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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

APPELLANT

APPELLATE CASE NO. 2018-001975

Appeal from Horry County

D. Craig Brown, Circuit Court Judge

Opinion No. 5839

PETITION FOR REHEARING

On July 21, 2021, this Court affirmed Appellant's commitment in a published opinion. *In the Matter of the Care and Treatment of Thomas Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 27). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

In affirming Appellant's commitment to the South Carolina Department of Mental Health as a Sexually Violent Predator (SVP), this Court held there was no error in denying Appellant's motion for a competency evaluation because "a prisoner is not entitled to be competent to stand

trial under the Act." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30). Appellant respectfully submits that this Court overlooked and/or misapprehended Appellant's prior history of decompensation and successful restoration to competency, and the relevance of these facts given the flexibility of the protections to be afforded by the Due Process Clause, and given that the right to effective assistance of counsel is not merely a superficial right. Appellant should have been granted a competency evaluation in this case, to effectuate his rights to a meaningful opportunity to be heard and the effective assistance of counsel. By holding that no judge ever has the discretion to order a competency evaluation in an SVP case, this Court improperly construes the Sexually Violent Predator Act (SVPA or the Act), too narrowly constricts the Due Process Clause, and renders the right to effective assistance of counsel superficial.

Appellant also respectfully submits this Court overlooked or misapprehended his argument that the first trial judge's decision Appellant was not entitled to an evaluation was based on the trial court's reading of an inapplicable portion of the Act. Finally, Appellant respectfully submits that because Appellant was eligible for a competency evaluation the Court should have addressed Appellant's final argument: since competency is fluid, Appellant's further decompensation meant that the second trial judge would not have been "overruling" another judge but would instead have been addressing a different issue.

FACTS

In 1999, Appellant pleaded guilty but mentally ill (GBMI) 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. 177. When Appellant's release date neared, the State sought his commitment pursuant to the SVPA, S.C. Code Ann. §§ 44-48-10 – 44-48-170.

Appellant had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. R. 91, ll. 5-14. Appellant also had a history of "decompensation;" "becoming more psychotic when he is noncompliant with his medications." R. 91, ll. 11-13.

On February 28, 2018, defense counsel moved for a competency evaluation. R. 171- R. 173. On August 7, 2018, the parties appeared before the Honorable William H. Seals, the chief administrative judge for the Horry County Court of Common Pleas, for a hearing on the matter. R. 1; R. 65. Defense counsel explained that when meeting with Appellant, "there were times when his answers made no sense relative to my questions," and Appellant could not participate in his defense. R. 3, ll. 12-18. Counsel offered that his own observations had been "verified by what Dr. G[ehle] put in her report as far as schizophrenia and prior treatments." R. 3, ll. 6-8.

Dr. Marie Gehle, a chief psychologist at the South Carolina Department of Mental Health, had evaluated Appellant to determine whether he was an SVP, and she diagnosed him with biastophilia and schizophrenia. R. 62, l. 24 – 58, l. 1; R. 67, ll. 18-20; R. 86, ll. 1-3. Appellant's mental health history included periods of "being on his medicine to decompensating and then being restored." R. 108, l. 23 – 109, l. 3. Appellant had been restored to competency more than once. R. 108, l. 23 – 109, 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. R. 108, ll. 3-10.

The trial 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 SVP proceedings against a respondent who was incompetent to stand trial on the predicate offense. R. 3, l. 21 – 4, l. 3.

However, Appellant was not incompetent to stand trial on the predicate offense—as seen, he pleaded GBMI and served twenty years in prison.

On October 22, 2018, when Appellant appeared before the Honorable D. Craig Brown for trial, defense counsel made a second motion for a competency evaluation based on a "significant change in circumstances." R. 6; R. 165. Counsel argued that conducting an SVP trial when Appellant lacked the ability to assist in his own defense was a violation of Appellant's procedural due process protections under the state and federal constitutions, as evidenced by the application of the three-pronged test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to his case. R. 165 – 166.

Counsel submitted to the trial court that per *Matter of Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017), a respondent in an SVP 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." R. 40, l. 11 – 42, l. 1. Counsel explained 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 Appellant was incapable of "making a logical response to questions," and because he did not know if Appellant could answer questions truthfully. R. 44, ll. 3-25; R. 43, ll. 14-25.

Counsel further 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." R. 43, l. 25 – 39, l. 10. Counsel offered that over the course of his representation, Appellant's handwritten letters to him had become more illegible, and that conversations with Appellant had gone from "iffy" to not "making any sense." R. 44, ll. 12-20.

The State erroneously argued that Appellant did not have the right to be competent at trial based on S.C. Code Ann. § 44-48-100(B) (an inapplicable provision) and since the requisite mental abnormality or personality disorder for SVP commitment might prevent competency in some of

these cases anyway. R. 37, l. 14 – 38, l. 1. Defense counsel countered that Appellant had a "track record" of "being able to be returned to competency when he stays on his psychiatric medications." R. 43, ll. 3-5. Counsel also pointed out that § 44-48-100(B) was inapplicable. R. 40, ll. 21-24.

The trial court stated, "I don't disagree with you [counsel] at all. The statute doesn't specifically address competencies in these types of cases." R. 42, 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." R. 42, ll. 5-8. "Judge Seals had the final say so . . ." R. 38, ll. 18-22.

The jury found that Appellant was a sexually violent predator and the court signed an order of commitment. R. 178; R. 161, ll. 9-12; R. 162, ll. 11-13.

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 respectfully submits this Court overlooked and/or misapprehended his argument that absent competency, Appellant's right to the effective assistance of counsel was merely a superficial right. 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, 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.

"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. "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). "[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)). Here, Appellant was unable to "participate in his defense" or "communicate with" counsel. R. 3, ll. 14-17; R. 40, l. 11 – 37, l. 1. "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 addressing Appellant's argument that he was unable to meaningfully exercise his right to counsel since he was likely incompetent, this Court recognized that Appellant was entitled to counsel but held, "[O]ur appellate courts have not yet addressed the issue raised by [Appellant]: does a potential SVP's right to counsel naturally encompass the right to be competent to assist counsel in his or her defense during the civil commitment trial? We find it does not." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29).

> [I]t appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the

> imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process . . . Thus, we find a prisoner is not entitled to be competent to stand trial under the Act.

Matter of Griffin, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30).

Although this Court recognized the General Assembly intended to safeguard SVP respondents' rights through the provision of counsel, this Court concluded that no incompetent respondent (including Appellant, who had a track record of successful restoration) was entitled to be evaluated for competency. *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30). As seen, Appellant was unable to logically converse with or respond to his counsel. This Court's construction of the Act improperly rendered Appellant's right to counsel a superficial right rather than a substantial one. *Chapman*, 419 S.C. at 184, 796 S.E.2d at 849.

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.

Appellant respectfully submits this Court overlooked and/or misapprehended the import of the undisputed evidence that Appellant had been restored successfully to competency to stand trial in connection with a prior case or cases. A competency evaluation was needed to effectuate Appellant's right to a meaningful opportunity to be heard in these circumstances, since absent

competency Appellant could not communicate with his counsel and since he could not testify before the jury.

"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). "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 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "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).

Here, Appellant's procedural due process rights were violated by the denial of an evaluation for fitness to stand trial so he could be heard in person at a meaningful time (after he had been evaluated for 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)).

It was undisputed that Appellant had been previously deemed not competent to stand trial on other matters, but he had been successfully restored to competency. The failure to allow Appellant flexibility here, to ensure a meaningful opportunity to present his case and be heard in person, 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. An application of *Eldridge* validates Appellant's position. R. 167 – 169. 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. Appellant, who could neither converse with his counsel nor testify before the jury, had no meaningful opportunity to be heard. The jury could not hear from Appellant or through defense witnesses, for example, on whether Appellant could identify his triggers, or what his plan was to prevent reoffending. The additional procedural

safeguard of allowing a competency evaluation would have been highly valuable here so Appellant could speak to his counsel or to the jury in his defense.

Finally, the third factor in *Eldridge* also weighs in favor of Appellant because 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. *See* S.C. Code Ann. §§ 44-23-410 – 44-23-460. Further, there was no harm to the State in waiting for a competency evaluation since Appellant was the party who was detained. The *Eldridge* factors weighed in Appellant's favor.

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.

Appellant respectfully submits this Court overlooked or misapprehended the legal error committed by the first trial judge, and overlooked or misapprehended legislative intent regarding an SVP respondent's right to be tried while competent.

When Appellant initially moved for a competency evaluation before the chief administrative judge, the court erroneously found that S.C. Code Ann. § 44-48-100(B) controlled whether Appellant was eligible for a competency evaluation. But, § 44-48-100(B) applied in cases where the accused SVP **was not** convicted of a predicate offense, and Appellant **was** convicted of

a predicate offense.[1] This Court did not address Appellant's argument that the trial court applied the wrong statutory provision, although it did discuss statutory construction.

> **In construing the Act in its entirety, we can find no statutory requirement of competence for proceedings arising under the Act**. **Rather, it appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense**. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process. *See Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). Furthermore, our precedent supports this conclusion. *See Oxner*, 430 S.C. at 566–69, 846 S.E.2d at 371–73 (finding the appellant's procedural due process rights were not violated when the appellant was incompetent for the SVP probable cause hearing); *c.f. Council v. Catoe*, 359 S.C. 120, 125, 597 S.E.2d 782, 784–85 (2004) (finding "the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply" in PCR actions). Thus, we find a prisoner is not entitled to be competent to stand trial under the Act.

Matter of Griffin, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29) (footnote omitted) (emphasis added).

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1 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).

Appellant's 1999 GMBI plea to assault with intent to commit criminal sexual conduct with a minor in the second degree meant that he was convicted of a sexually violent offense so as to qualify as a potential SVP. 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 "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)**, not (c).

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

(emphasis added). Therefore, while the General Assembly provided that the right not to be tried while incompetent did not apply to some respondents under the SVPA, it only provided that such

limitation applied to persons who 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). R. 37, l. 14 – 38, l. 1. Appellant was never found incompetent to stand trial for the predicate offense so subsection (B) was inapplicable. The trial court erred when it relied on this subsection to conclude that Appellant was not eligible for a competency evaluation, since Appellant was not in the class of offenders to which it applied.

Appellant respectfully submits that this Court's determination that no SVP respondent is ever permitted a competency evaluation is incorrect. The SVPA mandates one set of procedures for respondents who were incompetent on the predicate offense and another set of procedures for respondents who were competent on the predicate offense. The General Assembly only specified that the right to be competent did not apply to respondents who were not competent on the predicate offense.

By denying the right to competency to only one category of respondents, the Act expects that the other respondents, who were competent on the predicate offense, are (or can become) competent for the SVP trial. A reading of the above-cited statutory provisions evinces a legislative intent to afford respondents like Appellant the right to competency when tried. "The legislature's intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia–Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003)). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended

purpose of the statute." *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. at 23, 579 S.E.2d at 336.

"Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). "A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of the statute, and cannot, under its power of construction, supply an omission in a statute." *State v. Johnson*, 396 S.C. 424, 429, 721 S.E.2d 786, 788–89 (Ct. App. 2012) (citing *State v. White*, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999)). "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

Appellant respectfully asserts that this Court's construction of the Act was improperly expansive and was contrary to legislative intent. Had the General Assembly intended that the right to be competent at trial did not apply to respondents who were competent on the predicate offense, it would have so provided. The fact that the General Assembly did so provide as to offenders who were not competent on the predicate offense shows it intended the right not apply only to that category of offenders it specified.

The trial court's erroneous interpretation of the Act as a bar to Appellant's trial while competent deprived Appellant of the right to counsel and the right to procedural due process, as argued in Issues 1 and 2 above. Appellant hereby incorporates those arguments. 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 construe the Act in a manner that deprived Appellant of procedural due process.

Finally, *Matter of Care and Treatment of Oxner*, 430 S.C. 555, 559, 846 S.E.2d 365, 368 (Ct. App. 2020) does not support the conclusion that Appellant was not entitled to a competency evaluation, since Oxner was not competent to stand trial on the predicate offense, unlike Appellant who was competent on the predicate offense. Additionally, Oxner merely challenged the propriety of conducting a pretrial hearing while he was incompetent, rather than challenging the propriety of conducting the trial. Nor does *Council v. Catoe*, 359 S.C. 120, 123, 597 S.E.2d 782, 783 (2004), support such a conclusion since Council was the plaintiff in a collateral attack on his convictions rather than the respondent in a commitment action.

It was an error of law to find Appellant statutorily barred from an evaluation here, and Appellant respectfully submits this Court overlooked and/or misapprehended the above points.

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.

This Court declined to address Appellant's Issue 4, concluding, "Because our finding above is dispositive of the appeal, we decline to address [Appellant's] remaining issue of whether the trial court erred in denying [Appellant's] second motion for a competency evaluation." *Matter of Griffin*, Op. No. 5839 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 30).

However, as discussed above, the trial court should have discretion to order a competency evaluation in SVP cases. Appellant respectfully submits that because this Court misapprehended or overlooked the points raised in Issues 1 – 3 discussed above, it misapprehended and/or overlooked this issue.

Although one circuit judge may not overrule another, 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 the motion—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 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 and denied by the chief administrative judge. R. 171; R. 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 had continued to deteriorate. R. 6; R. 44, ll. 8-10.

It appeared the trial judge wanted to grant the motion but believed he could not. 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." R. 42, 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." R. 42, ll. 5-8.

"[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 . . ." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). *Drope* illustrates that as late as during the trial, it may be necessary and proper to reevaluate competency since competency may change over time. *Id.* at 174-75, 178; *see also 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, Appellant had a history of schizophrenia and he had been found incompetent to stand trial and restored more than once in other case(s) previously. R. 166; R. 108, l. 23 – 109, l. 3. Appellant's letters to counsel deteriorated over the course of representation, and conversations had gone from "iffy" to not "making any sense." R. 44, ll. 16-20; R. 44, 39, ll. 12-16. These facts demonstrated the need to reconsider an evaluation of Appellant's fitness to stand trial.

The trial court's determination that it could not "overrule" the prior judge was error—the prior judge's order was not controlling 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; *State v. Blair*, 275 S.C. 529, 273 S.E.2d at 536.

CONCLUSION

The court erred by denying Appellant's motions for a competency evaluation: where the SVPA must be construed in a manner that recognized Appellant's right to the effective assistance of counsel was a substantial right rather than a superficial right; where Appellant was entitled to a meaningful opportunity to be heard; where the first judge's decision erroneously rested an inapplicable statutory provision; and where the second judge's decision (that he could not overrule the first judge) also rested on a legal error because Appellant's mental state had continued to deteriorate and his motion thus presented a new question to the court. Appellant's history of decompensation and successful restoration supported his motion. These points were overlooked and/or misapprehended by this Court in its opinion, and Appellant respectfully requests rehearing.

Moreover, this Court's published opinion appears to completely deny trial courts the discretion to grant a competency evaluation in an SVP case, even in cases such as Appellant's, where the respondent had a history of successful restoration. Even if this Court does not alter the result of this case, the opinion should be modified to reflect that trial courts do have the discretion to order competency evaluations.

Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's commitment.

Respectfully Submitted,

s/ *Joanna K. Delany*
JOANNA K. DELANY
Appellate Defender

This 3rd day of August, 2021.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

D. Craig Brown, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO. 2018-001975

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Thomas Griffin, at 4546 Broad River Road, Columbia, SC 29210, this 3rd day of August, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT