violent offense" despite all offenses having been *nolle prossed* by the State. This Court should grant certiorari and reverse the Court of Appeals to correct this error.

ARGUMENT

I. The Court of Appeals' decision failed to recognize the deprivation of due process inherent in proceeding in a quasi-criminal trial against an incompetent person.

The Court should first grant certiorari to further clarify the constitutional right to effective assistance of counsel in SVP proceedings that it recognized in *Chapman.* As Oxner noted in his petition for rehearing, the Court of Appeals failed to address this fundamental issue in its Opinion. Instead, the Court of Appeals focused on whether it violates due process for the State to proceed against an incompetent person under the SVP Act generally without examining the interplay with the right to effective assistance of counsel.[4]

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[3] Because they are novel questions, this Court "is free to decide the question with no particular deference to the lower court." *S.C. Farm Bureau Mut. Ins. Co. v. Durham*, 380 S.C. 506, 510, 671 S.E.2d 610, 612 (2009).

[4] To support its holding, the Court of Appeals cited a handful of cases from other states addressing the general question of whether it violates due process to bring an SVP action against someone who is incompetent to stand trial in a criminal matter. 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.

The Court issued *Chapman* while briefing was ongoing in this case. Oxner refined his due process argument in light of that decision, further explaining how his inability to assist counsel was fundamentally at odds with the constitutional guarantee of the effective assistance of counsel in SVP proceedings as recognized by *Chapman*. The proceeding below resulted in a deprivation of his due process rights as a result. Reconciling *Chapman* with an accused's lack of competency is a critically important question that warrants this Court's consideration and guidance.

A. Significance of *Chapman*.

Chapman supports that S.C. Code Ann. § 44-48-100(B) improperly deprives accused SVPs of their right to procedural due process. In *Chapman*, this Court unequivocally held that "persons committed as SVPs have a right to the effective assistance of counsel, and may effectuate that right by seeking a writ of habeas corpus." *Id.* at 175, 796 S.E.2d at 844. As the Court explained, "given the significant due process implications inherent in civil commitments," the right to counsel afforded by § 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. 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 (emphasis added). 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, 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 effectiveness of counsel as in a criminal matter.

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

The State may not proceed with criminal prosecution of a person who is incompetent to stand trial because, *inter alia*, 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***" (emphasis added) (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993))); *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)).

In *Drope v. Missouri*, 420 U.S. 162 (1975), the 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 (emphasis added) (quoting Caleb Foote, *A Comment on Pre–Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 834 (1960)). As the court explained, the prohibition

on subjecting an incompetent person to criminal proceedings "is fundamental to an adversary system of justice." *Id.* at 172.

The Kansas Court of Appeals recently examined the right to effective assistance of counsel in probation revocation proceedings, and the concerns identified there are similarly present here. *See State v. Gonzalez*, 457 P.3d 938, 943 (Kan. Ct. App. 2019). As the *Gonzalez* 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).

Here, it is undisputed that Oxner is entirely unable to assist counsel. The capacity evaluation determined that Oxner 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 evaluation 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).)

Finally, the evaluation explained that Oxner would "not be self-protective if he were to testify," as he freely made highly incriminating statements. (*Id.* at 6; R. p. 224.)

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 in his own behalf[,] and to assist counsel to be zero." (Tr. p. 91:20-92:10; R. p. 207-08.) Additionally, the trial court's Order for Evaluation found that:

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

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

Therefore, this case presents a novel question of law that implicates an important constitutional right: can due process be guaranteed and there be effective assistance of counsel where the accused SVP has a total inability to assist counsel with the defense? The Court of Appeals, respectfully, sidestepped this important issue. As Oxner explained, the proceeding below essentially amounted to a quasi-criminal trial. Oxner was guaranteed and afforded all of the constitutional rights available to defendants at criminal trials except for the right not to be tried while incompetent. Moreover, there was a finding of guilt beyond a reasonable doubt. Yet, Oxner was incompetent and unable to meaningfully participate in his defense and assist counsel.

In a child sex case, for counsel to be effective, aid from the defendant is particularly important. These cases often have no physical evidence or witnesses other than the complainant and the accused, which was the case here. This 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 by a third-party. In this case, Oxner's knowledge of the family history and the alleged victims would be required in order to mount a proper defense.

C. The *Mathews* factors weigh in Oxner's favor.

The considerations detailed by the Court in *Chapman* support that, under these facts, Oxner's procedural due process rights were infringed. "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 weighs heavily in Oxner's favor. "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." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The high burden for showing that the offender should be released from the SVP program and the multiple procedural hurdles that must be overcome drive this fact home. *See* S.C. Code Ann. § 44-48-120 (explaining that the DMH must determine, *inter alia*, that the accused is "safe to be at large and, if released, is

not likely to commit acts of sexual violence" to even begin the review for possible release from the SVP program).

The second element also weighs in Oxner's favor. There is a considerable risk of erroneous deprivation of liberty under the existing SVP procedure in light of *Chapman*. As noted above, Oxner was not able to assist trial counsel in identifying any mitigating evidence or favorable witnesses. Moreover, it would have been dangerous for him to testify in his own defense due to his limited grasp of the legal process and inability to be self-protective. This is in stark contrast to SVP offenders who were competent to stand trial in their criminal cases and were either adjudicated guilty beyond a reasonable doubt by a jury of their peers or knowingly and voluntarily pled guilty. Those defendants could assist their attorneys in preparing and presenting a robust defense and take the stand on their own behalf if they so desired. This is simply not feasible with individuals like Oxner. Nevertheless, the SVP Act permits what is akin to a criminal trial to determine whether the offender committed the charged acts beyond a reasonable doubt despite no meaningful participation from the accused. [5]

Oxner acknowledges and recognizes that proceedings under the SVP Act are classified as civil, not criminal, in nature by the General Assembly. *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. When the right to counsel—essential the very right to mount a defense—is diluted, the procedure for detaining individuals as SVPs loses its

[5] The unique facts of this case highlight the need for this Court's guidance. In a typical SVP action, the accused was already criminally tried and convicted of a sexually violent offense, or pled guilty, and is nearing the end of his sentence and release back into the general public. Oxner, however, has been in the custody of DMH since 2005. He will remain in DMH custody even if the impetus for the SVP proceedings (a proposed transfer to a less restrictive facility) occurs.

constitutional footing. The constitutional guarantees afforded by the statute are useless if they cannot be meaningfully exercised.

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 abstentia*. Likewise, it would ensure that the court is presented with an individual who can understand the nature of the proceedings against him and testify in his own defense if he so chooses. Finally, it would confirm 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. While the State certainly has a compelling interest in protecting society from sexual predators, 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.

D. Certiorari is necessary to address these important concerns.

Therefore, for all these reasons, this case presents an important, novel question involving whether the constitutional guarantees of due process and the effective assistance of counsel in an SVP proceeding can ever be guaranteed where the accuse lacks competency to stand trial. The Court should grant certiorari to consider this important issue and reverse the Court of Appeals' erroneous finding that Oxner's procedural due process rights were not infringed.

II. The Court should also grant certiorari to address the novel question of the parameters of the constitutional right to a speedy trial guaranteed in SVP matters.

This issue also satisfies two of the factors supporting granting certiorari. As with the right to counsel, § 44-48-100(B) of the SVP Act also guarantees the right to a speedy trial. *See* S.C. Code Ann. § 44-48-100(B); U.S. Const. amend. VI; S.C. Const. art. I, § 14. "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).

In the criminal context, this Court has explained that the appropriate factors for evaluating whether the right to a speedy trial has been violated 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. "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 v. Wingo*, 407 U.S. 514, 533 (1972)). Instead, they are all related and must be considered along "with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. If a court concludes that this right has been violated, dismissal of the charges 'is the only possible remedy.'" *Langford*, 400 S.C. at 442, 735 S.E.2d at 482.

The analysis beings 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).

The Court should grant certiorari to address the applicability of these principles to SVP matters and, particularly, SVP cases involving a § 44-48-100(B) hearing.

A. Factual background and ruling of the Court of Appeals.

Here, an inexplicable delay of nearly five years occurred in this matter just to reach the § 44-48-100(B) hearing. The initial steps were completed promptly, including a finding of probable cause and appointment of counsel, Attorney Clemens, to represent Oxner. Shortly after appointment, on September 20, 2011, Attorney Clemens filed a *Brady* motion. However, this was the end of activity in the case for approximately ***four years***.[6] The record is unclear how long Attorney Clemens represented Oxner or why no further activity occurred. However, at some juncture his representation necessarily ended, as the Clerk of Court appointed new counsel for Oxner, Attorney Zmorchek, on September 10, 2015.

The Court of Appeals avoided the merits of Oxner's speedy trial argument by first finding that this issue was not preserved. However, at the § 44-48-100(B) hearing, Attorney Zmorchek specifically raised the issue of timeliness. (Tr. p. 80:17-24; R. p. 196.) As Oxner detailed in his

[6] In the interim, Oxner was re-indicted and re-evaluated for competency—although not until nearly three years later. Regardless, those proceedings were entirely separate from this SVP matter and were designed solely to correct the procedural deficiencies with the Petition detailed below.

petition for rehearing, she raised a "constitutional concern" about how the SVP case was brought five years prior, noting that "certainly this hearing wouldn't be timely." *See id.* The trial court, however, expressly rejected this argument finding that the State "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." (*Id.* at 85:23-86:7; R. pp. 201-02.) Certiorari is first necessary to correct this error.

B. The speedy trial factors weigh in Oxner's favor.

Moreover, the Court should also grant certiorari to offer guidance on the right to a speedy trial under § 44-48-100(B) and to correct the Court of Appeals' erroneous finding that the factors were not met here.

Each of the elements weigh in Oxner's favor. 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 MacDonald*, 456 U.S. at 6-7. It is undisputed that 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 triggered review); *see also State v. Barnes*, __ S.C. __, 846 S.E.2d 389, 398 (Ct. App. 2020) (parties agreed that the three year and seven month delay triggered review): *State v. Brazell*, 325 S.C. 65, 75-76, 480 S.E.2d 64, 70 (1997) (three year and five month delay); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978) (two year and four month delay).

Next, the State's lack of reason for the delay also tips in Oxner's favor. In rejecting Oxner's argument on this issue, the Court of Appeals improperly relied on facts not supported by the

Record to bolster the State's justification for delay. Here, the State's ***only*** justification in the Record 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 Court of Appeals, however, noted 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." *In re Care & Treatment of Oxner*, 430 S.C. 555, __, 846 S.E.2d 365, 371 (Ct. App. 2020). It further stated 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 that court's general experience, there is nothing in the Record of ***this case*** supporting that these issues were the cause of the delay. *Cf. State v. Hunsberger*, 418 S.C. 335, 347, 794 S.E.2d 368, 374 (2016) (finding that the court improperly relied on the case's complexity in finding that the delay was justified). Moreover, this Court has previously noted that "[n]eutral reasons, such as overcrowded dockets or negligence, should be weighted less heavily; however, ***the State is still ultimately responsible for bringing a criminal defendant to trial.***" *State v. Reaves*, 414 S.C. 118, 130, 777 S.E.2d 213, 219 (2015) (emphasis added).

The next factor is the defendant's assertion of the right. Here, the Court of Appeals improperly punished Oxner for the unexplained delay by finding that he did not timely raise the issue. As Oxner contended in his Petition for Rehearing, the State—not Oxner—bears the responsibility of justifying the delay between the charge and trial. *See Langford*, 400 S.C. at 443, 735 S.E.2d at 483. Oxner was and remains incompetent 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 Oxner's favor 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 Court of Appeals erroneously construed this against him.

Moreover, Oxner's counsel did raise the issue at the § 44-48-100(B) hearing. Admittedly, trial counsel did not file a formal motion prior to the hearing and did not raise the issue until at 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. Therefore, Oxner had already endured a considerable delay warranting relief in its own right. And, regardless, Oxner's failure to raise the speedy trial issue sooner was not dispositive of the speedy trial issue. *See Hunsberger*, 418 S.C. at 349, 794 S.E.2d at 375.

Finally, Oxner suffered prejudice. Right before the State filed the SVP Petition, Oxner was poised to be transferred to a less restrictive facility within the DMH for the first time in almost ten years. The delay prohibited Oxner from realizing that increased freedom for nearly five years. Furthermore, as Oxner explained in his opening brief, it can be ***presumed*** that he suffered prejudice solely due to the length of the delay. *See Hunsberger*, 418 S.C. at 351, 794 S.E.2d at 376 ("When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim."). As the *Hunsberger* Court explained, excessive delay "presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Id.* Moreover, as *Langford* noted, the most serious concern is where the length of the delay results in the possibility the defense will be impaired, as

"the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 400 S.C. at 445, 735 S.E.2d at 484.

Here, the nearly five year delay in this matter between the filing of the petition and the § 44-48-100(B) hearing is inexcusable, particularly considering how long ago the underlying events were alleged to have occurred. The State's primary justification for the delay was that there is no statutory time requirement, but this is not sufficient to overcome the presumption of prejudice.

Each of the speedy trial factors weighs in Oxner's favor. The Court should grant certiorari to provide guidance and clarification on the speedy trial guarantee afforded by the SVP Act. Moreover, certiorari is appropriate to correct the error of the Court of Appeals in finding that Oxner did not satisfy the factors.

III. The Court should also grant certiorari to address the meaning of a "person convicted of a sexually violent offense" under the SVP Act and the resulting procedural deficiency in this case.

Finally, the Court should grant certiorari to address the novel question of whether Oxner satisfied 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). The Court of Appeals erroneously found that Oxner satisfied the statutory definition despite the fact that all charges had been *nolle prossed* at the time the State brought the SVP action.

The State improperly instituted this action in 2011, asserting in its petition that Oxner met the definition of a person "convicted of a sexually violent offense." (Petition p. 1; R. p. 12.) 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 at the time the proceedings were instituted. This error was not corrected until 2014 when Oxner was re-indicted, and the State made no attempt to rectify the

erroneous findings from 2011. Thus, the statutory prerequisite findings under the SVP Act were all inaccurate and the lower court lacked jurisdiction to proceed with the § 44-48-100(B) hearing.

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 contemplates "a person has been convicted of a sexually violent offense," which the Act defines to include a person that has "been charged but determined to be incompetent to stand trial for a sexually violent offense." S.C. Code Ann. § 44-48-30(6) (emphasis added).

The Court of Appeals overlooked the critical 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 Oxner 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. As *Mackey* explained, "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). The Court of Appeals disregarded this important principle.

Moreover, the Court of Appeals failed to consider the critical fact that the State ***conceded*** that Oxner did not meet the 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*.

Thus, the Multi-Disciplinary Team, the Prosecutor's Review Committee, the Petition, and the trial court all made incorrect findings in 2011 that Oxner met the SVP Act's definition of "convicted of a sexually violent offense" because the underlying "charges" no longer existed. Although Oxner 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.

Additionally, the *nolle prossed* charges deprived the lower court of jurisdiction to proceed under the SVP Act on those charges. As a result, all proceedings up until the State re-indicted Oxner are void. *See Mackey*, 357 S.C. at 668, 595 S.E.2d at 242; *In re Brown*, 294 S.C. at 237, 363 S.E.2d at 689.[7]

[7] At a minimum, the Court of Appeals should have remanded with a directive that the State complete the proper steps and obtain the proper findings on the 2014 charges.

The Court should grant certiorari to reaffirm the important legal effect of a *nolle prosequi* and address whether the statutory definition of "convicted of a sexually violent offense" is met under these facts.

CONCLUSION

This case implicates novel issues of South Carolina law and important constitutional rights guaranteed to accused SVPs. The Court of Appeals erred by finding that Oxner's procedural due process rights were not violated by the § 44-48-100(B) hearing despite his incompetency to stand trial and inability to assist counsel. The Court of Appeals also erred by finding that Oxner's speedy trial rights were not violated. Finally, the Court of Appeals incorrectly found that Oxner met the statutory definition of having been charged with a sexually violent offense despite all prior charges having been *nolle prossed.* For all these reasons, this Court should grant certiorari to address the issues raised herein, reverse the Court of Appeals' erroneous decision, and dismiss the case. Barring that, the Court should reverse and remand for a new § 44-48-100(B) hearing.

Respectfully submitted,

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September 24, 2020

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, do hereby certify that on September 24, 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 a Writ of Certiorari

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September 24, 2020

Blake Williams

From: Blake Williams
Sent: Thursday, September 24, 2020 12:14 PM
To: 'awilson@scag.gov'; 'Deborah Shupe'
Cc: Dudek, Robert; Alexander, David; Matt Bogan
Subject: In re Oxner, Appellate Case No. 2016-001125
Attachments: 2020.09.24 Petition for a Writ of Certiorari - 4810-5426-9900 1.pdf

Good afternoon,

Attached for service please find Petitioner Oxner's Petition for a Writ of Certiorari. Service is made via email pursuant to subsection (g)(3) of Supreme Court Administrative Order 2020-05-29-02.

Thank you,

NELSON MULLINS

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