

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 29952

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

STEVEN MICHAEL FOSHAY,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE JENNIFER D. MAMMENGA
Circuit Court Judge

APPELLANT'S BRIEF

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STATE OF SOUTH DAKOTA,

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Defendant and Appellant.

PRELIMINARY STATEMENT

The transcript of the Status Hearing is referred to as "SH". The transcript of the Competency Hearing held February 8, 2017, is referred to "CH1". The transcript of the Competency Hearing held September 14, 2018, is referred to "CH2". The transcript of the Competency Hearing held October 7, 2019, is referred to "CH3". The transcript of the Competency Hearing held October 20, 2020, is referred to "CH4". The transcript of the Competency Hearing held November 19, 2021, is referred to "CH5". The transcript of the Motion to Dismiss Hearing is referred to as "MTDH". The Letter Brief in support of the Defendant's Motion to Dismiss is referred to as "LB". The Memorandum Decision on

Defendant's Motion to Dismiss is referred to as "MD". All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Steven Michael Foshay appeals the following order entered March 21, 2022 by the Honorable Jennifer Mammenga, Circuit Court Judge, Second Judicial Circuit: Order denying Defendant's Motion to Dismiss. Foshay's Notice of Appeal was filed March 30, 2022. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE

- I. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO DIMISS.

The circuit court denied Foshay's motion to dismiss, and the court continued Foshay's commitment.

Jackson v. Indiana, 406 U.S. 715, 717, 92 S. Ct. 1845 (1972)

SDCL § 23A-10A-14

STATEMENT OF CASE

The State charged Defendant and Appellant, Steven Michael Foshay, by Indictment with: Count 1 - Rape 1st Degree - Less than 13 Years Old, Count 2 - Rape 1st Degree - Less than 13 Years Old, Count 3 - Sexual Contact with Child Under 16 Years Old, Count 4 - Sexual Contact with Child Under 16 Years Old. Arraignment was held on September 19, 2016.

The court held a Competency Hearing of the Defendant on February 8, 2017. A Competency Status Hearing was held July 7, 2017. A second Competency

Hearing of was held September 19, 2018. A third Competency Hearing was held October 7, 2019. A fourth Competency Hearing of the Defendant in the matter was held October 20, 2020. A fifth Competency Hearing was held November 19, 2021. A hearing on the Defendant's Motion to Dismiss was held December 7, 2021.

The circuit court denied Foshay's Motion to Dismiss via Memorandum Opinion dated March 21, 2022. The circuit court continued Foshay's commitment to a certified facility.

STATEMENT OF FACTS

Defendant and Appellant, Steven Michael Foshay (Foshay), was charged by indictment with two counts of First-Degree Rape - Victim Less than 13 years old and two counts of Sexual Contact with a Child Under 16 on September 15, 2016. MD, p. 2. Foshay was arraigned on those charged on September 20, 2016. *Id.*

On October 5, 2016, counsel for Foshay filed a Motion for Psychological Examination with the Court. *Id.* On November 10, 2016, the Circuit Court granted Foshay's Motion and ordered a psychological evaluation of Foshay. *Id.* Dr. Kenneth Hasseler, a licensed psychologist specializing in neuropsychology, evaluated Foshay in November 2016. LB, p. 1. A competency hearing was held on February 8, 2017, where Dr. Hasseler testified regarding his evaluation of Foshay. MD, p. 2. Dr. Hasseler opined that Foshay suffers from an intellectual disability and has an IQ score of 61. *Id.* The Circuit Court found by a

preponderance of the evidence that Foshay was incompetent due to mental disease or defect and thereby ordered Foshay committed to the Human Services Center in Yankton, South Dakota, for a period of four months. *Id.*

In June 2017, Foshay was reevaluated by Dr. Kirk Zimbleman and diagnosed with a mild intellectual disability. *Id.* On July 7, 2017, a four-month review hearing on competency was held. The court found that Foshay remained incompetent to stand trial, and ordered that Foshay remain committed for a reasonable period of time, not to exceed one year. MD, p. 3.

On September 14, 2018, a second competency hearing was held. *Id.* Tonja Jungwirth, a licensed mental health counselor at the South Dakota Developmental Center (SDDC), testified that she conducted a psychological assessment of Foshay, which included the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). *Id.* Jungwirth testified that Foshay had a 94 percent correct response rate on the CAST-MR when he was read the question aloud. CH2, p. 15. Jungwirth testified that Foshay was competent to stand trial and would be able to assist his attorney in his defense with the help of his family. CH2, p. 17.

Dr. Hasseler also testified at the hearing. Dr. Hasseler opined that Foshay would not be able to assist properly with his defense due to his impaired decision-making capacity and reasoning. MD, p. 4. Dr. Hassler explained that the CAST-MR is not the sole tool for evaluating competency. *Id.* At the end of the hearing, the court held that Foshay was not restored to competency and ordered

that Foshay remain committed for another one-year period. *Id.*

On October 7, 2019, a third competency hearing was held. The court received and accepted testimony and expert opinion from Dr. Ada Powell. MD, p. 4. In Dr. Powell's evaluation, she concluded that Foshay lacked capacity to understand legal proceedings and participate in his defense as a result of a chronic, neuro-developmental disorder. *Id.* In her report, Dr. Powell opined that "there are no realistic interventions capable of substantially improving" Foshay's capacity to participate in his defense within a one-year time period. *Id.* Dr. Powell further opined that "it is more probable than not that Mr. Foshay will remain incompetent to assist in his own defense well into the foreseeable future." *Id.* The circuit court ordered Foshay to remain committed pursuant to SDCL 23A-10A-14. *Id.*

On October 20, 2020, a fourth competency hearing was held and a report and opinion from Jungwirth were accepted. *Id.* Jungwirth rendered the opinion that Foshay was not competent and was not likely to be found competent to proceed in the next year. *Id.* The circuit court found Foshay incompetent to stand trial and order that Foshay remain committed for yet another year. *Id.*

In September 2021, Jungwirth conducted another competency evaluation of Foshay. MD, p. 5. On October 7, 2021, Barbra Abeln, the Director of SDDC submitted a Certificate of Non-Recovery. *Id.* On November 19, 2021, a fifth competency hearing was held. CH5, p. 1. The court again found Foshay to be incompetent to stand trial and ordered Foshay remain committed for yet another

year. MD, p. 5.

On November 16, 2021, Foshay filed a Motion to Dismiss the charges against him pursuant to SDCL 23A-10A-14. *Id.* On December 7, 2021, the court held a hearing on Foshay's Motion to Dismiss. MTDH, p. 1. Jungwirth testified at the hearing that she did not believe Foshay had a substantial likelihood of being restored to competency in the foreseeable future. MD, p. 5. Jungwirth also testified that she reviewed Foshay's intellectual ability and found that Foshay continues to present with an IQ score of 61 and continues to be diagnosed with a mild intellectual disability. *Id.* Jungwirth also re-administered the CAST-MT examination and FIT-R on Foshay. *Id.* Foshay's CAST-MR score fell to 38 percent correct, which is well-below competency for someone with an intellectual disability. *Id.* Jungwirth opined that Foshay is not competent to face the charges against him. *Id.* Jungwirth also opined that there is not a substantial probability that Foshay will become competent in the foreseeable future. MD, p. 5-6.

Jungwirth also testified that the COVID-19 pandemic has hindered the competency restoration proceedings for many individuals that she has evaluated, including Foshay. MP, p. 6. Jungwirth testified that to comply with COVID-19 protocols, competency training has largely taken place over the phone, including her evaluation of Foshay. *Id.* Jungwirth opined that the protocols had a hinderance on competency training in a way that may make it more difficult for some to retain. MTDH, p. 24. Jungwirth believed that additional efforts could be made to assist Foshay in his competency restoration efforts, including more

frequent classes, in-person instruction, flashcards, and other classroom aids. MD, p. 6.

Steven Foshay remains committed while this appeal is pending.

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO DIMISS.

The circuit court erred by denying Foshay's Motion to Dismiss. This Court has explained that the standard of review for such an order is an abuse of discretion. *State v. Williams*, 2008 SD 29, ¶ 23, 748 N.W.2d 435, 442 (citing *State v. Carothers*, 2006 SD 100, ¶ 8, 724 N.W.2d 610, 615-16). In deciding whether the circuit court abused its discretion, the Court engages in statutory interpretation:

Statutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review. Statutory construction is employed to discover the true intent of the legislature in enacting laws, which is ascertained primarily from the language employed in the statute. We give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject.

Chapman v. Chapman, 2006 SD 36, ¶¶ 10-11, 713 N.W.2d 572, 576 (internal citations and quotations omitted). "When the language is clear and unambiguous, our only function is to declare the meaning of the statute as clearly expressed." *State v. Burdick*, 2006 SD 23, ¶ 6, 712 N.W.2d at 7.

SDCL § 23A-10A outlines the commitment procedure for persons deemed mental incompetent to stand trial. It is settled law that, "[a] person cannot be tried, sentenced, or punished for any public offense while he is mentally

incompetent to proceed.” SDCL § 23A-10A-2. SDCL § 23A-10A-4 provides:

If, after [a hearing to determine the mental competency of the Defendant], the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions . . . rendering the defendant mentally incompetent to the extent that the defendant is unable to understand the nature and consequences of the proceedings against the defendant or to assist properly in the defense, the court shall order the defendant to be placed in a restoration to competency program under the direction of an approved facility . . . for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed.

The legislature outlined the procedure to follow after the initial four-month period in SDCL § 23A-10A-14:

After four months of evaluation, pursuant to § 23A-10A-4, if the facility has not certified that the defendant is competent to proceed, pursuant to § 23A-10A-4.1, the director of the approved facility shall issue a report to the circuit court evaluating whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year. After receipt of that report by the circuit court, the court shall set a time for hearing to determine whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year.

If the court finds there is a substantial probability that the defendant will become competent to proceed within the next year, the court shall order the defendant to be placed in a restoration to competency program under the direction of an approved facility, committed to an approved facility, or placed on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for an additional specified period of time, not to exceed one year, or until the director of the facility issues a certificate of recovery pursuant to § 23A-10A-4.1.

If the court finds there is no substantial probability that the

defendant will become competent to proceed within one year but there is a substantial probability that the defendant will become competent in the foreseeable future, the court shall review the defendant's condition to determine appropriate placement and order the defendant to be placed in a restoration to competency program under the direction of an approved facility, committed to an approved facility, or to be placed on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for a term consistent with § 23A-10A-15.

If the one year provided for in this section has run without a certificate of recovery being issued, the director of the approved facility shall notify the court that one year has expired since the order of detention, and the court shall order a hearing to review the defendant's condition to determine appropriate placement and order the defendant's placement in a restoration to competency program under the direction of an approved facility, commitment to an approved facility, or placement on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for a term consistent with § 23A-10A-15.

If the court finds that there is no substantial probability that the defendant will become competent to proceed in the foreseeable future, the court shall dismiss the criminal charges against the defendant. If the director of the facility determines there is probable cause to believe that the defendant is a danger to self or others if the defendant is released, the director shall include the basis for that determination in the report and may recommend that the prosecutor file a petition for civil commitment proceedings.

(emphasis added).

This statute is consistent with the Fourteenth Amendment's prohibition against unduly prolonged involuntary commitment of a criminal defendant. See *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (holding "indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.")

In this case, Foshay has been committed due to incompetency from intellectual disability since 2017. Foshay has resided in three separate facilities to receive restoration services, including: Human Service Center, South Dakota Developmental Center, and Volunteers of America. SDCL § 23A-10A-14 makes clear that if there is no substantial probability that the defendant will become competent in the foreseeable future, the court must dismiss the criminal charges.

The record is absent of any articulable solution to assist Foshay in being restored to competency. In fact, the court has repeatedly found the opposite. In 2016, Dr. Hasseler identified the basis for Foshay's lack of capacity is one that may not improve even with time or rehabilitation. In 2017, Dr. Zimbelman wrote that there may be "some" possibility that Foshay "could" attain capacity but only if there were vigorous restoration efforts. In 2019, Dr. Powell believed that there were not realistic interventions to restore Foshay and that it is more likely than not that Foshay will **not** attain capacity in the foreseeable future. Dr. Jungwirth suggested additional classes per week or flashcards may possibly improve retention, but was unsure what would be available. Nevertheless, Dr. Jungwirth still held the opinion that even with additional efforts there was not a substantial probability that Foshay would be restored.

Foshay has been committed for nearly six years due to a cognitive disability that renders him incompetent. No meaningful evaluation has found him to be competent in the past, even with continuous restoration, training, and education. There is no evidence to support a substantial probability that Foshay

will be competent in the foreseeable future. If the court find that there is no substantial probability that Foshay will competent to proceed in the foreseeable future, the court **shall** dismiss the criminal charges against Foshay. SDCL § 23A-10A-14.

CONCLUSION

The circuit court abused its discretion in denying the Defendant's Motion to Dismiss. For the aforementioned reasons, authorities cited, and upon the settled record, Foshay respectfully asks this Court to remand this case to the circuit court with instruction directing the circuit court to grant Foshay's Motion to Dismiss pursuant to SDCL § 23A-10A-14.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Steven Michael Foshay, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 26th day of October, 2022.

/s/ Betsy Doyle _____
Betsy Doyle
Minnehaha County Public Defender
ATTORNEY for APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 2,455 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 26th day of October, 2022.

/s/ Betsy Doyle
Betsy Doyle
Attorney for Appellant

APPENDIX

PAGE(S)

MEMORANDUM DECISION ON DEFENDANT'S
MOTION TO DISMISS

A1

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

<p>STATE OF SOUTH DAKOTA, Plaintiff, vs. STEVEN MICHAEL FOSHAY, Defendant.</p>	<p>CRI 16-6482 MEMORANDUM DECISION ON DEFENDANT'S MOTION TO DISMISS</p>
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The above-entitled matter came before the Court for a hearing on Defendant's Motion to Dismiss on December 7, 2021, at the Minnehaha County Courthouse, Sioux Falls, South Dakota, the Honorable Jennifer D. Mammenga presiding. The State of South Dakota appeared through Minnehaha County Deputy State's Attorney Lori Ehlers. Defendant appeared personally and with his attorney, Betsy Doyle. Both parties provided additional briefing after the hearing for the Court's review. The Court, having heard and reviewed the arguments and authorities submitted by the parties, now enters the following Memorandum Decision finding that Defendant is not currently competent to stand trial; however, the Court does not find that there is no substantial probability that he will attain competency in the foreseeable future due to the impact of COVID-19 protocols on competency restoration education and evaluation procedures. Therefore, the Court DENIES Defendant's Motion to Dismiss.

FACTUAL & PROCEDURAL SUMMARY¹

Defendant Steven Michael Foshay (Defendant) was charged by indictment on September 15, 2016 with two counts of First Degree Rape – Victim Less than 13 years old and two counts of Sexual Contact with a Child Under 16. Defendant was arraigned on those charges on September 19, 2016.

On October 5, 2016, counsel for Defendant filed a Motion for Psychological Examination with the Court. Judge Robin Houwman granted this Motion and ordered a psychological examination on November 10, 2016. A competency hearing was held on February 8, 2017, where Dr. Kenneth Hasseler testified regarding his evaluation of Defendant. After conducting a neuropsychological examination on Defendant, which involved a review of academic, mental health, and medical records, Dr. Hasseler opined that Defendant suffers from an intellectual disability and has an IQ score of 61. The Court found by a preponderance of the evidence that Defendant was incompetent due to mental disease or defect and thereby ordered that Defendant be committed to the Human Services Center in Yankton, South Dakota, for a period of four months.

In June 2017, Defendant was reevaluated by Dr. Kirk Zimbleman and diagnosed with a mild intellectual disability. In his report, Dr. Zimbleman opined, “with reasonable certainty, that there is some possibility that the defendant, with vigorous and sustained restoration efforts, could attain competency.” On July 7,

¹The facts included in this summary are drawn from the pleadings in the file and Tonia Jungwirth's, M.S. Ed., LPC-MH, testimony at the December 7, 2021, hearing on Defendant's Motion to Dismiss.

2017, a four-month review hearing on competency was held and Judge Houwman found that Defendant was still incompetent to stand trial, and ordered that Defendant remain committed for a reasonable period of time, not to exceed one year.

In October 2017, Tonja Jungwirth, a licensed mental health counselor at the South Dakota Developmental Center in Redfield, South Dakota, where Defendant was then residing, conducted a psychological assessment of Defendant. Jungwirth testified that she agreed with Defendant's previous diagnoses of having an intellectual disability and found a diagnostic impression of Attention Deficit Hyperactivity Disorder (ADHD) as well. In May 2018, Jungwirth conducted a competency evaluation on Defendant, and opined that he was competent to stand trial after having participated in competency restoration sessions.

On June 19, 2018, Barbara Abeln, the Director of the South Dakota Developmental Center (SDDC) submitted an affidavit attesting that Defendant had been restored to competency. On September 14, 2018, another competency hearing was held. Tonja Jungwirth testified that she had conducted a psychological assessment of Defendant, which included the Competence Assessment for Standing Trial for Defendants With Mental Retardation (CAST-MR). Jungwirth testified that Defendant had a 94 percent correct response rate on the CAST-MR, and that he did very well on the examination compared to others with like intellectual disabilities. Jungwirth testified that he was competent to stand trial and would be able to assist his attorney in his defense with the help of his family.

Dr. Hasseler also testified at the hearing and stated that Defendant would not be able to assist properly with his defense due to his impaired decision-making capacity and reasoning. Dr. Hassler testified that the CAST-MR is not the sole tool for evaluating competency. At the end of the hearing, Judge Susan Sabers held that Defendant was not restored to competency and ordered that Defendant remain committed for another one-year period.

On October 7, 2019, a competency review hearing was held before Judge Sabers and an evaluation report and opinion from Dr. Ada Powell was accepted. In the report, Dr. Powell rendered the opinion that the defendant lacked capacity to understand legal proceedings and participate in his defense as a result of chronic, neuro-developmental disorder. In her report, Dr. Powell opined that "there are no realistic interventions capable of substantially improving" Defendant's capacity to participate in his defense within a one-year time period. She further opined that "it is more probable than not that Mr. Foshay will remain incompetent to assist in his own defense well into the foreseeable future." Defendant was ordered to remain committed pursuant to SDCL 23A-10A-14.

On October 20, 2020, a competency review hearing was held before Judge Sabers and a report and opinion from Jungwirth were accepted. Jungwirth rendered the opinion that Defendant was not competent and was not likely to be found competent to proceed in the next year. Judge Sabers found Defendant incompetent to stand trial and ordered that Defendant remain committed for another year.

In September 2021, Jungwirth conducted another competency evaluation of Defendant. On October 7, 2021, Barbara Abeln, the Director of the South Dakota Developmental Center ("SDDC") submitted a Certificate of Non-Recovery. The Defendant appeared before this Court on November 19, 2021 and was again found incompetent to stand trial and ordered to remain committed for another one-year period.

Defendant filed a Motion to Dismiss the charges pursuant to SDCL 23A-10A-14 on November 16, 2021. On December 7, 2021, this Court held a hearing on the motion. Jungwirth testified that she did not believe Defendant to have a substantial likelihood of being restored to competency in the foreseeable future. Jungwirth testified that she reviewed Defendant's intellectual ability and found that he continues to present with an IQ score of 61 and continues to be diagnosed with a mild intellectual disability. She also reviewed his mental health diagnoses and testified that he had begun medication for anxiety. Jungwirth also re-administered the CAST-MR examination on Defendant, as well as the Fitness Interview Test (FIT-R). Jungwirth testified that Defendant showed definite and serious impairment on the FIT-R test. Defendant's CAST-MR score fell to 38 percent correct, which is well below competency for someone with an intellectual disability. Jungwirth testified that Defendant has been participating in competency restoration since September 2017. Ultimately, Jungwirth opined that Defendant is not competent to face the charges against him and is likely not going to be found competent in the next year. She did not find there to be a substantial probability that he will become competent in the

foreseeable future. She testified that her opinion is not that he will never recover competency, but that he is currently struggling with understanding the components of the legal system.

Jungwirth also testified that the COVID-19 pandemic has hindered competency restoration proceedings for many individuals she has evaluated, including Defendant. She testified that competency training has largely taken place over the phone, and even her evaluation was not conducted face to face due to COVID-19 protocols. Jungwirth stated that the protocols have seriously influenced treatment and teaching of competency lessons in a manner that someone could retain. Jungwirth believed that there were additional efforts that could be made to assist Defendant his competency restoration, including more frequent classes, in-person instruction, flashcards, and other classroom aids.

LAW AND ANALYSIS

SDCL § 23A-10A outlines the commitment procedure for persons adjudged mentally incompetent to stand trial. It is well established that, "[a] person cannot be tried, sentenced, or punished for any public offense while he is mentally incompetent to proceed." SDCL § 23A-10A-2. South Dakota law provides:

If, after [a hearing to determine the mental competency of the Defendant], the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions . . . rendering him mentally incompetent [to stand trial] the court shall commit the defendant to the custody of an approved facility . . . for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed.

SDCL 23A-10A-4 (emphasis added). SDCL § 23A-10A-14 outlines the procedure to follow after the initial four-month period:

After four months of evaluation, pursuant to § 23A-10A-4, if the facility has not certified that the defendant is competent to proceed, pursuant to § 23A-10A-4.1, the director of the approved facility shall issue a report to the circuit court evaluating whether there is a substantial probability that within the next year the defendant will become competent to proceed. After receipt of that report by the circuit court, the court shall set a time for hearing to determine whether or not the defendant is reasonably likely to become competent to proceed within the next year.

If the court finds there is a reasonable likelihood that the defendant will become competent to proceed within the next year, it shall order the defendant committed to an approved facility for an additional specified period of time, not to exceed one year, or until the director of the facility issues a certificate of recovery pursuant to § 23A-10A-4.1.

If the court finds there is no reasonable likelihood that the defendant will become competent to proceed within one year, it shall review the defendant's condition to determine appropriate placement and order the defendant committed to an approved facility for a term consistent with § 23A-10A-15.

If the one year provided for in this section has run without a certificate of recovery being issued, the director of the approved facility shall notify the court that one year has expired since the order of detention, and the court shall order a hearing to review the defendant's condition to determine appropriate placement and order the defendant's commitment to an approved facility for a term consistent with § 23A-10A-15.

S.D. Codified Laws § 23A-10A-14. Accordingly, after the court's initial ordered detention expires, the court is to order a hearing to determine appropriate placement and order a commitment term under SDCL § 23A-10A-15, which provides:

If the most serious charge against the defendant is a Class A or B felony, the order shall be for any period of time the court

determines is reasonable or until the charges have been dismissed by the prosecution. The order may not exceed the maximum penalty allowable for the most serious charge facing the defendant. Upon expiration of the order of detention, or after the expiration of the longest time the defendant could have been sentenced, whichever is longest, the criminal charges against the defendant shall be dismissed. If the prosecutor believes there is probable cause to believe that the defendant is a danger to self or to others at the time of dismissal, the prosecutor may file a petition in accordance with chapter 27A-10 or 27A-11A or title 27B, for further restoration to competency.

Every twelve months thereafter, the director of the approved facility shall notify the court if the defendant is still in a restoration to competency program under the direction of an approved facility or in the approved facility pursuant to this chapter, and the circuit court shall hold a hearing to review any order of detention to determine if the defendant has become competent to proceed.

S.D. Codified Laws § 23A-10A-15.

In *Jackson v. Indiana*, the State of Indiana's statutory scheme was under constitutional scrutiny when "a mentally defective deaf mute with a mental level of a pre-school child," who could not read, write, or virtually otherwise communicate, was charged with two criminal offenses and committed under Indiana statute. 406 U.S. 715, 717, 92 S.Ct. 1845 (1972). The defendant had very little possibility of improvement even if he were not deaf. *Id.* at 719. Accordingly, the defendant argued his equal protection under the law was violated because if there were no criminal charges pending against him, his commitment would have proceeded under the more lenient civil statutes. *Id.* The defendant also argued that his indefinite commitment under Indiana law deprived him of due process and subjected him to cruel and unusual punishment. *Id.*

Regarding due process, the Supreme Court held that:

Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not, the State must either institute civil proceedings applicable to indefinite commitment of those not charged with the crime, or release the defendant.

Id. at 738 (citing *Greenwood v. United States*, 350 U.S. 366 (1958)) (emphasis added).

The Supreme Court further found that "at the least, due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*

Jackson makes clear that indefinite commitment of a defendant solely on account of incompetency to stand trial violates the Due Process clause. 406 U.S. at 731.

Due Process requires this Court to make a determination as to whether Defendant's continued confinement serves any purposes with respect to his ability to become competent to stand trial. *See Jackson*, 406 U.S. at 738 ("[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.") Defendant asserts that there is no substantial probability that he will ever attain competency in the foreseeable future, and therefore, due process requires that he should be immediately released.

The purpose for which Defendant was committed was to provide him psychological attention so that he might achieve a level of competency that would allow him to be criminally tried. *Jackson*, 406 U.S. at 738. Defendant has been

confined for approximately five years in an attempt to gain competency for trial. During that time, there have been conflicting opinions from the mental health professionals who have evaluated Defendant as a part of the competency evaluation and restoration process as to whether he is or ever will be competent to assist in his own defense.

At the hearing on this motion, Tonja Jungwirth testified that she did not believe that substantial probability exists that Defendant will become competent in the foreseeable future. However, Jungwirth's further testimony that competency restoration proceedings were hindered by COVID-19 protocols for all individuals participating in this programming gives the Court significant pause in deciding that this Defendant will *never* be restored to competency. Defendant's CAST-MR score fell nearly 30 points after the COVID-19 protocols were put into place. Jungwirth testified that this Defendant could benefit from a more hands-on restoration approach, which could include more classes, in-person instruction, and other classroom aids.

This Court is cognizant of the length of time that Defendant has been confined for purposes of competency restoration and agrees that the restoration process cannot continue indefinitely. To that end, the Court encourages the competency restoration program to follow Jungwirth's recommendations to give Defendant more tailored education that may better assist him in regaining competency, which should be possible based on the relatively low local spread of COVID-19 at the current time.

Based on Jungwirth's testimony that individuals participating in competency restoration have all been hindered due to the COVID-19 protocols put into place, this Court cannot find that there is no substantial probability that Defendant will ever gain competency and that his continued commitment is unreasonable.

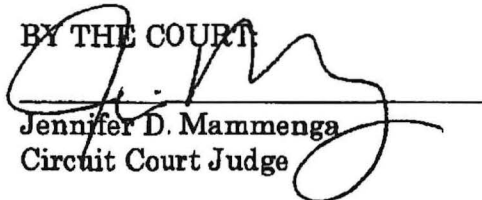
CONCLUSION & ORDER

The Court's Findings of Fact and Conclusions of Law included in this Memorandum Opinion are incorporated into this Order by reference.


IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is DENIED.

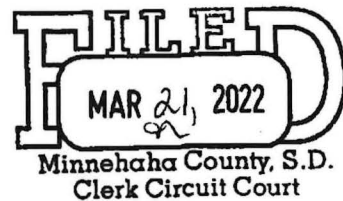
Dated this 21st day of March, 2022.

BY THE COURT:


Jennifer D. Mammenga
Circuit Court Judge

ATTEST:
Clerk of Courts

BY: 
Deputy (SEAL)



CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

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Dated this 26th day of October, 2022.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29952

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN MICHAEL FOSHAY,

Defendant and Appellant.

INTERMEDIATE APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JENNIFER D. MAMMENGA
Circuit Court Judge

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Order Granting Petition for Intermediate Appeal filed May 13, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29952

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN MICHAEL FOSHAY,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as “State.” Defendant/Appellant, Steven Michael Foshay, is referred to as “Defendant.” The settled record in the underlying case is denoted as “SR.” Defendant’s Brief is denoted as “DB.” All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On March 21, 2022, the Honorable Jennifer D. Mammenga, Circuit Court Judge, Second Judicial Circuit, entered a Memorandum Decision and Order Denying Defendant’s Motion to Dismiss in *State of South Dakota v. Steven Michael Foshay*, Minnehaha County Criminal File Number 49CRI16-006482. SR:277-87. Defendant filed a Petition for Permission to Appeal that order and, on May 13, 2022, this Court granted

Defendant's Petition. SR:289-90. This Court has jurisdiction under [SDCL 23A-32-12](#).¹

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED BY DENYING DEFENDANT'S MOTION TO DISMISS?

The circuit court did not rule on the issue of whether it erred. The circuit court did deny Defendant's Motion to Dismiss.

Jackson v. Indiana, 406 U.S. 715 (1972)

State v. Edwards, 1997 S.D. 130, 572 N.W.2d 113

State v. Miranda, 2009 S.D. 105, 776 N.W.2d 77

[SDCL 23A-10A-14](#)

STATEMENT OF THE CASE

On September 14, 2016, an Indictment was filed in Minnehaha County Criminal File Number 49CRI16-006482, charging Defendant with four counts. SR:11-12. Defendant was charged with Count 1: first-degree rape with a child less than thirteen years old in violation of [SDCL 22-22-1\(1\)](#), a Class C felony; Count 2: first-degree rape with a child less than thirteen years old in violation of [SDCL 22-22-1\(1\)](#), a Class C felony; Count 3: sexual contact with a child less than sixteen years old in

¹ Defendant incorrectly alleges that this Court has jurisdiction pursuant to [SDCL 23A-32-2](#). DB:2. [SDCL 23A-32-2](#) states, "[a]n appeal to the Supreme Court may be taken by the defendant from final judgment of conviction." [SDCL 23A-32-2](#). This appeal is not taken from a "final judgment of conviction," and, thus, jurisdiction does not arise under [SDCL 23A-32-2](#).

violation of [SDCL 22-22-7](#), a Class 4 felony; and Count 4: sexual contact with a child less than sixteen years old in violation of [SDCL 22-22-7](#), a Class 4 felony. SR:11-12. Defendant was arraigned on September 19, 2016. SR:278.

Subsequently, Defendant filed a Motion for Psychological Examination, asking the circuit court for an order that Defendant receive an evaluation. SR:15-16. On November 10, 2016, the circuit court entered an Order for Psychological Examination. SR:17-18.

On February 8, 2017, a competency hearing was held before the Honorable Robin Houwman (“Judge Houwman”). SR:25, 300. At the hearing, evidence was presented by stipulation of the parties that Defendant received a psychological evaluation from Dr. Kenneth Hasseler (“Dr. Hasseler”), a licensed psychologist specializing in neuropsychology. SR:25, 28-45, 302. Based on the evaluation, Dr. Hasseler determined that Defendant suffered from a mild intellectual disability. SR:42, 304. Dr. Hasseler opined that Defendant suffered from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. SR:25, 42, 304. Based on this opinion, the circuit court found by a preponderance of the evidence that Defendant was incompetent and ordered Defendant to be committed for a reasonable time, not to exceed four months, to the Human Services Center to receive treatment to determine whether or not

there was a substantial probability that in the foreseeable future he will become competent to stand trial. SR:25-26, 305.

On June 19, 2017, pursuant to [SDCL 23A-10A-4](#), Dr. Kirk Zimbleman, Director of Psychology of the Human Services Center, filed with the circuit court a certificate of non-recovery and report. SR:46-54. He advised that based on the evaluation he performed on Defendant, it was his opinion that there was not a substantial probability that Defendant would become competent to proceed within the next year. SR:46, 324.

On July 7, 2017, a four-month review hearing was held before Judge Houwman. SR:55, 323. The circuit court considered the certificate of non-recovery and report from Dr. Zimbleman. SR:324-25; *see* SR:46-54 (certificate and report). Dr. Zimbleman opined “with reasonable certainty, that there is some possibility that [D]efendant, with vigorous and sustained restoration efforts, could attain competency.” SR:54. The circuit court found Defendant incompetent and ordered that Defendant be committed for a reasonable amount of time not to exceed one year pursuant to [SDCL 23-10A-14](#). SR:55-56, 326-27.

On June 19, 2018, a certificate of competency and report were submitted to the circuit court. SR:57-60. Tonja Jungwirth (“Jungwirth”), who at that time was a behavioral therapist and licensed professional counselor in mental health, performed an evaluation on

Defendant. SR:57-60, 120-21. Based on Defendant's evaluation, she reported that Defendant was competent to stand trial. SR:57-60.

On September 14, 2018, a competency hearing was held before the Honorable Susan Sabers ("Judge Sabers"). SR:118. Jungwirth testified that Defendant had a mild intellectual disability with an IQ score of 61. SR:131. Jungwirth testified that she had conducted a psychological assessment on Defendant, which included a competence assessment to stand trial test ("CAST-MR"). SR:132-33. A CAST-MR is a sixty-minute multiple choice test divided into three sections. SR:132, 140. The first section tests over basic legal concepts like a defendant's knowledge of the criminal justice system. SR:132. The second section tests a defendant's ability to assist in their defense and includes questions about the client-attorney relationship, the limits and strengths of confidentiality, and the rules of the procedure in a courtroom. SR:132. The third section tests a defendant's understanding of case events. SR:132.

Defendant did "very well" compared to people with his like disability on his CAST-MR by scoring a 94% correct response rate. SR:132-34. The score for this test for people with an intellectual disability is usually below the mean score of 66%. SR:134, 139. Based on her evaluation of Defendant, she opined that Defendant would be able to assist his attorney in his defense with the assistance of his family. SR:135. Jungwirth consulted with Dr. Jay Trenhaile, a psychologist,

who agreed with Jungwirth's conclusion and approved of her report that was submitted to the circuit court. SR:126, 135-36.

Dr. Hasseler also testified at the hearing. SR:145. He testified that he met with Defendant on July 9, 2018, and conducted a competency interview and neuropsychological evaluation. SR:145, 148, *see* SR:84-105 (report). Based on his evaluation, Dr. Hasseler opined that Defendant's knowledge and understanding of the courtroom and basic legal concepts has improved with competency training. SR:152. Dr. Hasseler also administered a CAST-MR, where Defendant scored in range with individuals deemed competent to stand trial and above average for an individual with an intellectual disability. SR:98, 102. However, Dr. Hasseler concluded that Defendant had not made enough progress for him to believe that Defendant had the ability to participate in his own defense. SR:152. At the conclusion of the hearing, the circuit court held that the State failed to show by a preponderance of the evidence that Defendant was competent to stand trial. SR:180, 184. It further ordered that Defendant remain committed for a reasonable period of time not to exceed one year. SR:181, 185.

On October 7, 2019, an annual competency hearing was held before Judge Sabers. SR:223, 380. The parties stipulated to a report from Dr. Ada Powell ("Dr. Powell"), a licensed psychologist, who opined that Defendant lacked capacity to understand legal proceedings and participate properly in his defense. SR:381-82; *see* SR:194-222 (report).

Dr. Powell opined that “there are no realistic interventions capable of substantially improving” Defendant’s capacity to participate in his defense within a one-year time period. SR:201. She further opined that “it is more probable than not that [Defendant] will remain incompetent to assist in his own defense well into the foreseeable future.” SR:201. The circuit court ordered that Defendant remain committed. SR:223-24.

On October 20, 2020, an annual competency hearing was held before Judge Sabers. SR:335. The circuit court considered the certificate of non-recovery and report from an evaluation completed by Jungwirth. SR:241, 336-74; *see* SR:225-34 (certificate and report). The parties did not dispute the finding that Defendant was incompetent to stand trial. SR:336. The circuit court held that Defendant was incompetent to stand trial and ordered that he remain committed for another year. SR:241-43, 337.

On November 19, 2021, an annual competency hearing was held before the Honorable Jennifer D. Mammenga (“Judge Mammenga”). SR:307. At the hearing, a certificate of non-recovery and report from an evaluation completed by Jungwirth were presented by stipulation of the parties. SR:311-12, 314, *see* SR:245-54 (certificate and report). The parties stipulated to the finding that Defendant had not been restored to competency. SR:314. Based upon the report and stipulation, the circuit court found that Defendant was incompetent to stand trial and ordered

that he remain committed for a reasonable period of time not to exceed one year. SR:315.

Defendant filed a Motion to Dismiss. SR:256. Defendant argued that the charges against him should be dismissed because “[n]othing in the record suggests that there is a substantial probability that [D]efendant will attain capacity to proceed in the foreseeable future.” SR:265-58. Additionally, Defendant argued that the amendment to [SDCL 23A-10A-14](#) supported dismissal. SR:258.

On December 7, 2021, a hearing on the Motion to Dismiss was held before Judge Mammenga. SR:341. Additional procedural details regarding this hearing will be addressed below. At the conclusion of the hearing, the circuit court gave the State and Defendant an opportunity to submit written arguments. SR:370-72. Both parties did. SR:264-74.

On March 10, 2022, Brian Mulder (“Mr. Mulder”), Director of Volunteers of American-Dakotas Community Support Provider Program, the place where Defendant was residing for the past two years, submitted a letter to the circuit court. SR:263, 276. In the letter, Mr. Mulder wrote that since the December 2021 hearing, Defendant is refusing to follow his recommended program and refusing to take his proscribed medicine consistently. SR:276. Additionally, Mr. Mulder wrote that Defendant distributed to other participants Delta 8 products and had photographs of both male and female genitals on his phone. SR:276. Mr. Mulder wrote

that Defendant could possibly prove to be a danger to himself or the community. SR:276.

On March 21, 2022, the circuit court entered a Memorandum Decision and Order Denying Defendant's Motion to Dismiss. SR:277-87. The circuit court found that Defendant is not currently competent to stand trial. However, the circuit court concluded that it "does not find that there is no substantial probability that he will attain competency in the foreseeable future due to the impact of COVID-19 protocols on competency restoration education and evaluation procedures." SR:277. Defendant filed a Petition for Permission to Appeal and, on May 13, 2022, this Court issued an Order Granting Petition for Allowance of Appeal from Intermediate Order. SR:289-90.

STATEMENT OF FACTS²

Between July 2016 and August 2016, Defendant was living with twelve-year-old J.A.R. in Sioux Falls, South Dakota. SR:1. J.A.R. reported to law enforcement that during this time, she was vaginally penetrated twice by Defendant. SR:1.

² The State's Statement of Facts is taken from the Affidavit in Support of Arrest Warrant. SR:1-3. The grand jury transcript was ordered by Defendant on September 19, 2016, SR:14, but is not part of the Settled Record. Evaluation reports reference additional facts from law enforcement reports, *see, e.g.*, SR:29-32, but those law enforcement reports are not part of the Settled Record.

Specifically, J.A.R. reported that sometime during the last two weeks of July 2016, when she was watching television in her room, Defendant entered the room and told her that he wanted to have sex with her. SR:1-2. Defendant pulled his shorts down and laid on top of J.A.R. Defendant then began to force his penis into her vagina. SR:2. J.A.R. reported that Defendant's penis slightly penetrated her vagina before she pushed him off. SR:2.

J.A.R. reported that the second encounter occurred during the first week of August 2016. SR:2. J.A.R. woke up from sleeping in her room to find Defendant laying on top of her. SR:2. Defendant pulled both his and J.A.R.'s shorts down, inserted his penis into J.A.R.'s vagina, and engaged in penetration for approximately two minutes. SR:2. J.A.R. reported that Defendant pulled his penis out of her vagina before ejaculating. SR:2.

Defendant subsequently admitted to law enforcement that he engaged in intercourse with J.A.R. during the last weeks of July and sometime shortly thereafter. SR:2-3. Defendant expressed concerns that J.A.R. could be pregnant. SR:3.

ARGUMENTS

THE CHARGES AGAINST DEFENDANT SHOULD NOT BE DISMISSED PURSUANT TO [SDCL 23A-10A-14](#).

A. Background.

In Defendant's Petition for Permission to File an Intermediate Appeal, Defendant argued that the circuit court applied the wrong legal

standard in denying his motion. Defendant does not present arguments in his brief regarding whether the circuit court applied the wrong legal standard. To the extent relevant based on the standard of review, Defendant has waived this argument.³

On appeal, Defendant fails to properly raise and frame his issue before this Court. Defendant frames the issue as “whether *the circuit court erred* by denying [D]efendant’s motion to dismiss.” DB:2.

Defendant did not raise the issue to the circuit court of whether *it erred* in its ruling. See [United States v. Sineneng-Smith](#), 140 S. Ct. 1575, 1579 (2020) (“In both civil and criminal cases, . . . we rely on the parties to frame the issues for decision.”). Defendant did raise to the circuit court the issue of whether the charges against him should be dismissed pursuant to [SDCL 23A-10A-14](#), but that is not the issue, as Defendant frames it, for decision by this Court.⁴ See generally [Miller v. Hernandez](#), 520 N.W.2d 266, 272 (S.D. 1994) (holding that an issue can be waived on

³ The failure to cite supporting authorities violates [SDCL 15-26A-60\(6\)](#) and waives the issue on appeal. *E.g.*, [State v. Patterson](#), 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (quoting [First Nat’l Bank in Sioux Falls v. Drier](#), 1998 S.D. 1, ¶ 20, 574 N.W.2d 597, 601); [State v. Fool Bull](#), 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169 (quoting [State v. Pellegrino](#), 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599).

⁴ Furthermore, [SDCL 15-26A-60\(4\)](#) requires a concise statement of the legal issues and “a concise statement of how the [circuit] court decided it.” [SDCL 15-26A-60\(4\)](#). Defendant failed to comply with [SDCL 15-26A-60\(4\)](#) by omitting how the circuit court decided the issue of *whether it erred*, likely because this issue was not decided. DB:2. Defendant did include a statement of how the circuit court ruled on his Motion to Dismiss. DB:2.

appeal by failing to *properly* raise it in accordance with appellate procedure).

The issue that Defendant is attempting to raise is whether the charges against him should be dismissed pursuant to [SDCL 23A-10A-14](#). Defendant does not point to any specific factual findings of the circuit court that are clearly erroneous. Defendant appears to challenge whether the circuit court’s factual findings support the dismissal standard in [SDCL 23A-10A-14](#)—that there is no substantial probability that Defendant will become competent in the foreseeable future. DB:10. Defendant also appears to argue that other evidence should have also been considered. DB:10. Because no constitutional violation occurred and the application of [SDCL 23A-10A-14](#) to the facts support the circuit court’s holding, the circuit court’s Memorandum Decision and Order Denying Defendant’s Motion to Dismiss should be affirmed.

B. *Standard of Review.*

This Court reviews “a [circuit] court’s denial of a motion to dismiss under an abuse of discretion standard.” [State v. Miranda, 2009 S.D. 105, ¶ 14, 776 N.W.2d at 81](#) (quoting [State v. Williams, 2008 S.D. 29, ¶ 23, 748 N.W.2d 435, 442](#)). Whether the circuit court abused its discretion in denying Defendant’s Motion to Dismiss depends on the statutory application of [SDCL 23A-10A-14](#). *See id.* ¶ 13 n.1, [776 N.W.2d at 81](#) n.1. This Court’s “review of statutory [application] is de novo,

giving no deference to the circuit court’s conclusions of law.” *Id.* (quoting *State v. Moss*, 2008 S.D. 64, ¶ 9, 754 N.W.2d 626, 629).

This Court “review[s] the court’s findings of fact under the clearly erroneous standard.” *State v. Schumacher*, 2021 S.D. 16, ¶ 19, 956 N.W.2d 427, 432 (quoting *State v. Vortherms*, 2020 S.D. 67, ¶ 18, 952 N.W.2d 113, 117). “Clear error is shown only when, after a review of all the evidence, [this Court is] left with a definite and firm conviction that a mistake has been made.” *State v. Guthrie*, 2002 S.D. 138, ¶ 5, 654 N.W.2d 201, 203 (quotation omitted); see *Evans v. Evans*, 2020 S.D. 62, ¶ 20, 951 N.W.2d 268, 276. “The [circuit] court’s findings of fact are presumed correct and [this Court] defer[s] to those findings unless the evidence clearly preponderates against them.” *Guthrie*, 2002 S.D. 138, ¶ 5, 654 N.W.2d at 203-04 (quotation omitted). “Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo.” *Schumacher*, 2021 S.D. 16, ¶ 19, 956 N.W.2d at 432 (quoting *Vortherms*, 2020 S.D. 67, ¶ 18, 952 N.W.2d at 117).

Additionally, whether a constitutional violation has occurred is reviewed de novo. *State v. Guzman*, 2022 S.D. 70, ¶ 30, ___ N.W.2d ___. “If such constitutional violation has occurred, the circuit court has necessarily abused its discretion.” *Id.*

However, if a defendant fails to properly preserve an issue for appellate review, this Court is limited to plain error review if a defendant

invokes plain error review on appeal.⁵ See *State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818. Ordinarily, this Court will not apply a standard of review to a waived issue where plain error review is not invoked because this Court simply will decline to review the issue. See *State v. Podzimek*, 2019 S.D. 43, ¶ 27, 932 N.W.2d 141, 149.

C. *The Circuit Court’s Factual Findings are not Clearly Erroneous and Support its Denial of Defendant’s Motion to Dismiss.*

“A person cannot be tried, sentenced, or punished for any public offense while he is mentally incompetent to proceed.” SDCL 23A-10A-2. Relevant here, a defendant is “mentally incompetent” to stand trial if he is “suffering from a mental disease [or] developmental disability, as defined in § 27B-1-18,⁶ . . . rendering him mentally incompetent to the

⁵ The State is not requesting or invoking plain error review on behalf of Defendant. *Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d at 818 (refusing to apply plain error review in the absence of a party’s request). See *id.* (“As a general rule, an appellate court may review only the issues specifically raised and argued in an appellant’s brief.” (quoting *United States v. Simmons*, 964 F.2d 763, 777 (8th Cir. 1992))).

⁶ SDCL 27B-1-18 states:

A developmental disability is any severe, chronic disability of a person that:

- (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (2) Is manifested before the person attains age twenty-two;
- (3) Is likely to continue indefinitely;
- (4) Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and

(continued . . .)

extent that he *is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.*” SDCL 23A-10A-1 (emphasis added); see *State v. Asmussen*, 2006 S.D. 37, ¶ 32, 713 N.W.2d 580, 591 (defining a defendant competent to stand trial as one that has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and has a “rational as well as factual understanding of the proceedings against him” (quoting *State v. Raymond*, 1997 S.D. 59, ¶ 17, 563 N.W.2d 823, 827)).

“[A]ll criminal defendants have a due process right, in certain circumstances, to have their competence determined in an evidentiary hearing.” *State v. Edwards*, 1997 S.D. 130, ¶ 9, 572 N.W.2d 113, 115 (quoting *Hurney v. Class*, 551 N.W.2d 577, 583 (S.D. 1996)); see SDCL 23A-10A-3. “If the defendant, state, or court asserts that a defendant is mentally incompetent to proceed, the state has the burden of proving the mental competence of the defendant by a preponderance of the evidence.” SDCL 23A-10A-6.1. Pursuant to SDCL 23A-10A-4,

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering the defendant mentally incompetent to the extent that the defendant is unable to understand the nature and consequences of the

(5) Reflects the person’s need for an array of generic services, met through a system of individualized planning and supports over an extended time, including those of a life-long duration.

SDCL 27B-1-18.

proceedings against the defendant or to assist properly in the defense, the court shall order the defendant to be placed in a restoration to competency program The defendant shall be treated for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed

[SDCL 23A-10-4](#). After four months,

[I]f the facility has not certified that the defendant is competent to proceed, pursuant to § 23A-10A-4.1, the director of the approved facility shall issue a report to the circuit court evaluating whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year. After receipt of that report by the circuit court, the court shall set a time for hearing to determine whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year.

If the court finds there is a substantial probability that the defendant will become competent to proceed within the next year, the court shall order the defendant to be placed in a restoration to competency program . . . for an additional specified period of time, not to exceed one year, or until the director of the facility issues a certificate of recovery pursuant to § 23A-10A-4.1.

If the court finds there is no substantial probability that the defendant will become competent to proceed within one year but *there is a substantial probability that the defendant will become competent in the foreseeable future*, the court shall review the defendant's condition to determine appropriate placement and order the defendant to be placed in a restoration to competency program . . .

If the one year provided for in this section has run without a certificate of recovery being issued, the director of the approved facility shall notify the court that one year has expired since the order of detention, and the court shall order a hearing to review the defendant's condition to

determine appropriate placement and order the defendant's placement in a restoration to competency program

If the court finds that there is no substantial probability that the defendant will become competent to proceed in the foreseeable future, the court shall dismiss the criminal charges against the defendant

SDCL 23A-10A-14 (emphasis added).

In *Jackson v. Indiana*, the Supreme Court of the United States held that “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment’s guarantee of due process.” *Jackson v. Indiana*, 406 U.S. 715, 730 (1972). In *Jackson*, the defendant could not speak, “read, write, or otherwise communicate except through limited sign language” and had a “mental level of a pre-school child.” *Id.* at 717. His “almost non-existent communication skill[s], together with his lack of hearing and his mental deficiency, left him unable to understand the nature of the charges against him or to participate in his defense.” *Id.* at 718. “[N]o facilities that could help someone as badly off as [the defendant] to learn minimal communication skills.” *Id.* at 719. The trial court ordered the defendant be committed for essentially a “life sentence” without ever being convicted of a crime because the defendant would never attain a status of competency to stand trial. *Id.*

The Supreme Court of the United States held that a defendant cannot be committed based solely on his incapacity to proceed to trial but can be committed for “the reasonable period of time necessary to

determine whether there is a substantial probability that he will attain [the capacity to proceed to trial] in the foreseeable future.” *Id.* at 738. The Supreme Court declined to attempt to place a time limit on all cases because of differing state facilities and procedures. *Id.* However, in the case before the Supreme Court, the record “sufficiently establishe[d] the lack of a substantial probability that [the defendant] will ever be able to participate fully in a trial.” *Id.* at 738-39. Therefore, the Supreme Court held that the defendant’s indefinite commitment was unconstitutional. *Id.* at 720.

Here, to grant Defendant’s Motion to Dismiss, the circuit court was required to find that “there is no substantial probability that [D]efendant will become competent to proceed in the foreseeable future.” [SDCL 23A-10A-14](#). The circuit court reviewed the pleadings and other documents in the file—which included a transcript of the September 14, 2018, competency hearing—as well as heard Jungwirth’s testimony at the most recent hearing. SR:278. On March 21, 2022, the circuit court entered a Memorandum Decision and Order Denying Defendant’s Motion to Dismiss. SR:277-87. The circuit court incorporated the Memorandum Opinion’s Findings of Fact and Conclusions of Law into its Order. SR:287. The factual findings of the circuit court are not alleged to be clearly erroneous and support its conclusion that it “does not find that there is no substantial probability that [Defendant] will attain competency in the foreseeable future due to the impact of COVID-19

protocols on competency restoration education and evaluation procedures.” SR:277.

The circuit court reviewed documents that showed that Defendant was first found incompetent to stand trial on February 8, 2017, and was ordered to be committed for four months to receive treatment to determine whether or not there was a substantial probability that in the foreseeable future Defendant would become competent to stand trial. SR:278. In June 2017, Defendant was diagnosed by Dr. Zimbleman with a *mild* intellectual disability. SR:278. Dr. Zimbleman opined that “with reasonable certainty, that there is some possibility that [D]efendant, with vigorous and sustained restoration efforts, could attain competency.” SR:278.

Indeed, eleven months later, in May 2018, the documents in the file showed that Jungwirth conducted a competency evaluation on Defendant and opined that he was competent to stand trial. SR:278. At the September 14, 2018, competency hearing, Jungwirth testified that Defendant did “very well” on his CAST-MR test compared to people with his like disability by scoring a 94% correct response rate. SR:279. She opined that Defendant would be able to assist his attorney in his defense with the assistance of his family. SR:279. However, Dr. Hasseler testified that Defendant was not competent, in part, because of his impaired decision-making capacity and reasoning. SR:280. The circuit

court held that Defendant was not restored to competency and ordered he remain committed. SR:280.

At the December 7, 2021, Motion to Dismiss hearing, the circuit court hear testimony from Jungwirth. SR:341. Jungwirth⁷ opined that Defendant continues to be diagnosed with a mild intellectual disability, the least intellectual disability on the scale. SR:350, 358. She opined that Defendant had the ability to communicate with counsel and assist in his own defense but has impairments. SR:362. She testified about her previous 2018 evaluation where she opined that Defendant was competent to stand trial. SR:352. She testified that Defendant's IQ would not typically improve over time, but it would also not decrease—unless something like a head injury occurred. SR:359.

Despite an IQ that had not changed and continued competency training, Defendant's CAST-MR scores in 2018 and 2021 were vastly different. Both times, the test was administered the same way by Jungwirth reading the test out loud to Defendant. SR:360. On the 2018 test, Defendant scored a 94%.⁸ SR:363. On the 2021 test, Defendant scored a 38%, a "correct response rate . . . well below the number for a

⁷ At the time of this hearing, Jungwirth's highest level of education was a doctorate in psychology with an emphasis in school psychology.

⁸ Dr. Hasseler also administered the CAST-MR test to Defendant in 2018. SR:363. The results were similar to the CAST-MR test Jungwirth administered to Defendant in 2018. SR:363.

person who may be found competent that has an intellectual disability.”
SR:360.

Jungwirth initially testified that she could not identify any reason why the scores in 2018 and 2021 were different. SR:353. However, she later explained that the COVID-19 pandemic “really did a lot of hinderance” on competency training. SR:364, 367.⁹ She explained that both competency trainings and annual evaluations were impacted. SR:364-65. Jungwirth testified, “not being able to have face to face, having masks on, social distancing, a lot of those things really kind of influence a lot of treatment or being able to be taught in a way that somebody can retain it.” SR:364. At some points, Defendant was attempting to do competency training over the phone. SR:364. Even Jungwirth’s evaluation was not face to face. SR:365. Jungwirth then opined that the changes in the competency training could potentially be impacting the differences in the 2018 through 2021 reports. SR:364.

Jungwirth further admitted that a regression in competency training from pre-pandemic scores was not unique to Defendant. SR:367. Jungwirth testified that she has seen this with multiple individuals.

⁹ Additionally, Jungwirth opined that Defendant is having “more and more difficulties of being able to recall things.” SR:361. She later admitted that time and age can have some influence on how you remember things. SR:363. Therefore, the passage of time appears to then negatively influence the score of the third section of the CAST-MR, Defendant’s understanding of case events.

SR:367. Jungwirth stated that people are having difficulties and regression with being able to retain and learn information. SR:367. Jungwirth testified that children she works with in the school system are going through the same thing because of the lack of face-to-face learning. SR:367. During Jungwirth's recent evaluation with Defendant, he was just starting to get back to face-to-face treatment. SR:368.

Jungwirth testified that additional steps could be taken to rehabilitate Defendant. SR:364. Typically, people who are in competency training have one session once a week for thirty to sixty minutes. SR:368. Jungwirth suggested that if Defendant used flash cards more than once a week, that may improve his score. SR:361. Another option would be to increase the number of days a week that he does competency training. SR:365-66.

Based on the testimony from Jungwirth, the circuit court found in its Memorandum Opinion and Order that the COVID-19 pandemic has hindered competency restorations proceedings for many individuals, including Defendant. SR:282. The circuit court found that competency trainings and evaluations have largely taken place over the phone because of the COVID-19 pandemic. SR:282. The circuit court found that the COVID-19 protocols have seriously influenced treatment and teaching in a manner someone could retain. SR:282. Lastly, the circuit court found that additional efforts existed that could assist Defendant in

his competency restoration, including more frequent classes, in-person instruction, flashcards, and other aids. SR:282.

Defendant has failed to show, or argue, that these factual findings were clearly erroneous. See DB:10. The findings are presumed correct. Defendant appears to argue that other opinions of experts should have been considered. DB:10. But “worth and weight of expert testimony is for the finder of fact and expert testimony is not binding on the fact-finder.” *Edwards*, 1997 S.D. 130, ¶ 11, 572 N.W.2d at 116 (citing *State v. Iron Shell*, 301 N.W.2d 669, 672 (S.D. 1981)). Furthermore, if this Court finds that the circuit court’s findings of fact are inadequate, the remedy is not to grant Defendant’s Motion to Dismiss. See DB:11. The remedy is remand to the circuit court to make the appropriate determinations. *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 29, 955 N.W.2d 382, 392-93.

The application of [SDCL 23A-10A-14](#) to the facts of this case supports the circuit court’s denial of Defendant’s Motion to Dismiss. The circuit court declined to find “no substantial probability that the defendant will become competent to proceed in the foreseeable future.” SR:277. Defendant has a mild intellectual disability, which Dr. Zimbleman opined that with vigorous and sustained restoration efforts, Defendant could attain competency. By May 2018, Jungwirth, along with Dr. Trenhaile, had the opinion that Defendant was competent. Even Dr. Hasseler opined in 2018 that Defendant’s knowledge and

understanding of the courtroom and basic legal concepts has improved with competency training. SR:152. Defendant was making progress.

However, the COVID-19 pandemic prohibited “vigorous and sustained restoration efforts,” or at least the efforts that were being made which allowed Defendant to score “very well” compared to people with his like disability in 2018. Jungwirth opined that Defendant’s intellectual function should not have decreased from 2019 to 2021, and initially opined that she could not identify any reason for different scores.

SR:353, 359. Jungwirth opined that Defendant actually had appeared to have lost a lot of functioning since the 2018 evaluation. SR:362. The circuit court inquired about the CAST-MR 2018 score of 94% versus the 2021 score of 38%. SR:367. The circuit court asked if this was the type of response Jungwirth is seeing from multiple people during the COVID-19 pandemic. Jungwirth admitted, “[a]ctually yes, it is,” and further opined that children she works with are having similar experiences with learning. SR:367-68. Jungwirth opined that the COVID-19 pandemic could be impacting the differences in the 2018 and 2021 reports.

SR:364.

The foreseeable future includes competency training where COVID-19 protocols are lifted, similar to the treatment Defendant received in 2018. Along with pre-COVID-19 pandemic efforts that could be implemented, the circuit court identified additional efforts that could be made, like more frequent classes than merely once a week. Based on the

application of the factual findings to the legal standards of [SDCL 23A-10A-14](#), the circuit court did not abuse its discretion in declining to find “no substantial probability that the defendant will become competent to proceed in the foreseeable future.”

This case is materially distinguishable from *Jackson v. Indiana*. In *Jackson*, the defendant could not understand the nature of the charges against him or participate in his defense because he could not speak, “read, write, or otherwise communicate except through limited sign language” and had a “mental level of a pre-school child.” *Jackson*, 406 U.S. at 717. Here, Defendant has a mild intellectual disability and currently “does have the ability to communicate with counsel and assist in his own defense, but he has impairments.” SR:362. Unlike *Jackson*, where there were no facilities in the state that could help someone as badly off as the defendant to learn minimal communication skills, making his commitment a “life sentence;” Defendant was in a facility where he made enough progress in 2018 for two experts to form the opinion that he was competent. Therefore, since Defendant’s due process rights are not violated, the findings of fact are not challenged, and the application of those facts to [SDCL 23A-10A-14](#) support denying Defendant’s Motion to Dismiss, the circuit court did not abuse its discretion.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that this Court affirm the circuit court's Memorandum Decision and Order Denying Defendant's Motion to Dismiss and remand the case to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in [SDCL 15-26A-66\(b\)](#) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,744 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 6th day of December, 2022.

/s/ Jennifer M. Jorgenson
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6th, 2022, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Steven Michael Foshay* was served via electronic mail upon Betsy Doyle at bdoyle@minnehahacounty.org.

/s/ Jennifer M. Jorgenson
Jennifer M. Jorgenson
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 29952

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

STEVEN MICHAEL FOSHAY,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE JENNIFER D. MAMMENGA
Circuit Court Judge

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Notice of Appeal Filed on March 30, 2022

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 29952

vs.

STEVEN MICHAEL FOSHAY,

Defendant and Appellant.

PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Steven Foshay ("Foshay"), will limit discussion to the issues that need further development or argument. Any matter raised in Foshay's initial brief, but not specifically mentioned herein, is not intended to be waived. Foshay will attempt to avoid revisiting matters adequately addressed in the initial brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "State's Brief." All citations will be followed by the appropriate page number. Foshay relies upon the Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the court on October 18, 2022.

JURISDICTIONAL STATEMENT

Steven Michael Foshay appeals the following order entered March 21, 2022 by the Honorable Jennifer Mammenga, Circuit Court Judge, Second Judicial Circuit: Order denying Defendant's Motion to Dismiss. Foshay's Petition for Permission to file an Intermediate Appeal was filed March 30, 2022. With no response from the State, the Court granted allowance of this appeal on May 13, 2022. Foshay states in his initial brief that this Court has jurisdiction pursuant to SDCL 23A-32-1, however, this Court has jurisdiction over the appeal pursuant to SDCL 23A-32-12.

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO DIMISS.

The State suggests that the Foshay waived his argument by not properly framing his issue before this Court. See State's Brief 10-11. However, this argument fails. Clearly, the issue that is before the Court is the denial of the motion to dismiss. That issue was framed properly and was raised in the Petition for Permission to File an Intermediate Appel and in Appellant's Brief. The issue before this Court is whether the circuit court erred in denying the motion to dismiss. Foshay submits to this Court that the circuit court did err by the grounds and premise used for its denial of the motion to dismiss. The law and analysis relied upon by the circuit court was inaccurate and erroneous.

Specifically, the circuit court relied upon an inaccurate and outdated

SDCL 23A-10A-4 citing:

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of an approved facility having residential capability. The facility shall have custody and treat the defendant for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed...

Memorandum Decision (MD) 6.

The South Dakota legislature amended 23A-10A-4 in 2020 and the current

law now reads:

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering the defendant mentally incompetent to the extent that the defendant is unable to understand the nature and consequences of the proceedings against the defendant or to assist properly in the defense, the court shall order the defendant to be placed in a restoration to competency program under the direction of an approved facility, commit the defendant to the custody of an approved facility having residential capability, or order the defendant to be placed on outpatient status for restoration to competency if the court makes a written finding that the defendant is not considered to be a danger to the health and safety of others and is otherwise eligible for bond. A defendant placed on outpatient status is subject to the provisions of chapter 23A-43. The defendant shall be treated for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed...

SDCL 23A-10A-4

Furthermore, the circuit relied upon and cited an inaccurate and outdated version of SDCL 23A-10A-14 citing:

After four months of evaluation, pursuant to § 23A-10A-4, if the facility has not certified that the defendant is competent to proceed, pursuant to § 23A-10A-4.1, the director of the approved facility shall issue a report to the circuit court evaluating whether there is a substantial probability that within the next year the defendant will become competent to proceed. After receipt of that report by the circuit court, the court shall set a time for hearing to determine whether or not the defendant is reasonably likely to become competent to proceed within the next year.

If the court finds there is a reasonable likelihood that the defendant will become competent to proceed within the next year, it shall order the defendant committed to an approved facility for an additional specified period of time, not to exceed one year, or until the director of the facility issues a certificate of recovery pursuant to § 23A-10A-4.1.

If the court finds there is no reasonable likelihood that the defendant will become competent to proceed within one year, it shall review the defendant's condition to determine appropriate placement and order the defendant committed to an approved facility for a term consistent with 23A-10A-15.

If the one year provided for in this section has run without a certificate of recovery being issued, the director of the approved facility shall notify the court that one year has expired since the order of detention, and the court shall order a hearing to review the defendant's condition to determine appropriate placement and order the defendant's commitment to an approved facility for a term consistent with 23A-10A-15.

MD 7.

The authority relied upon by the circuit court is consistent with an outdated version of SDCL 23A-10A-14. However, the South Dakota legislature amended 23A-10A-14 in 2021 and the current law now reads:

After four months of evaluation, pursuant to § 23A-10A-4, if the facility has not certified that the defendant is competent to proceed, pursuant to § 23A-10A-4.1, the director of the approved facility shall issue a report to the circuit court evaluating whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year. After receipt of that report by the circuit court, the court shall set a time for hearing to determine whether there is a substantial probability that the defendant will become competent to proceed and whether there is a substantial probability that it will occur within the next year.

If the court finds there is a substantial probability that the defendant will become competent to proceed within the next year, the court shall order the defendant to be placed in a restoration to competency program under the direction of an approved facility, committed to an approved facility, or placed on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for an additional specified period of time, not to exceed one year, or until the director of the facility issues a certificate of recovery pursuant to § 23A-10A-4.1.

If the court finds there is no substantial probability that the defendant will become competent to proceed within one year but there is a substantial probability that the defendant will become competent in the foreseeable future, the court shall review the defendant's condition to determine appropriate placement and order the defendant to be placed in a restoration to competency program under the direction of an approved facility, committed to an approved facility, or to be placed on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for a term consistent with § 23A-10A-15.

If the one year provided for in this section has run without a certificate of recovery being issued, the director of the approved facility shall notify the court that one year has expired since the order of detention, and the court shall order a hearing to review the defendant's condition to determine appropriate placement and order the defendant's placement in a restoration to competency program under the direction of an approved facility, commitment to an approved facility, or placement on outpatient status for restoration to competency if the defendant is not considered to be a danger to the health and safety of others for a term consistent with §

23A-10A-15.

If the court finds that there is no substantial probability that the defendant will become competent to proceed in the foreseeable future, the court shall dismiss the criminal charges against the defendant. If the director of the facility determines there is probable cause to believe that the defendant is a danger to self or others if the defendant is released, the director shall include the basis for that determination in the report and may recommend that the prosecutor file a petition for civil commitment proceedings.

SDCL 23A-10A-14

The circuit court's application of the factual record to inaccurate South Dakota law is an abuse of discretion and erroneous. The circuit court found that Dr. Jungwirth did not believe there was substantial probability that the defendant will become competent in the foreseeable future. MD 10. However, the circuit court applied this factual finding to its analysis and conclusion that it gave the court "significant pause in deciding that the defendant will *never* be restored to competency". MD 10. While this may be true, it is not the legal standard under South Dakota law and is an erroneous application of the current law set forth by the South Dakota legislature.

The circuit court further found that it "cannot find that there is no substantial probability that the Defendant will ever gain competency and that his continued commitment is unreasonable". MD 11. Again, while this may be true and may be consistent with *Jackson v. Indiana* 406 U.S. 715, 717, S.Ct. 1845 (1972), it is not consistent with SDCL 23A-10A-14. SDCL 23A-10A-14 requires a finding of

substantial probability that the defendant will become competent in the foreseeable future to continue commitment. No such finding was made and the record is void of facts to support continued commitment.

The motion to dismiss was denied based on outdated and erroneous South Dakota law and is therefore erroneous and an abuse of discretion. According to the factual record and testimony of the evaluating doctor and by language of South Dakota statute, the motion to dismiss should have been granted.

CONCLUSION

The circuit court abused its discretion in denying the Defendant's Motion to Dismiss. For the aforementioned reasons, authorities cited, and upon the settled record, Foshay respectfully asks this Court to remand this case to the circuit court with instruction directing the circuit court to grant Foshay's Motion to Dismiss pursuant to SDCL § 23A-10A-14.

Dated this 5th day of January, 2023

/s/ Betsy Doyle
Betsy Doyle
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 1,658 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 5th day of January, 2023

/s/ Betsy Doyle
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The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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