STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
D. Craig Brown, Circuit Court Judge

Opinion No. 5839 (S.C. Ct. App. Filed July 21, 2021)

Lower Court Case No. 2016-CP-26-06412

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

PETITIONER

APPELLATE CASE NO. 2018-001975

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 27, 2021.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial, where Petitioner had the right to counsel, and where counsel explained he could not effectively represent Petitioner at trial because Petitioner was incapable of rational conversation, since the SVPA must be construed in a manner that recognized Petitioner's right to effective assistance of counsel?

2.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial, where Petitioner was unable to logically communicate and thus unable 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?

3.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner'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 Petitioner had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable?

4.

Whether the Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial where trial court had found the chief administrative judge's ruling on the matter months before could not be "overruled," where Petitioner's mental state had continued to deteriorate, and where Petitioner 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?

STATEMENT OF THE CASE

Petitioner was tried before the Honorable D. Craig Brown and a jury pursuant to the Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§ 44-48-10 – 44-48-170, from October 22 – 23, 2018, in Horry County. R. 6. James Falk represented Petitioner and Christopher Morrow represented the State. R. 6. The jury found Petitioner was a sexually violent predator (SVP). R. 162, ll. 11-13. The trial court signed an order of commitment. R. 178.

On November 1, 2018, Petitioner served his notice of appeal. The Court of Appeals affirmed in a published opinion. *In the Matter of the Care and Treatment of Thomas Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 27-30). Petitioner sought rehearing. Rehearing was denied in an order filed September 27, 2021.

Petitioner now files this petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because novel questions of law are presented and substantial constitutional issues are directly involved. *See* Rule 242(b)(1), SCACR; Rule 242(b)(4), SCACR. Further, the Court of Appeals' decision is in conflict with a prior decision of this Court. *See* Rule 242(b)(3), SCACR.

This case presents novel questions of law: 1) whether an accused SVP's right to the effective assistance of counsel encompasses the right to be competent at trial to assist counsel in his defense; and 2) whether due process affords an accused SVP, who was competent to stand trial on the predicate offense and who had a history of successful competency restorations, the right to a competency evaluation and restoration if needed so that he may have a meaningful opportunity to be heard at trial. At issue here is whether an accused SVP, who has a track record of competency restoration, has the right to be heard at his trial by anyone (his lawyer; the jury) before he is indefinitely committed. These questions directly involve substantial constitutional issues since the reach of the constitutional rights to due process and the assistance of counsel must be established in order for this matter to be resolved. *See* U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

Finally, the decision of the Court of Appeals is in conflict with a prior decision of this Court, since this Court held in *Matter of Chapman*, 419 S.C. 172, 796 S.E.2d 846 (2017), that the right to counsel afforded potential SVPs cannot merely be a superficial right, but the Court of Appeals' decision effectively rendered it so.

This Court should grant the petition for writ of certiorari.

STATEMENT OF FACTS

In 1999, Petitioner pleaded guilty but mentally ill (GBMI) to second degree assault with intent to commit criminal sexual conduct with a minor, and he was sentenced to twenty years in prison. R. 177. When Petitioner's release date neared, the State sought his commitment pursuant to the SVPA. Petitioner had a decades-long history of schizophrenia, which caused auditory and visual hallucinations when he went without antipsychotic medication. R. 91, ll. 5-14. Petitioner 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 – 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, and defense counsel explained that Petitioner could not participate in his defense because when meeting with counsel, "there were times when [Petitioner's] answers made no sense relative to my questions." R. 1; R. 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. Counsel argued Petitioner "would be prejudiced by trying to have this trial where he could have a significant deprivation of liberty . . . [since] he can't participate in his defense." R. 3, ll. 14-18.

Dr. Marie Gehle, a chief psychologist at the South Carolina Department of Mental Health, had evaluated Petitioner 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. Petitioner's mental health history included periods of "being on his medicine to decompensating and then being restored." Petitioner had been restored to competency more than once in connection with at least one prior case. R. 108, l. 23 – 109, l. 3. Petitioner had been compliant

with his medications for periods sometimes as long as seventeen years. Prior to trial, Petitioner was moved from the Department of Corrections to the Horry County jail and his medications were changed from injections to oral medications. R. 171 – 172. Petitioner's psychiatric medications were discontinued on January 12, 2018 (nine months before his SVP trial and one month before his motion for a competency evaluation), due to sporadic and then eventual noncompliance with the medication regimen. R. 108, ll. 3-10.

The circuit court denied the motion based on an incorrect reading of 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. (Petitioner was competent to stand trial on the predicate offense.) S.C. Code Ann. § 44-48-100(B) provides that a pretrial hearing may proceed with an incompetent respondent where the respondent was incompetent on the predicate offense:

> **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**. . .

(emphasis added).

Based on that inapplicable provision, the circuit court ruled, "44-48-100(B) says that . . . all the constitutional rights available to defendants at criminal trials [apply] other than the right not to be tried while incompetent. So, I think that's dead on the money in the statute." R. 3, l. 22 – 4, l. 3.

On October 22, 2018, when Petitioner 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 explained that Petitioner's "mental state ha[d] significantly deteriorated," and that Petitioner could not testify because he was incapable of logically or truthfully answering questions. R. 44, ll. 3-25; R. 43, ll. 14-25. Counsel further explained he had "not been able to speak with [Petitioner], 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, conversations with Petitioner had gone from "iffy" to not "making any sense." R. 44, ll. 12-20.

Counsel submitted 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 argued that conducting an SVP trial when Petitioner lacked the ability to assist in his own defense was a violation of Petitioner'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.

The State argued that Petitioner did not have the right to be competent at trial based on S.C. Code Ann. § 44-48-100(B) (as seen, 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 Petitioner 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. 38, ll. 18-22; R. 42, ll. 5-8.

The trial went forward and the jury deliberated for only twenty-five minutes before it found that Petitioner was a sexually violent predator. R. 161, ll. 9-12; R. 162, ll. 11-13. The court signed an order of commitment. R. 178.

In a published opinion, the Court of Appeals found no error and held that an accused SVP cannot be entitled to a competency evaluation. *Matter of Griffin,* Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 27-30). The opinion did not address Petitioner's history of successful competency restoration. The Court of Appeals recognized that whether an accused SVP's right to counsel encompassed the right to be competent to assist counsel was a novel issue but concluded there was no statutory right to competency and that other procedural protections afforded by the Act sufficiently satisfied due process. The Court of Appeals further found *In re Oxner*, 430 S.C. 555, 566-69, 846 S.E.2d 365, 371-73 (Ct. App. 2020) *cert. granted* August 25, 2021, supported this conclusion. *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29).

ARGUMENT

1.

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

Petitioner had a right to the effective assistance of counsel in this SVP case. Absent competency, Petitioner was unable to access this right because he could not communicate with his counsel and assist in his defense.

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,[1] and a constitutional right "arising under the Fourteenth Amendment and the South Carolina Constitution." *Matter of Chapman,* 419 S.C. 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. "The test for competency to stand or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987). "It has long been accepted that a person whose

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

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)). A person who is incompetent to stand trial is unable to assist his attorney in preparing his defense. A "mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no chance to defend himself." *Drope*, 420 U.S. at 171 (internal quotations omitted). Petitioner was unable to "participate in his defense" because counsel could not "communicate with [his] client." R. 3, ll. 14-17; R. 40, l. 11 – 37, l. 1. Due to his inability to engage in rational thought and communicate with and assist counsel, Petitioner was essentially tried *in absentia*.

"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 this case, the circuit court and Court of Appeals construed the Act as depriving Petitioner of the opportunity to attain competency for trial. R. 3, l. 21 – 4, l. 3; *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29-30). Absent competency, Petitioner could not understand the proceedings, consult with his lawyer or participate in his defense, which rendered his right to effective assistance of counsel illusory. This error conflicted with Petitioner's right to counsel since the Act must be construed so that an accused's right to counsel is not merely a superficial right. *Chapman*, 419 S.C. at 184, 796 S.E.2d at 849; U.S. Const. amend. XIV; S.C. Const. art. I, § 3; S.C. Code Ann. § 44-48-90.

2.

The Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial, where Petitioner was unable to logically communicate and thus unable 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.

Petitioner was unable to communicate with counsel or the jury but he had been successfully restored to competency more than once in connection with at least one prior criminal case. The flexible protections of due process should have afforded Petitioner a competency evaluation to effectuate his right to a meaningful opportunity to be heard before he was indefinitely deprived of his liberty.

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

"The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, **the opportunity to be heard in person**, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial

review." *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008) (emphasis added). "Procedural due process requires notice, **the opportunity to be heard in a meaningful way**, and judicial review." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (emphasis added). "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)). Here, counsel explained Petitioner could not testify since he was unable to logically or truthfully answer questions. R. 43, ll. 15-25. Counsel had been unable to consult with Petitioner about his defense. R. 43, l. 25 – 44, l. 3. Petitioner was denied the opportunity to be heard in person and to be heard in a meaningful way before he was indefinitely deprived of his liberty—opportunities to which he was constitutionally entitled.

The Court of Appeals identified other rights afforded offenders under the SVPA, including the right to counsel, the right to a probable cause hearing, and the right to a jury trial; it concluded those rights were sufficient to satisfy procedural due process. However, it did not address the important fact of Petitioner's history of successful competency restoration. *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 27-30). Procedural due process requires that Petitioner be afforded a meaningful opportunity to be heard, which was not possible where he could not communicate with his lawyer or with the jury due to an apparent lack of fitness to stand trial. As detailed in Issue 1 above, Petitioner also had a due process right to counsel. *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846.

"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 Petitioner had been previously deemed not competent to stand trial in earlier criminal case(s) but he had been successfully restored to competency. R. 108, l. 23 – 109, l. 3. It was error to deny Petitioner flexibility here, to be evaluated for and, if necessary, restored to competency so that he had a meaningful opportunity to mount a defense.

Mathews v. Eldridge, 424 U.S. at 335, held that due process requires the consideration of three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional procedural safeguards; and 3) the Government's interest, including the function involved and the burdens that the additional safeguards would entail. *Eldridge* supports Petitioner's position. First, 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").

Second, there was a considerable risk of an erroneous deprivation of liberty under existing procedures. Petitioner was unable to communicate due to his apparent lack of competency. He could not alert his counsel to any favorable facts or witnesses. He could not testify before the jury about, for example, whether he 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, so that Petitioner could be heard by his counsel or the jury in his defense.

Third, the State'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. "[A]ttempting 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 Det. of Morgan*, 330 P.3d 774, 784 (Wash. 2014) (Stephens, 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). The State's burden is low here too, as Petitioner had been successfully restored to competency before. The *Eldridge* factors, therefore, weigh in Petitioner's favor.

Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), also supports Petitioner's position. At issue in *Council*, 359 S.C. at 124, 597 S.E.2d at 784, was the propriety of an indefinite stay of an applicant's post-conviction relief (PCR) proceedings until he could become competent. This Court reasoned that since the majority of Council's PCR claims were legal matters that could be determined from the trial record, the PCR hearing could proceed despite his incompetency. *Id*. at 127-28, 597 S.E.2d at 786. However, this Court recognized that even a PCR applicant may need to be competent to assist his lawyer with fact-based issues. *Id*.

In this case, Petitioner was unable to assist his lawyer with fact-based issues. Counsel could not obtain critical information from Petitioner about his plans to avoid reoffending, such as

whether he intended to undergo treatment in an outpatient setting, any plans for medication compliance, or the names of any helpful witnesses. R. 44, ll. 12-20. Also, *Council* was not a civil commitment proceeding aimed at depriving a person of his liberty—Council had already been deprived of his liberty at a trial. Moreover, Council was the party with the burden of proof, unlike this case, where Petitioner was defending himself against the State's offer of proof.

A civil commitment is a "significant deprivation of liberty." *Chapman*, 419 S.C. at 179, 796 S.E.2d at 846 (citing *Addington*, 441 U.S. at 425). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Eldridge*, 424 U.S. at 334. A flexible application of due process required a competency evaluation under these unusual circumstances. U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

3.

The Court of Appeals erred where it affirmed the denial of Petitioner'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 Petitioner had instead been convicted of a predicate offense and § 44-48-100(B) was therefore inapplicable.

The chief administrative judge incorrectly based his denial of Petitioner's motion for a competency evaluation on an inapplicable portion of the SVPA. The Court of Appeals and the circuit judge both misinterpreted the legislative intent of the Act, which provided the right to competency at trial was unavailable only to those offenders who were incompetent to stand trial on the predicate offense. S.C. Code Ann. § 44-48-100(B).

Petitioner was convicted of second degree assault with intent to commit criminal sexual conduct with a minor, a sexually violent offense, [2] upon a plea of GBMI, and he served twenty years in prison. R. 177. The State erroneously argued Petitioner did not have the right to be competent at trial based on § 44-48-100(B), an inapplicable provision. R. 37, l. 14 – 38, l. 1. The SVPA addresses both the commitment of offenders like Petitioner, who have been found guilty of sexually violent crimes, and offenders who could not be tried for their sexually violent crimes due to incompetency. Petitioner's GBMI plea to a sexually violent offense qualified him as a potential SVP pursuant to § 44-48-30(6)**(e)**. In contrast, under § 44-48-30(6)**(c)**, a person who has "been charged but determined to be incompetent to stand trial for a sexually violent offense" also qualifies as a potential SVP. S.C. Code Ann. § 44-48-100(B) provides a separate pretrial

[2] *See* § 44-48-30(2)(i).

hearing procedure exclusively directed at offenders who fall within subsection **(c)** of § 44-48-30(6). As to subsection **(c)** offenders, § 44-48-100(B) provides in part,

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

Therefore, while the General Assembly provided that the right to competency did not apply to some offenders under the SVPA, it only extended this limitation to persons who fall under § 44-48-30(6)**(c)**—that is, persons who were incompetent to stand trial in the underlying criminal case—not persons like Petitioner, who fell under subsection **(e)**.

The State also argued that an offender's requisite mental abnormality or personality disorder might prevent competency anyway, but Petitioner's history was one of successful restorations to competency. R. 37, l. 14 – 38, l. 1; R. 166; R. 43 ll. 3-5. As discussed in Issues 1 and 2 above,[3] Petitioner needed to be competent to access the effective assistance of counsel, and due process requires that procedures be tailored to the capacities and circumstances of those who are to be heard so that they are given a meaningful opportunity to present their case. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (internal quotations and alterations omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)). Petitioner's capacities and circumstances, as

[3] Petitioner hereby incorporates the arguments from Issues 1 and 2, above.

shown by his history of competency restoration, required a tailoring of procedures to allow a competency evaluation, so that he could access his counsel and his opportunity to be heard.

The General Assembly precluded the right of competency only as to one category of offenders, leaving extant a right to competency for the remaining offenders. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). "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). *See also First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC*, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018) ("the legislature knew how to provide for an exception had it desired to do so as evidenced by the 'fraudulent conveyance' exception in the preceding subsection").

The Court of Appeals held there was "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." *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29). This construction of the Act was improperly expansive. Had the legislature intended to include persons who were competent on the predicate offense in the category of offenders denied the right to competency at trial, the fact that it knew how to do so was evidenced by its inclusion of offenders who were not competent on the predicate offense.

The Court of Appeals also concluded that *In re Oxner*, 430 S.C. 555, 561, 846 S.E.2d 365, 369 (Ct. App. 2020), *cert. granted* August 25, 2021, supported its decision since it had

found Oxner's procedural due process rights were not violated when a pretrial hearing was held while Oxner was incompetent. *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 29). However, unlike Petitioner, Oxner was granted competency evaluations but was repeatedly found incompetent on the predicate offense. No further procedural protections existed that could help Oxner. Moreover, the objection to competency in Oxner was merely as to his competency at a pretrial hearing rather than at trial, as in Petitioner's case. *Oxner*, 430 S.C. at 558-61, 846 S.E.2d at 367-69.

The SVPA may not be construed "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. Petitioner had a due process right to be heard at a meaningful time and in a meaningful manner. *Eldridge*, 424 U.S. at 333. The circuit court and Court of Appeals' statutory interpretation was incompatible with Petitioner's rights to counsel and due process. S.C. Code Ann. § 44-48-90; U.S. Const. amend. XIV; S.C. Const. amend. Art. I, § 3.

4.

The Court of Appeals erred where it affirmed the denial of Petitioner's motion to be evaluated for competency to stand trial where trial court had found the chief administrative judge's ruling on the matter months before could not be "overruled," where Petitioner's mental state had continued to deteriorate, and where Petitioner 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.

The trial judge was inclined to grant Petitioner's competency motion, but believed it was bound by the chief administrative judge's earlier decision. This was error, since Petitioner's continued cognitive decline presented a new matter to the court. The Court of Appeals declined to address this issue, finding its resolution of the other issues dispositive. *Matter of Griffin*, Op. No. 5389 (S.C. Ct. App. Filed July 21, 2021) (Howard Adv. Sh. No. 25 at 30, n. 5).

Although one circuit judge may not overrule another,[4] 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. *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 Petitioner), was ordered to undergo a competency evaluation by Judge Spruill in 1977 and he was found incompetent. In 1978, he was returned to court after his competency was restored. *Id*. In 1979, Judge Harris

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

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 revisit competency at a later date, and nothing precluded the second judge from acting: this 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. Of particular relevance was 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 Petitioner's own history. Although Petitioner was evaluated as a potential SVP by Dr. Gehle, he was not evaluated for competency. However, Dr. Gehle noted Petitioner had previously, successfully been hospitalized for competency restoration, and he historically decompensated into psychosis when he did not take prescribed medications. R. 108, l. 23 – 109, l. 3; R. 166.

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 denied by the chief administrative judge. R. 171; R. 1. On October 22, 2018, counsel again moved for a competency evaluation before the trial judge and argued there was a "change in circumstances" since Petitioner's condition continued to deteriorate. R. 6; R. 44, ll. 8-10. The trial judge was inclined to grant the motion, but incorrectly understood himself bound by the chief administrative judge's decision. The trial judge responded, "I don't disagree with you at all. The statute doesn't specifically address competencies in these types of cases . . . 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. 2-8.

In *Drope v. Missouri*, 420 U.S. 162, 169 (1975), the question arose whether there was "reasonable cause to believe that a person who attempted to commit suicide in the midst of a trial might not be mentally competent to understand the proceedings against him." The United States Supreme Court held, "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may, in some circumstances, be sufficient [to signal] . . . the need for further inquiry to determine fitness to proceed . . ." *Id*. at 180. *Drope* illustrates that as late as during the trial, it may be necessary to reevaluate competency. *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").

Counsel argued that Petitioner had a history of psychosis and had been found incompetent to stand trial a number of times previously. R. 166; R. 108, l. 23 – 109, l. 3. Counsel explained that conversations with Petitioner over the course of his representation had gone from "iffy" to not "making any sense." R. 44, ll. 8-20. These facts were relevant to revisiting Petitioner's need for a competency evaluation.

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

error—the prior judge's order was not the final word since the matter was one of Petitioner's present competency.

As discussed in Issues 1 and 2, above, Petitioner had substantial constitutional and statutory rights to effective assistance of counsel and procedural due process.[5] These rights were related to his competency at the time of trial. The trial court's failure to order a competency evaluation was an improper deprivation of Petitioner's rights to due process and the assistance of counsel. *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Blair*, 275 S.C. 529, 273 S.E.2d at 536 (1981); U.S. Const. amend. XIV; S.C. Const. amend. art. I, § 3; S.C. Code. Ann § 44-48-90.

[5] Petitioner hereby incorporates the arguments from Issues 1 and 2, above.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

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

ATTORNEY FOR PETITIONER

This 27th day of October, 2021.

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Oct 27 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
D. Craig Brown, Circuit Court Judge

Opinion No. 5839 (S.C. Ct. App. Filed July 21, 2021)

Lower Court Case No. 2016-CP-26-06412

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

PETITIONER

APPELLATE CASE NO. 2018-001975

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Thomas Griffin, at 4546 Broad River Road, Columbia, SC 29210, this 27th day of October, 2021.

s/ *Joanna K. Delany*
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Appellate Defender

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