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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001075

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's motions for a competency evaluation because people subject to the SVPA do not have a due process or statutory right to be competent to participate in the SVPA proceedings. (Appellant's Issues I, II, III, and IV).

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On June 14, 1999, Appellant Thomas Griffin was convicted of one count of second degree criminal sexual conduct with a minor, and sentenced to twenty years incarceration. Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment to the South Carolina Department of Mental Health as a sexually violent predator, for long term, control case and treatment.

A trial on the merits was originally scheduled in March 2018 but the trial was continued because Appellant requested a competency evaluation, which the presiding judge took under advisement. The judge did not issue an order, and the parties agreed to present the motion to the chief administrative judge on August 7, 2018. After a hearing, the Honorable William H. Seals, Circuit Court Judge, denied the motion on the ground the SVPA does not require that persons subject to its terms be competent before the matter can proceed. (August 7, 2018 Hearing Transcript [HT], pp. 1-4; Record on Appeal [R.], pp. 1-4).

The case was then called for a jury trial on October 22, 2018, before the Honorable D. Craig Brown, Circuit Court Judge. On the day of trial, Appellant again moved for a competency evaluation on the grounds counsel was unable to effectively communicate with Appellant and prepare for trial due to Appellant's documented mental illness. Appellant also argued due process required that he be competent to assist counsel with his defense, and his counsel stated the only time he had won a SVPA case was when he was able to call the client to testify and rebut the State's expert. The State opposed the motion, again on the ground the SVPA did not require the person to be competent for the SVPA proceedings to go forward. The court denied Appellant's motion on the ground the issue had been conclusively decided by Judge Seals, and the court did not have the authority to overrule another circuit court judge. (Trial Transcript [TT], pp. 29-40,

Defendant's Exhibit 1 [Respondent's Second Motion for Competency to Stand Trial Evaluation, filed October 22, 2018]; R., pp. 34-45, 165-176).

Marie Gehle, Psy.D, was qualified as an expert in forensic psychology without objection and testified she was appointed by the court to evaluate Appellant pursuant to the SVPA. As part of the evaluation, Dr. Gehle reviewed all available records regarding Appellant's criminal history, his periods of incarceration, mental health evaluations and interviewed Appellant for approximately four hours. She testified the person's past sexual behavior is "the best indicator of their future sexual behavior" because a person's sexual behavior tends to remain consistent over time, "especially when it's deviant." (TT, pp. 57-66; R., pp. 62-71).

In 1972, Appellant was convicted of assault with intent to commit rape in North Carolina. He was released from the North Carolina prison in 1996, and approximately one month later he assaulted a twelve year old female in Horry County, South Carolina. He confronted the victim as she came out of a convenience store restroom, presented a knife, pushed her back into the restroom, and stated he had not had sex in three years. He fled when the victim screamed for her father. On June 14, 1999, Appellant pled guilty to assault with intent to commit second degree criminal sexual conduct with a minor. (TT, pp. 67-72, State's Exhibit 1 [Sentencing Sheet and Indictment]; R., pp. 72-77, 177).

Appellant was released on bond for the December 1996 offense in February 1997. While out on bond, he committed a similar sexual offense in North Carolina in May 1997. He sexually assaulted a twelve year old female when she left her school classroom to walk to the restroom. He initially approached her and asked for money, and the victim gave him a dollar before going into the restroom and entering a bathroom stall. Appellant followed her into the restroom, reached over the stall door, unlocked it, presented a knife and told the victim he wanted sex and he would not

hurt her if she complied. Appellant then performed oral sex on the victim, digitally penetrated her vagina and fondled her breasts. After another student walked into the bathroom and observed what was happening, Appellant told the victim to get dressed and he was going to take her to his house, and said he had a gun. When they left the restroom, the victim broke away from Appellant and ran to a classroom. During the interview with Dr. Gehle, Appellant verified the victim's account and admitted he committed the offense. (TT, pp. 72-74; R., pp. 77-79).

In addition to his sexual offenses and convictions, Appellant had a significant history of non-sexual, violent offenses. While incarcerated, Appellant had numerous disciplinary infractions, including violent misconduct and sexual misconduct. Dr. Gehle testified Appellant's history indicated he had significant difficulty controlling his behavior. (TT, pp. 74-78; R., pp. 79-83).

The records revealed Appellant completed the first phase of the Department of Corrections' sex offender treatment program in 2008. Appellant told Dr. Gehle the four months of treatment consisted of watching a film, and he could not tell Dr. Gehle any treatment terms, such as risk factors, somebody should learn in treatment. (TT, pp, 78-79; R., pp, 83-84).

Dr. Gehle testified Appellant told her that if he was released, "he was going to go to church and sit in the back row and get his big money and look out for his great, great grandchildren." He claimed he was going to receive almost $2 million from Social Security, and he was going to enjoy that money. He stated he might live with his family, or buy a piece of land and a mobile home.

Dr. Gehle stated Appellant's release plans were not practical. His sister told her the amount of money he claimed he will receive from Social Security was inaccurate. In addition, he told Dr. Gehle he committed the North Carolina offense "because he wanted to go back to prison,"

"because his family was trying to kill him because of this money." She testified he had some delusions and odd beliefs that were "really concerning." (TT, pp. 79-80; R., pp.84-85).

Dr. Gehle diagnosed Appellant with Other Specified Paraphilic Disorder (Biastophilia), and Schizophrenia (Continuous). She testified Appellant's paraphilic disorder was based on Appellant's "deviant sexual interests involving coercive sexual acts with non-consenting persons." She further testified Appellant has a long history of diagnosed Schizophrenia, which is a type of psychotic disorder. During her interview of Appellant, he "exhibited delusions and disorganized speech," and he told her "he had a history of auditory and visual hallucinations when he wasn't taking his antipsychotic medication." Dr. Gehle also stated Appellant had a history of decompensation when he was not compliant with his medication, but his delusional thinking had remained present even when he was taking psychotic medications. (TT, pp. 80-86; R., pp. 85-91).

Dr. Gehle testified the combination of a paraphilia and Schizophrenia "impairs [Appellant's] impulse control," he exhibited paranoid delusions "related to physical violence and things like that against women," and he had "delusions related to sexual functioning." All those things "just impair his judgment and increase his risk that he'll commit another sexual offense." (TT, p. 87-88; R., pp. 92-93).

Based on Appellant's score (4) on the Static 99R, an actuarial risk assessment tool, Dr. Gehle testified Appellant was almost two times more likely to reoffend sexually compared to the average sex offender. In addition to the static factors encompassed by the Static 99-R, Dr. Gehle stated Appellant exhibited multiple dynamic risk factors for reoffending sexually, including "a preference for pubescent children, offense supportive attitudes, sexualized violence, lack of emotionally intimate relationships with adults, poor problem solving abilities, lifestyle impulsiveness, and resistance to rules and supervision." (TT, pp. 88-93; R., pp. 93-98).

Dr. Gehle testified it was her opinion Appellant had Biastophilia and Schizophrenia, and those mental abnormalities made him likely to commit sexual offenses in the future if not confined for control, care and treatment. She further opined Appellant met the criteria for civil commitment pursuant to the SVPA. (TT, pp. 93-95; R., pp. 98-100).

On cross-examination, Dr. Gehle testified her opinions were based, in part, on things Appellant told her during the interview. She stated she asked follow-up questions at times, asked Appellant to repeat himself, and sometimes asked him to spell words she could not understand because he tended to mumble. She stated his spelling "was not terrible," and Appellant might have "a little bit of [intelligence] impairment," which could be related to his Schizophrenia or an intellectual disability. (TT, pp. 97-98; R., pp. 102-103).

Dr. Gehle stated Appellant was on his antipsychotic medication the day she interviewed him, and he still displayed some schizophrenic symptoms, such as delusional and disorganized thinking. She noted Appellant had been found incompetent to stand trial during his criminal case, and after a period of hospitalization, he was found competent. (TT, pp. 99-102; R., pp. 104-107).

Based on medical records from the detention center where Appellant was located after his prison term ended, Dr. Gehle testified Appellant had been prescribed antipsychotic medication, but his compliance had been "somewhat sporadic," and he stopped taking it altogether in mid-January 2018. As a result, the doctor discontinued his medication due to Appellant's noncompliance. (TT, pp. 102-103; R., pp.107-108).

As to Appellant's medication compliance while in the community, Dr. Gehle stated Appellant told her he took medication in prison, but she did not know if he was on medication at the time he committed the qualifying sexually violent offense in South Carolina. She testified the records indicated Appellant "decompensates and gets very ill" when not on medication, but he still

had impaired and disorganized thinking and delusions when he was appropriately medicated. She further testified untreated Schizophrenia can cause more impaired behavior, and can "cause somebody to act out in a variety of ways," which seemed to be part of Appellant's offense pattern. (TT, pp. 109-112; R., pp. 114-117).

On re-direct examination, Dr. Gehle testified she considered the circumstances of Appellant sexual offenses, particularly the South Carolina offense and the subsequent North Carolina offense, and some of the significant circumstances were Appellant's use of a weapon in both offenses and he offended in places he could be easily caught. She also considered the fact that Appellant had only been out in the community a total of approximately three months since the age of sixteen, and during those three months he sexually offended twice, with the second offense occurring while Appellant was out on bond from the South Carolina offense. (TT, pp. 121-125; R., pp. 126-130).

After the State rested, Appellant's counsel moved for a directed verdict, which was denied. He also stated it was not necessary for the court to ask Appellant about testifying, and he was making "that decision as [Appellant's] counsel based on [counsel's] conversations with [Appellant] that I do not think that that would work." The court noted for the record that counsel had indicated to the court Appellant attempted to talk to counsel during the trial, and counsel told the court he "did not necessarily understand what [Appellant] was saying," and "[i]t was not in a coherent manner." (TT, pp. 126-128; R., pp. 131-133).

During closing argument, Appellant's counsel stated Appellant "needs to go to a mental hospital where he can get the treatment, be brought back to sanity like he was in 1999 and he was at other times in the past." Counsel then told the jury:

> I'm put in a situation today that I can hardly communicate with [Appellant] because he talks and gesticulates, and I have no idea what he's saying. It's sort of, you

> know, he may be saying inside a body that's trapped that he can't talk but anyways he doesn't need to go to a program to be tried and taught how not to be a sexually violent predator. I mean, he needs to go to someplace where he can be restored to competency.

(TT, p. 149; R., p. 154).

The jury found Appellant is a sexually violent predator beyond a reasonable doubt. The court ordered that he be committed to the South Carolina Department of Mental Health for long term control care and treatment. (TT. p. 157, Order of Commitment filed October 23, 2018; R., pp. 162,178). This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." Carson v. CSX Transp., Inc., 400 S.C. 221, 734 S.E.2d 148, 152 (2012). "Questions of statutory construction are a matter of law." Boiter v. S.C. Dep't of Trans. 393 S.C. 123, 712 S.E.2d 401, 405 (2011). The Court reviews questions of law *de novo*. Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288, 291 (2012).

ARGUMENT

The circuit court properly denied Appellant's motions for a competency evaluation because people subject to the SVPA do not have a due process or statutory right to be competent before SVPA proceedings can move forward. (Appellant's Issues I, II, III, and IV).

Appellant contends the circuit court erred in denying his motion for a competency evaluation to determine if he was competent to be tried because: 1) counsel told the court he could not effectively represent him; 2) procedural due process required the requested evaluation because the SVPA constitutes a significant deprivation of his liberty interest, and his history indicated he could be successfully restored to competency; 3) the circuit court incorrectly applied §44-48-100(B); and 4) the circuit court erroneously ruled it could not overrule another circuit court judge because he had been found to be incompetent to stand trial in a previous criminal case, and his mental condition had deteriorated since the previous order was entered. While set forth in Appellant's Brief as four separate issues, all of the asserted errors are ultimately premised on a purported procedural due process violation.[1]

A. SPVA, Competency and Procedural Due Process (Appellant's Issue II)

1. Statutory Interpretation

"The cardinal rule of statutory construction is that the court ascertain and effectuate the intent of the legislature." Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 831 S.E.2d 429, 432 (2019) (*citing* Greene v. S.C. Election Comm'n, 314 S.C. 449, 445 S.E.2d 451, 453 [1994]). The court must first attempt to construe the plain language of the statute, and if the language of a statute is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.' *Id.* (*quoting*

[1]Appellant asserts procedural due process, but has not challenged the constitutionality of the SVPA itself, so the ultimate issue is statutory construction as applied.

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 [2000]) (emphasis in original). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent." Hodges, 533 S.E.2d at 581. The statute's words must 'be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.' Odom, 831 S.E.2s at 432 (*quoting* Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 642 S.E.2d 751, 754 [2007]); *see also* State v. Simpson, No. 2016-002210, 2020 WL 86625, at *4 (S.C. Ct. App. Jan. 8, 2020) (same).

The legislative intent must be gleaned from the entire statute rather than clauses taken out of context. Singletary v. S.C. Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231, 236 (Ct. App. 1994). "The statute must be read as a whole, and sections that are part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 629 S.E.2d 624, 629 (2006). The court should not concentrate on isolated phrases within the statute, but read the statute as a whole and in a manner consonant and in harmony with its purpose. *Id.* "In that vein, [the court] must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (citation omitted) (alterations in original) (*quoting* State v. Sweat, 379 S.C. 367, 665 S.E.2d 645, 651, 654 [Ct. App. 2008]).

To ascertain the legislative intent to encompass mentally incompetent persons in the class of persons covered under the SVPA, the court need look no further than the express purpose of the statute. The Legislature found "that a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the

existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018). The SVPA defines "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons whose relevant mental abnormalities render them incompetent to participate in the court proceedings.

This legislative intent is further evidenced by the express exclusion of the right not to be tried while incompetent in hearings required by §44-48-100(B). This section provides that when a person was found to be incompetent to stand trial on a sexually violent offense, the court must hold a hearing to determine whether the person committed the charged act or acts ("guilt/innocence hearing"), and all constitutional rights afforded a defendant at criminal trials apply to the hearing "**other than the right not to be tried while incompetent.**" S.C. Code Ann. §44-48-100(B) (2018) (emphasis added).[2] If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt that the person actually committed the charged offenses, it is disingenuous to argue the Legislature intended that competency be required for other SVPA proceedings, including a trial to determine if the person qualifies as a sexually violent predator. Holding otherwise would lead to SVPA proceedings pending indefinitely while the person is detained in a secure facility without "long term control, care and treatment," or the release of

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[2]The statute requires the court to make specific findings on "the extent to which the person's incompetence . . . 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." In this case, even though the trial was not a guilt/innocence hearing pursuant to 44-48-100(B), the court did note on the record counsel's report he could not understand Appellant when Appellant tried to talk to him during the trial. (TT, p. 128; R., p 133).

potential sexually violent predators with virtually no supervision and no treatment. Either alternative is an absurd result, and undermines the ultimate goals of public safety, and "long term control, care and treatment" of sexually violent predators.

2. Procedural Due Process

It is now well established that sexual predator civil commitment proceedings are civil, not criminal, even if the applicable statute affords certain rights routinely recognized in criminal cases. Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding the constitutionality of Kansas' sexual predator civil commitment statute); In re Matthews, 345 S.C.638, 550 S.E.2d 311, 316-317 (2001) (SVPA proceedings are civil, not criminal, in nature); In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 344 (2002) (same). As a result, procedures for establishing competence for criminal defendants do not apply, and the abatement requirements of criminal procedure do not apply. In re Sykes, 303 Kan. 820, 367 P.3d 1244, 1247 (2016).

The Kansas Supreme Court's thorough, well-reasoned analysis of the interplay between sexually violent predator civil commitment proceedings and the person's competency in Sykes is instructive. As in this case, Sykes contended the civil commitment proceedings violated his due process right to assist in his own defense. After again acknowledging the civil nature of sexual predator commitment proceedings, the court found there was no statutory requirement of competence in civil proceedings, and declined to create one, citing Hendricks and In re Hay, 263 Kan. 822, 953 P.2d 666 (1992) (specific protections provided by the sexual predator civil commitment statute satisfy procedural due process requirements). *Id.* at 1247-1248.

The court then reviewed the Washington Supreme Court's analysis of due process and competency in civil commitment proceedings in In re Detention of Morgan, 180 Wash.2d 312, 330 P.3d 774 (2016), and concurred in the Washington court's conclusion that the three part due

process requirements outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), weighed in favor of allowing sexual predator proceedings to move forward if the person is incompetent to assist in his defense.[3] *Id.* The court then noted seven other jurisdictions had reached the same conclusion on the issue. *Id.* (*citing* Moore v. Superior Court, 237 P.3d 530 (2010) (due process does not require mental competence of individual subject to commitment under Sexually Violent Predators Act); In re Commitment of Weekly, 956 N.E.2d 634, 647 (2011) (establishing that fitness evaluation does not affect ability to receive a fair commitment trial because of numerous procedural safeguards against erroneous deprivation of liberty); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (lack of pretrial competence evaluation causes no deprivation of due process rights); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) ("robust, adversary character" of commitment proceeding minimizes risk of erroneous commitment of person who is not sexually dangerous; due process is preserved through adversarial process); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App.2003) (SVP determination, regardless of competency of respondent, is not unconstitutional deprivation of liberty); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (difference between sexual predator commitment proceedings and conventional commitment proceedings does not make predator proceedings punitive; competency requirement for criminal proceedings is inapplicable to civil commitments); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (no right to competency evaluation before hearing on sexually violent person status; commitment is for treatment, not punishment, and due process concerns are remote)).

The court expressed concerns regarding the alternatives if competency was required in sexual predator civil commitment proceedings, which are the same concerns outlined above. The

[3]The Mathews three part test is discussed below in relation to this case.

first alternative was to release the person from the State's control until such time as he may become competent to stand trial, which releases an individual with violent tendencies into society. The second alternative was to commit him for treatment as a mentally ill person subject to involuntary commitment under regular civil commitment laws, which would provide care and treatment for the mental illness, but the person is still institutionalized without being competent to represent himself at a commitment hearing, even if under a different statutory provision than the sexually violent predator statute. Addressing the contention that the sexually violent treatment would not sufficiently address other mental disorders, the court concluded:

> [T]he State is not required to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. The legislature is free to recognize degrees of harm, and it may address restrictions to those cases where it deems the need to be most clear. In this instance, the State has chosen treatment of the sexual predatory mental defect as having a priority over Schizophrenia or other mental disorders.

Id. at 1248 (internal citation omitted).

This case presents a prime example of why competency is not required in SVPA proceedings. Appellant acknowledged to Dr. Gehle he is better <u>when</u> he takes the prescribed medication for his Schizophrenia, which is the primary source of his incompetency. While he contends he was not <u>receiving</u> medication after he was transferred from the Department of Corrections, where he was on medication and competent, to the Horry County Detention Center, the records reveal the medication **was** initially prescribed at the Detention Center, but Appellant would not take it consistently, and the prescription was eventually discontinued because Appellant **refused to take the medication.** (TT, pp. 102-103; R., 107-108). Given his long history and experience with the effect of not taking the prescribed medication, as well as his statements about his medical history to Dr. Gehle during the interview, Appellant knew his condition would

deteriorate if he stopped taking the medication.[4] In short, any issue regarding Appellant's competency at the time of trial was an issue created by Appellant's own conduct in refusing to take prescribed medication he knew made his condition better.

Further, if Appellant received a competency examination and was declared incompetent, he would receive medical treatment designed to address his incompetency, with no sex offender treatment even offered. Once Appellant's competency was "restored," he would return to, and remain in, the Detention Center with no treatment (except prescribed anti-psychotic medication which he could refuse to take) until a new SVPA trial could be scheduled. Assuming Appellant took the prescribed medication, after the case was scheduled for trial, he could stop taking the medication, as he did in January 2018 after the case was first scheduled for trial, and once again decompensate, thus starting the vicious cycle over again. Such a result would be absurd, and completely undermine the purpose of the SVPA.

3. Mathews Three Part Test

Appellant argues the circuit court erred in finding his procedural due process rights were not violated when he was subjected to "what essentially amounted to (sic) quasi-criminal trial, complete with a 'verdict' beyond a reasonable doubt, while he was incompetent and unable to meaningfully participate in his defense." (Brief of Appellant, p. 19). While facially acknowledging the difference between SVPA proceedings and criminal proceedings, Appellant ultimately ignores that difference, instead relying on criminal due process case law and conclusory statements rather than true analysis.

[4]The Detention Center could not force medicate Appellant absent a court order to do so, which was never even requested between February 2018 and October 2018.

Appellant cites the factors identified in Mathews v. Eldridge, 424 U.S. 319 (1976), as the benchmarks for determining whether procedural protection is warranted.[5] Those factors include: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probative value, if any, of additional safeguards; and 3) the government interest, including the function involved, as well as the fiscal and administrative burdens additional or substitute procedural requirements would entail. *Id.* at 334-335. In essence, he summarily concludes all these factors weigh in his favor, with his ultimate conclusion being the **only** due process procedure that will meet constitutional muster is to require all people subject to the SVPA be competent to stand trial. Again, Appellant asks this Court to ignore relevant case law, and write out entire sections of the SVPA, which it cannot do.

Procedural due process requires notice and a meaningful opportunity to be heard. Mathews, 424 U.S. at 333. What process is due depends on what is fair in a particular context. *Id.* at 334; *see also* Morgan, 330 P.3d at 779 (same); Weekly, 956 N.E.2d at 644-645 (same); Moore v. Superior Court, 237 P.3d 530, 539 (Cal. 2010) (balancing test required to determine what process is due to a potential civil committee); Commonwealth v. Burgess, 878 N.E.2d 921, 928 (Mass. 2008) (deprivation of liberty interest must be balanced against governmental interest in protecting citizens); Commonwealth v. Nieves, 846 N.E.2d 379 (Mass. 2006) (same). Contrary to Appellant's conclusory assertion the Mathews three part test weighs in his favor, the procedural due process afforded to Appellant under the SVPA, combined with the State's compelling public safety interest, weighs in favor of the State.

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[5]As discussed above, the Washington Supreme Court and the Kansas Supreme Court have analyzed the Mathews three part test in relation to sexual predator civil commitment statutes, and held the statutes do not violate procedural due process. South Carolina's SVPA was premised on the Kansas sexual predator statute.

a. Liberty Interest

The State does not dispute civil commitment under the SVPA affects a significant liberty interest. The liberty interest must be considered in context, including the purpose of the interest deprivation, which is public safety and long term control, care and treatment under the SVPA.

Contrary to Appellant's repeated attempts to conflate the SVPA with a criminal proceeding, South Carolina courts have conclusively determined a SVPA proceeding is civil, not criminal, and is aimed at treatment rather than punishment. *See* Matthews, 550 S.E.2d at 315-317. While Appellant's liberty will be significantly impacted by civil commitment, he will not just be confined as he would with a criminal sentence, or even housed in a mental health facility where he will receive treatment only for his Schizophenia in hopes of restoring him to competency. Rather, he will be housed in a separate, secure facility, where he will receive appropriate medical and psychological treatment, including medications as needed, to address both his paraphilic and schizophrenic disorders, throughout his commitment.[6]

b. Risk of Erroneous Liberty Deprivation

Assuming for argument only that the liberty factor, standing alone, weighs in Appellant's favor, his remaining analysis is fundamentally flawed. His overriding premise regarding the risk of erroneous liberty deprivation is his incompetency.[7] Again, Appellant conflates the requirement of competency in a criminal trial with a SVPA civil commitment trial.

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[6]The fact that the SVPA treatment program is not a "forensic" mental health hospital does not negate the fact it provides appropriate medical and mental health treatment. Further, the appropriateness of the treatment provided can be addressed in the statutorily required annual reviews of the committee's mental health status.

[7]The State does not dispute Appellant's Schizophrenia diagnosis impacts his mental incompetency, even when he takes his prescribed medication. The question of Appellant's mental competency is not the issue; rather, the issue is whether the SVPA proceedings can move forward even assuming he is mentally incompetent.

As discussed above other jurisdictions analyzing the issue of mental incompetency in sexual predator proceedings based on statutes similar to the SVPA have determined the risk of an erroneous deprivation of liberty is minimal in light of the numerous procedural safeguards and heightened burden of proof in sexual predator cases. *See* Morgan, 330 P.3d at 779 (the robust statutory guaranties provide substantial protection against an erroneous deprivation of liberty); Weekly, 956 N.E.2d at 645 (procedural safeguards of the sexual predator act ensure the risk of erroneous deprivation of liberty is slight); Moore, 237 P.3d at 543-544 (same); Burgess, 878 N.E.2d at 929 (same). The procedural safeguards identified in those cases include: 1) assistance of counsel (at public expense when appropriate); 2) ability to retain experts (at public expense when appropriate); 3) use of process to compel attendance of witnesses; 4) cross-examination of adverse witnesses; 5) right to appeal final determination; 6) right to have hearing conducted according to the rules of evidence; and 8) determination of whether the person meets the criteria for civil commitment under the SVPA is beyond a reasonable doubt. Burgess at 929.

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford the mentally incompetent person appropriate due process. In addition to the numerous levels of review prior to the commitment trial, the person has; 1) the right to counsel; 2) the right to present evidence; 3) the right to cross-examine witnesses; 4) the right to retain experts; 5) the right to have the rules of evidence apply; and 6) the right to have the civil commitment determination made beyond a reasonable doubt. S.C. Code §§44-48-50, -60, -70, -80, -90, and -100(A). Contrary to Appellant's assertion this factor weighs in his favor, these safeguards make the risk of an erroneous deprivation of liberty under the SVPA minimal, and the factor weighs in the State's favor.

c. Governmental Interest

It cannot be disputed the State has a compelling interest in protecting society from sexual predators, which is the over-arching purpose of the SVPA. The effectiveness, or even availability, of treatment is not relevant if a goal of a sexual predator statute is to provide treatment. Hendricks, 521 U.S. at 365; *see also* Nieves, 846 N.E.2d at 387 (commitment to protect the public under a sexually violent predator statute is not improper even where no effective treatment exists to remedy the person's infirmity).

Even if Appellant's mental status prevented his actual participation in trial preparation and trial, the State's interest in protecting the public from sexual predators is paramount to his liberty interest. Experts and counsel can review Appellant's history, arrest records, previous mental health evaluations and treatment records, and interview him to the extent possible, in order to reach conclusions regarding his mental diagnosis and risk to reoffend sexually, and how to handle such issues at trial. *See* Moore, 237 P.3d at 543 (nature of issues, evidence and findings in sexual predator proceeding prevents person from playing much more than a supporting role; any chance the person's mental incompetence would significantly impair his contribution to his defense is relatively attenuated). Requiring competency before a SVPA case can proceed undermines the clear legislative intent of the SVPA.

The SVPA contains unambiguous statutory language expressing the legislative intent that commitment proceedings go forward against an incompetent person, even if the person may have limited comprehension of the proceedings. S.C. Code §44-48-100(B) (person deemed incompetent and not likely to become competent does not have right to be competent at a guilt/innocence hearing); *see also* Burgess, 878 N.E.2d at 927 (same). Requiring competency before a SVPA case can move forward effectively writes §44-48-30(6)(c) and §44-48-100(B) out

Appellant now seeks to expand Chapman to apply in a direct appeal if counsel merely tells the trial court he cannot effectively represent his client for some reason. Chapman does not stand for this proposition, and expanding its scope will result in the very thing the Supreme Court sought to avoid – addressing the merits of ineffective assistance of counsel claims in direct appeals from civil commitments pursuant to the SVPA.[8] Therefore, Appellant's claim of ineffective assistance of counsel is not properly presented in this direct appeal.

Even if the Court considers the ineffective assistance of counsel allegations, a review of the trial record reveals Appellant's counsel was very effective in vigorously protecting Appellant's interests. In his brief to this Court, Appellant refers to trial counsel as a seasoned, well experienced trial attorney, and it must be presumed he acted as such in the proceeding. In addition to repeatedly raising the competency issue at every opportunity, including in closing argument, he aggressively cross-examined the State's expert regarding the basis for her diagnoses and conclusions, and made a thorough and impassioned closing argument, which included reference to his inability to call Appellant as a witness. Thus, trial counsel acted exactly how a seasoned, experienced trial attorney would be expected to act under the circumstances, and his actions cannot be considered ineffective for purposes of an ineffective assistance of counsel claim.

Finally, trial counsel claimed he could only win the case if Appellant was able to testify on his own behalf about his offenses, particularly the North Carolina pending charge, and the inability to call Appellant as a witness rendered counsel's representation ineffective.[9] This contention

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[8]Indeed, trial counsel stated multiple times he could not "effectively" represent Appellant. It can be inferred counsel used the effective representation language precisely to try to expand Chapman and make the ineffective assistance issue reviewable on direct appeals.

[9]If the State had been aware counsel would make this claim, it could have presented examples of SVPA cases the State has lost in the absence of any testimony on behalf of the respondents. The often repeated contention SVPA cases are essentially "slam dunks" for the State is simply inaccurate.

requires extensive speculation, as well as disregard for evidence in the record, to rule in Appellant's favor. The Court must assume Appellant could have prevailed at trial **but for** counsel's inability to call him as a witness, which ignores significant undisputed facts that fully support the jury's verdict.

There was no dispute at trial about Appellant's Schizophrenia diagnosis, and Dr. Gehle testified Appellant continued to exhibit certain schizophrenic symptoms, including delusions and disorganized thinking, even when he was adequately medicated. It does not require speculation to assume Appellant would have exhibited those symptoms when subjected to the stress of testifying at trial, the jury would have observed Appellant's condition, and considered it in reaching a verdict.

Further, Dr. Gehle testified Appellant admitted to her during the interview that he committed the North Carolina offense, and verified the victim's factual account as accurate. In light of this evidence, and the probability Appellant would have exhibited schizophrenic symptoms while testifying, it is likely the jury verdict would be the same if Appellant had testified at trial.

C. Court's Reliance on §44-48-100(B) (Appellant's Issue III)

Appellant contends the circuit court's reference to §44-48-100(B) as the basis for its ruling at the August 7, 2018 hearing on Appellant's motion for a competency evaluation was error because that section of the SVPA did not apply. While §44-48-100(B) did not directly relate to Appellant's case, it does provide insight and guidance into the Legislature's intent regarding competency in SVPA cases. As discussed above, the legislative intent must be gleaned from the entire statute rather than sections considered in isolation, and considering the SVPA in its entirety and its underlying purpose, including §44-48-100(B), the Legislature did not intend mental incompetency to factor into the efficacy of SVPA proceedings. Accordingly, the circuit court's

consideration of that statute section as instructive on the issue of Appellant's right to a competency evaluation was not erroneous.

D. Overruling Another Circuit Court Judge (Appellant's Issue IV)

Appellant contends the circuit court judge presiding at trial erred in ruling he could not overrule the circuit court judge's ruling at the August 7, 2018 hearing. He argues this was error because his mental health status was "fluid" and had deteriorated since the August hearing, and therefore, the prior circuit court ruling was not binding on the trial judge. This contention is the ultimate red herring.

The issue at the August 7, 2018 hearing was whether Appellant was entitled to a competency evaluation at all under the SVPA, and that issue did not change between August and October. The fluidity or deterioration of Appellant's mental health and competency was irrelevant in August 2018, and it remained irrelevant in October, 2018. At the August 2018 hearing, the circuit court ruled Appellant was not entitled to a competency evaluation under the SVPA, and the ruling on that issue was binding in subsequent circuit court proceedings.

CONCLUSION

Based on the foregoing, the State respectfully submits the judgment of the circuit court and Appellant's commitment as a sexually violent predator should be affirmed.

Respectfully submitted,

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July 22, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001075

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "revised Order Concerning Personal Identifying Information and Other Sensitive Informationin Appellate Court Filings."

ALAN WILSON
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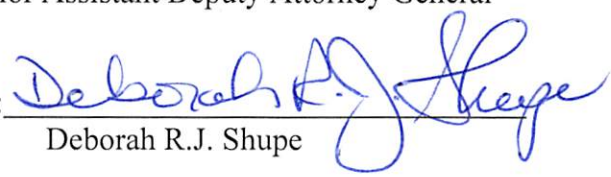
BY: 
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PROOF OF SERVICE

I, Sally Ellison, certify I served the Final Brief of Respondent on Appellant by email and by depositing a copy in the United States mail, postage prepaid, addressed to:

Joanna K. Delany
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 22nd day of July, 2020.

Sally Ellison

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Sally Ellison

From: Sally Ellison
Sent: Wednesday, July 22, 2020 9:15 AM
To: 'jdelany@sccid.sc.gov'; 'Kasperski, Katriel'
Cc: Deborah Shupe; Sally Ellison
Subject: Emailing: 2 attachments
Attachments: Griffin Thomas Cover Letter to FBOR 2018-001975 (02331863xD2C78).pdf; Griffin, Thomas FBOR 2018-001975 (02331800xD2C78).pdf

Follow Up Flag: Worldox

Good Morning:

Attached please find a copy of the Final Brief of Respondent in In the Matter of the Care and Treatment of Thomas Griffin Appellate Case No. 2018-001075, along with its cover letter. This brief will be submitted to the Court of Appeals today through the AIS system. As indicated in the Proof of Service, a hard copy of the Final Brief will be deposited today in the U.S. Mail.

Please reply to confirm receipt of this email.

Thank you.

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