IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1732

IN RE THE DETENTION OF
NICHOLAS CORBIN LEE WYGLE,
Respondent.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUTLER COUNTY
THE HONORABLE DEDRA SCHROEDER, JUDGE

APPELLEE'S BRIEF & REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

As the respondent notes, this appeal presents an issue of first impression: whether a person is "presently confined" for purposes of Iowa's SVP law when they are serving a special-parole sentence under Chapter 903B. *See* Respondent's Proof Br. at 2. Retention by the Supreme Court would be appropriate. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

The respondent, Nicholas Wygle, seeks interlocutory review of an order denying his motion to dismiss a petition seeking his commitment as a sexually violent predator under Chapter 229A. The respondent's motion to dismiss was denied by the Butler County District Court, the Hon. DeDra Schroeder presiding. This Court granted interlocutory review and stayed further proceedings in the district court.

Statement of the Case/Facts

The State filed a petition to commit the respondent as a sexually violent predator. 3/14/2016 Petition; App. 6–8. The petition alleged that the respondent was previously convicted of assault with intent to commit sex abuse (a sexually violent offense), that he suffers from the mental abnormality of pedophilic disorder, and that he is likely to

commit future sexually violent offenses if not confined in a secure facility. 3/14/2016 Petition, p. 1; App. 6. The petition also alleged that the respondent was "presently confined at the Curt Forbes Residential Facility, Ames, Iowa, pursuant to the Butler County District Court's order sentencing the Respondent on his 903B.2 Special Sentence." 3/14/2016 Petition, p. 1; App. 6.

The district court entered a probable-cause order, finding that the respondent was "presently confined" because "his placement at a residential facility is a form of confinement …." 3/24/2016 Order, p. 5; App. 13. The respondent challenged this determination with a motion to dismiss, which the State resisted. *See* 8/30/2016 Motion to Dismiss; App. 18–22; 9/9/2016 Resistance; App. 23–25. The district court denied the motion following a hearing. 10/11/2016 Order; App. 26.

The respondent sought interlocutory review, which this Court granted after staying further proceedings. *See* 11/1/2016 Supreme Court Order; App. 37.

ARGUMENT

I. A Person Serving a Special Sentence Pursuant to Chapter 903B Is "Presently Confined" for Purposes of Chapter 229A Because They Are Committed to the Custody of the Department of Corrections.

Preservation of Error

The State does not contest error preservation for the statutory question raised on appeal.

Standard of Review

Review is for correction of errors at law. *In re Det. of Shaffer*, 769 N.W.2d 169, 172 (Iowa 2009).

Merits

At issue in this appeal is whether the term "presently confined" in Iowa Code section 229A.4(1) encompasses placement at a residential correction facility as part of a special-parole sentence under Chapter 903B. The respondent asserts that "presently confined" only refers to incarceration in a prison, while the State urges and the district court concluded that "presently confined" includes persons serving the special sentence under 903B, at least when they are placed at a residential correctional facility. This Court should follow in the footsteps of *Shaffer* and *Willis*, reaffirm that "presently confined" is a flexible term, and hold that the respondent

in this case is presently confined and thus subject to commitment as a sexually violent predator ("SVP") under Chapter 229A.

The term "presently confined" is not expressly defined in the Code, but some guidance can be found in this Court's case law. In *Shaffer*, this Court was asked to determine whether a person erroneously held in custody qualified as "presently confined" for purposes of Chapter 229A. *See In re Det. of Shaffer*, 769 N.W.2d 169 (Iowa 2009). This Court answered yes, noting it had rejected "attempts to apply a hypertechnical definition of the phrase 'presently confined.'" *Id.* at 174. Similarly, in *Willis*, this Court held that a respondent was "presently confined" for a sex offense when he was in the county jail but not yet convicted of a sex offense. *In re Det. of Willis*, 691 N.W.2d 726, 728–30 (Iowa 2005). *Shaffer* and *Willis* both weigh in favor of affirming the district court here, rather than accepting the respondent's hypertechnical argument that "presently confined" refers only to "prison." Respondent's Proof Br. at 10. More pointedly, the respondent's argument that "presently confined" means "prison" cannot be reconciled with this Court's conclusion in *Willis* that confinement in a county jail was sufficient.

The only Iowa Supreme Court case to find a respondent was not presently confined was *In re Det. of Gonzales*, 658 N.W.2d 102 (Iowa 2003).[1] Gonzales was incarcerated for operating without consent and was not on parole for a sex offense or subject to a 903B special sentence.[2] This Court determined that the term "presently confined" means presently confined for a sexually violent offense. *See id.* at 105. The Court's rationale was that the State could not rely on the operating-without-consent sentence because it was related to a "totally different—or even perhaps a trivial—offense." *Id.* at 105. *Gonzales* is distinguishable, as this respondent's special sentence under Chapter 903B flows directly from and part of his sentence for a sex offense. *See State v. Harkins*, 786 N.W.2d 498, 505 (Iowa Ct. App. 2009) (noting "the special sentence is part of [the] sentence for third-degree sexual abuse"). The respondent admits that, unlike Gonzales, he was "serving a sentence imposed for his commission of a

[1] In his brief, the respondent points to an unpublished Court of Appeals decision, *In re Det. of West*, No. 11-1545, 2013 WL 988815 (Iowa Ct. App. March 13, 2013). *West* does not address the specific issue presented in this appeal, but to the extent it is inconsistent with the State's position on appeal, *Willis* and *Shaffer* control.

[2] Gonzales was released from prison on the sex offense in 1997 and Chapter 903B was enacted seven years later. *See* 2005 Acts, ch 158, §39.

sexually violent offense" and "that he was serving said sentence while living at the [C]urt Forbes Residential Facility." Respondent's Proof Br. at 6–7.

To the extent Iowa case law should be supplemented with out-of-state case law, support for special parole supporting an SVP commitment can be found in the Ninth Circuit's application of California law. *See Jackson v. California Dep't of Mental Health*, 318 F. App'x 582, 586 (9th Cir. 2009). Under the California SVP scheme, the equivalent term to Iowa's "presently confined" was "inmates who were in custody serving a determinate sentence or in custody following a revocation of parole." *Id.* at 586–87. The Ninth Circuit concluded that parolees met this definition of "in custody," even though they were not physically confined in prison, because the state retained significant control over them. *See id.* at 586–87. So too with special parole under Chapter 903B, which mandates parole conditions, allows revocation and further incarceration, and permits placement in a work release program or at a residential correctional facility. *See generally* Chapter 903B (2015); *see also* Iowa Code Chapter 901B (2015) (establishing the corrections continuum,

including "quasi-incarceration sanctions" at Level III, such as placement at residential facilities or house arrest).

Aside from the case law, the statutory provisions contained in Chapter 229A also support a broader definition of "presently confined" than only "prison." Section 229A.2(1), which defines "agency with jurisdiction," provides parameters for agencies that must provide the Attorney General notice concerning potential SVPs in the agency's custody, and the definition "includes but is not limited to the department of corrections, the department of human services, a judicial district department of correctional services, and the Iowa board of parole." Iowa Code § 229A.2(1) (2015). This definition is much broader than the respondent's proposal that "presently confined" refers only to "prison": if only prison were relevant, the definition in section 229A.2(1) would refer only to the Department of Corrections, not entities involved with parole, probation, and special sentences, like the Department of Human Services, the Department of Correctional Services, and the Board of Parole. The language of Chapter 903B similarly supports that a person on a special sentence is in "custody." *See* Iowa Code § 903B.2 ("A person [subject to this Chapter] shall also be sentenced … to a special sentence committing

the person into the **custody** of the director of the Iowa department of corrections for a period of ten years…" (emphasis added)).

That the respondent in this case is in custody and "presently confined" is also supported by the criminal code. Iowa Code section 719.4 criminalizes "escape or absence from custody," and expressly applies to a "community-based correctional facility" and an "institution to which the person was committed" by reason of his conviction. *See* Iowa Code § 719.4 (2015). The Curt Forbes Residential Facility is such a facility: the respondent was ordered to reside there as a condition of his parole and cannot leave without the permission of the Department of Corrections. *See* motions hrg. tr. p. 9, line 17 — p. 10, line 2; 10/11/2016 Order, p. 1; App. 26.

In his brief, the respondent appears to hang much of his argument on the reference to "total confinement" in section 229A.3(1)(a). *See* Respondent's Proof Br. at 10. This reliance is misplaced. That section—the only place "total confinement" appears in Iowa's SVP law—provides a timetable for notification to the Attorney General, not a substantive limit on the State's authority. *See* Iowa Code § 229A.3(1)(a). As this Court said in *Huss*, "section 229A.3(1) is not an essential step in the process for filing a petition"

and instead "is only intended to be a heads-up" to the Attorney General. *In re Det. of Huss*, 688 N.W.2d 58, 63 (Iowa 2004); *accord* 4/24/2016 Order, p. 5; App. 13.

A comparative analysis of Iowa's SVP law also undermines the respondent's contention regarding section 229A.3(1)(a). Some states have chosen to include "total confinement" as a driving term for commitment under their equivalent to section 229A.4(1). *See* Wash. Rev. Code Ann. § 71.09.030 (West 2017) ("A petition may be filed alleging that a person is a sexually violent predator … when it appears that … [a] person … previously has been convicted of a sexually violent offense is about to be released from total confinement"); N.H. Rev. Stat. Ann. § 135-E:4 (West 2017) (creating an emergency-petition procedure for unexpected release of potential SVPs from "total confinement"). In contrast, the Iowa General Assembly chose not to include "total confinement" as the driving term of section 229A.3(1)(a), and the Legislature omitted the term "total confinement" from the Chapter's definitional section, further evincing an intent to discard that concept. *Compare* Iowa Code § 229A.2 (2015) (no mention of "total confinement"), *with* Fla. Stat. § 394.912(11) (West 2017) (defining "total confinement"); N.H. Rev.

Stat. Ann. § 135-E:2(XII) (West 2017) (same);Wash. Rev. Code Ann. § 71.09.020(19) (West 2017) (same). As this Court has recognized, "legislative intent is expressed by omission as well as by inclusion of statutory terms." *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 812 (Iowa 2011). If the Legislature intended for "presently confined" to only mean "total confinement" or "prison," it would have said so.

Moreover, even if the Legislature intended to give "total confinement" some meaning in our statutory scheme, at least one court has suggested that, even under a "total confinement" approach, an "SVPA action may be commenced at any time that a respondent is serving any part of the 'complete sentence' which 'includes the prison sentence, the maximum good time credit allowance and a period of postrelease supervision.'" *In re Care & Treatment of Sporn*, 215 P.3d 615, 618 (Kan. 2009) (citing and quoting *In re Care & Treatment of Johnson*, 85 P.3d 1252 (Kan. App. 2004), *rev. denied* 278 Kan. 845 (2004)). Under a similar rationale, Chapter 903B would also fall within the scope of "total confinement" because it is a form of post-release supervision.

Sound public policy also supports the State's position. In *Willis*, this Court concluded that the "presently confined" alternative was constitutional because potential SVPs have less opportunity to commit offenses while confined than while they are not under supervision. *See Willis*, 691 N.W.2d at 729–30. A respondent on a 903B sentence is still subject to the control and "custody" of the Department of Corrections, meaning the respondent "has limited opportunity to commit 'sexually predatory acts[.]'" 3/14/2016 Order, p. 7; App. 15. While the respondent may have more freedom than while in a high-security prison, he is not released into society, and it is still appropriate for the State to rely on the "presently confined" alternative. In addition, strictly reading "presently confined" to mean "prison" creates a disincentive for the Department of Corrections to place inmates in the least restrictive environment (such as a work camp or residential facility), if the State loses the ability to file a Chapter-229A petition based on the location of confinement. The best approach, given these concerns, is a flexible definition of "presently confined" consistent with this Court's case law, including placement at a residential facility under Chapter 903B. *See Gonzales*, 658 N.W.2d at 105.

Finally, to the extent the policy concern underlying the respondent's brief is that he worries the SVP law will sweep too broadly if "presently confined" includes 903B sentences, the legal landscape shows that Iowa's SVP law is already sufficiently narrow. At least five courts have expressly held that the reason for which the respondent is presently confined need not be related to a sexual offense. *See, e.g.*, *In re Manigo*, 728 S.E.2d 32, 36 (S.C. 2012); *Holtcamp v. State*, 259 S.W.3d 537, 542–44 (Mo. 2008); *In re Civil Commitment of P.Z.H.*, 873 A.2d 595, 598 (N.J. Super. 2005); *Hale v. State*, 891 So.2d 517, 520–21 (Fla. 2004); *In re Detention of Wilber W.*, 53 P.3d 1145, 1152 (Ariz. 2002) *vacated and remanded on other grounds by In re Detention of Wilber W.*, 62 P.3d 126 (Ariz. 2003)). Given this Court's holding in *Gonzales*, Iowa's SVP law is thus already substantially restrained and complies with due process. *See generally Gonzales*, 658 N.W.2d 102 (holding confinement must be for a sex offense).

CONCLUSION

This Court should affirm the denial of the motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Because this case presents an issue of first impression, the State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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