IN THE SUPREME COURT OF IOWA
NO. 17-0807
(Delaware County No. PCCV007453)

REVETTE ANN SAUSER,)
)
Applicant-Appellant,)
)
vs.)
)
STATE OF IOWA)
)
Respondent-Appellee.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
THE HONORABLE THOMAS A. BITTER, DISTRICT JUDGE

APPELLANT REVETTE ANN SAUSER'S APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A DISTRICT COURT NEED NOT DEFINE THE SPECIALIZED TERM "CONFINEMENT" AS DEFINED BY THIS COURT'S DECISIONS IN *STATE v. RICH* AND SUBSEQUENT CASES WHEN TAKING A GUILTY PLEA TO A CHARGE OF KIDNAPPING?

Rhoads v. State, 848 N.W.2d 22 (Iowa 2014)

State v. Rich, 305 N.W.2d 739 (Iowa 1981)

State v. Robinson, 859 N.W.2d 464 (Iowa 2015)

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 10th day of July, 2018, I electronically filed this document by filing it through EDMS, which will send notice to the following registered filers:

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I further certify that on the 10th day of July, 2018, I filed this document by electronically filing it with the Clerk of the Supreme Court of Iowa through EDMS.

A copy will also be mailed via United States Postal Service, First Class Mail, postage prepaid to: Revette Ann Sauser, Inmate No. 1111461, Iowa Correctional Institution for Women, 420 Mill Street SW Mitchellville, IA 50169.

_____/s/ Webb L. Wassmer____
WEBB L. WASSMER

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STATEMENT OF THE CASE

Revette Ann Sauser was convicted on February 1, 2012, after pleas of guilty, of Kidnapping in the Second Degree, in violation of Iowa Code § 710.3 (Count I); Voluntary Manslaughter, in violation of Iowa Code § 707.4 (Count II); and Going Armed with Intent, in violation of Iowa Code § 708.8 (Count III). App. 67 (Disposition and Judgment, filed February 1, 2012).[1] The charges related to the death of Ms. Sauser's husband, Terry Sauser, on April 3, 2011. Ms. Sauser was sentenced to consecutive sentences of 25 years on Count I, ten years on Count II, and five years on Count III, for a total of 40 years. App. 68. No direct appeal was taken.

Ms. Sauser filed an Application for Post-Conviction Relief. App. 20 (Application for Post-Conviction Relief, filed May 11, 2012). An Amended Application was filed by appointed counsel. App 25 (Amended Application for Post-Conviction Relief, filed September 10, 2013). Ms. Sauser raised various claims, which were decided by the District Court after hearing. App. 25

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1 "App." refers to the Appendix filed January 30, 2018. "Add." refers to the Addendum to this Application.

(Amended Application for-Post-Conviction Relief); App. 30 (Order, filed May 18, 2017).

The District Court decided five claims raised by Ms. Sauser, denying each. This appeal advanced only one issue: "Whether the [trial] court erred in finding a factual basis for the kidnapping charge, and that Revette's counsel was ineffective in allowing her to plead to the kidnapping charge?" App. 35-36 (Order, filed May 18, 2017, at 6-7) (Issue #3). The central issue for that claim is whether, for the purpose of establishing a factual basis for a plea to kidnapping, the District Court taking the plea must assure that the defendant's admission that she "confined" the victim is made in accordance with this Court's specialized definition of "confinement" for the purposes of kidnapping as set forth in *State v. Rich*, 305 N.W.2d 739 (Iowa 1981), and its progeny, or whether applying the commonly understood definition of kidnapping is sufficient.

The questions and answers during the 2012 plea colloquy to establish the factual basis for the confinement element of the guilty plea to the kidnapping charge were as follows:

> THE COURT: Okay. First of all, with regard to Kidnapping in the Second Degree, the elements of that offense would be as follows: That you confined without authority or consent an individual named Terry Sauser, with the intent to inflict serious injury upon him, while armed with a dangerous weapon, and that is contrary to Iowa Code Section 710.3. . . . .
>
> . . .
>
> MR. GOODMAN: She -- and we went through the elements of these offenses, and we believe that there are sufficient Minutes, and she's prepared to stipulate that there's sufficient evidence to support these charges. Is that correct?
>
> THE DEFENDANT: Yes.
>
> . . .
>
> THE COURT: On that date, did you bring a gun to your living room, knowing you were going to confine Terry Sauser?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You knew you did not have the right to confine Terry Sauser during the argument that the two of you had. Correct?

> THE DEFENDANT: Correct.
>
> . . .
>
> THE COURT: You used the gun that you were, carrying to keep Mr. Sauser confined in that space, correct?
>
> THE DEFENDANT: Correct.

App. 73, 75, 76 (State's PCR Ex. A – Transcript of Plea and Sentencing held February 1, 2012).

Because the Minutes were a central component of the District Court's finding of a factual basis for the guilty plea to kidnapping, the contents of the Minutes must be considered. App. 42 (Minutes, filed April 18, 2011). The Minutes list the State's witnesses, generally state that those witnesses will testify consistently with their reports, and attach various police reports. The Minutes, with respect to the element of "confinement" required for a kidnapping conviction, state as follows.

First, three of the officers initially responding to the scene consistently describe Ms. Sauser's statements to authorities at that time. Ms. Sauser made unsolicited statements to the first

two officers to enter the house, Delaware County Sheriff's Deputy Matthew Menard and Sergeant James R. Hauschild of the Manchester Police Department, that "'she didn't shoot him intentionally, just ask him.'" App. 50 (Deputy Menard) or "I didn't mean to do it," "I didn't mean to do it ask him," "I didn't mean to shot [sic] him." App. 53 (Sgt. Hauschild). After the scene was secured, Ms. Sauser again "then stated that she did not shoot him intentionally. . . . She told me they were sitting on the couch and that they were fighting. Revette stated that she told him that she was leaving and Terry told her that you are not leaving; you are not going to go. When she stated that they were fighting, I did not want to ask her anymore about the incident." App. 50 (Deputy Menard). *See also* App. 53 (Sgt. Hauschild) (similar).

Ms. Sauser was also interviewed at the scene by Delaware County Sheriff's Deputy Jill Rahe. App, 46 (Deputy Rahe):

> Revette advised that she returned home earlier Sunday between 3:30 and 4:00 o'clock from Illinois. She had been staying there with a friend Kathy Miller due to the fighting she and Terry had been doing since their marriage was not good. Revette advised that she stopped at the

> store when she got home. She was coming back so they could try to work things out. Revette advised that the main thing she and Terry had been fighting about was Terry' ex-wife. Terry was sitting on the couch drinking (Seagram and Seven). Revette claims that he was being belligerent and that it was getting worse the more he had to drink. Revette said she thought Terry had about three drinks. Revette advised that during she and Terry's argument, Terry told Revette that if he could not have her that no one would have her. Revette stated that every time she would attempt to get off the couch to leave Terry would move his hands in a threatening manner and she would get scared and feel threatened. Revette advised that she got the gun after the second time she told Terry she was going to leave. Revette advised that she has had the gun for a while because she would carry money from the store to the bank. Revette retrieved the gun from underneath the futon in the living room. Revette advised that Terry did not see that she had the gun. After the second time of Terry telling Revette that she was not allowed to leave and that if he could not have her no one would, she got the gun out. She pointed the gun at Terry and he grabbed on to the gun pushing it back towards her. At some point during this struggle the gun went off. Revette advised that the gun fired once. Revette advised that she did not shoot Terry purposely. It was self defense. Revette advised that they were struggling over the gun, and she shot him and then she called 911.

App. 47 (Deputy Rahe).

Also of significance to the issue before the Court is the PCR trial testimony of Ms. Sauser's trial attorney, Thomas Goodman, Esq., regarding his discussions with Ms. Sauser and his analysis pertaining to the elements of the Kidnapping charge. Mr. Goodman testified that there were not any plea offers forthcoming from the State until right before trial. App. 87 (PCR Tr. Tr. at 85). Ms. Sauser did not decide to accept the plea offer until the morning of trial. App 88 (*Id.* at 86). The specifics of the plea were discussed with Ms. Sauser the day before she entered the plea. App.89-90 (*Id.* at 93-94).

Mr. Goodman did not suggest the charges for the plea, those came from the prosecutor. App. 91 (PCR Tr. Tr. at 95). With regard to the confinement element of kidnapping, Mr. Goodman testified:

> Q; Did you feel that, in fact, there was a basis for that? [the kidnapping charge]
>
> A: I thought that there was a factual basis. It was maybe a little more tenuous than some others, but I thought that it was something that would fit the circumstances given the fact that she did hold the gun and pointed it in his

direction, which would basically fit the definition of kidnapping.

Q: Did you discuss that with Revette?

A: I did.

Q: And what was her take on that?

A: I think she was more concerned with how much time she was going to do than what the factual basis was for it.

Add. 91-92 (PCR Tr. Tr. at 95-96). Mr. Goodman further testified:

Q: My only other question really for you is with relation to the factual basis for the kidnapping charge. What did you think was the factual basis for the kidnapping charge?

A: When I – when I discussed it with Revette in terms of – in terms of what had occurred, I asked her, you know. Did you hold the gun on him for some time before you fired it? I believe her answer to that was yes. I don't specifically recall that because I – I had some doubts at least initially as to whether we would have a complete factual basis for that particular charge, but she indicated that, yes, she was pointing the gun at him, and I said, Well, would he have been free to get up and leave And she said, Well, I was holding the gun on him. So I think given these circumstances, that – like I said, it was a little more tenuous than maybe some other factual basis that you would have in most.

Q: Wasn't it also –

A: But I think it did meet the – the requirements.

Q: Wasn't there also actually evidence that – or at least statements by Revette that Terry didn't know she had the gun right up until the point that she shot him?

A: I – I – I don't know exactly. My recollection is that she had the gun – that he was at one end of the couch, she was at the other end of the couch, he had been drinking, and she wanted to leave because there was some storm that was coming in, he didn't want her to leave, so then this whole storm and everything, that that entered into the discussion. At some point she became upset with him, pulled out the gun. She, I think believed that he was going to come at her, that was – that was initially what she had told me. How long she held that gun oh him, I really don't know. We didn't discuss how long. To me it sounded like it was a short period of time, but she did threaten him with it that she was going to shoot him, so I think based on the threat, that that probably met the definition for kidnapping.

Q: Was there any evidence that she – or any indication in the evidence that she prevented him from leaving?

A: I think that once she held the gun on him, that he sat back on the couch is what my understanding was.

> Q: Did she indicate to you that she prevented him from leaving, told him he couldn't leave, that he attempted to leave, wanted to leave, any of that?
>
> A: I don't think there was any discussion concerning that.
>
> Q: So essentially there's no evidence that she actually confined him, and she didn't move him?
>
> A: Well, if she's holding a gun at him, I think that probably in most people's minds would be confinement.
>
> Q: And that's it?
>
> A: I don't know that we needed a whole lot more.

Add. 93-95 (PCR Tr. Tr. at 104-06).

Ms. Sauser appealed. The Court of Appeals of Iowa, in a 2-1 decision, affirmed the District Court on June 20, 2018. Add. 1. The majority reasoned that to establish a factual basis for a plea to kidnapping, the defendant must admit only that she "confined" the victim and that the District Court in taking the plea need not define the legal meaning of "confinement" or determine if the

"confinement" meets the specialized definition of "confinement" for kidnapping set forth in *Rich* and subsequent cases. *Rich* holds:

> Applying these principles of construction, we conclude that our legislature, in enacting section 710.1, intended the terms "confines" and "removes" to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse. Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.

Rich, 305 N.W.2d at 745.

Judge Doyle, in dissent, correctly reasoned that a judge taking a guilty plea in a kidnapping case must properly define "confinement" in accordance with this Court's precedents and determine that the "confinement" involved in the kidnapping meets that definition. Add. 5-6. Judge Doyle concluded that the

"[t]he facts before us do not involve sufficient confinement to constitute kidnapping," and, therefore, would reverse and remand to give the State an opportunity to establish a factual basis for the kidnapping plea. Add. 6-7.

STATEMENT SUPPORTING FURTHER REVIEW

This Court should grant further review in this matter. The Court of Appeals' conclusions are contrary to Supreme Court precedent and Iowa law. *See* Iowa R. App. P. 6.1103(1)(b).

In particular, the Court of Appeals' holding that a District Court is not required to define "confinement" in accordance with the specialized definition of that term set forth in *State v. Rich*, 305 N.W.2d 739 (Iowa 1981), when accepting a guilty plea to a charge of kidnapping, is in direct conflict with this Court's decisions in *Rich* and subsequent cases applying *Rich*. Thus, under the precedent set by the majority opinion a District Court taking a plea need not assure itself that there is a factual basis for "confinement" as specially defined by *Rich* but only need assure

itself that there is a factual basis for "confinement" as commonly understood. Under the majority opinion's approach, *Rich* becomes a nullity.

This Court should grant further review to clarify how a District Court should define and apply the term "confinement" in taking a plea to a kidnapping charge. Following the majority's approach in this case will result in guilty pleas being accepted in cases, like this one, where the facts may establish confinement under the common definition but do not under the required specialized definition of confinement set forth in *Rich*.

ARGUMENT

I. "CONFINEMENT" IS A SPECIALIZED WORD IN THE CONTEXT OF KIDNAPPING AND THE FACTUAL BASIS FOR A GUILTY PLEA TO KIDNAPPING MUST BE ESTABLISHED IN ACCORDANCE WITH THE SPECIALIZED DEFINITION OF "CONFINEMENT" SET FORTH IN *RICH*, NOT IN ACCORDANCE WITH THAT TERM'S COMMON UNDERSTANDING

The issue presented is a straightforward one. When accepting a guilty plea to the offense of kidnapping, must the

District Court define and measure the factual basis for the "confinement" element of the offense with respect to the specialized definition of "confinement" set forth in *Rich*? Or may the District Court accept the plea if the "confinement" involved falls within the common understanding of the meaning of "confinement" without regard to whether the "confinement" meets the requirements of *Rich* and without properly defining "confinement" for the defendant?

A. The Requirement of Confinement and the Test of *Rich*

An essential element of kidnapping is "confinement." This Court has explored the confinement necessary to constitute kidnapping in several cases because many crimes involve some degree of confinement.

This Court's modern jurisprudence on this issue begins with *State v. Rich*, 305 N.W.2d 739 (Iowa 1981). In *Rich*, the defendant had moved the victim around to various places at a shopping mall and sexually abused her. *Id.* at 740-41. Rich argued that it

should not be kidnapping when the confinement and removal was merely incidental to the crime of sexual abuse. *Id.* at 742.

This Court began by noting that "[i]t is not contested that some degree of confinement or removal of the victim is present in most cases of sexual abuse. Neither chapter 710 (kidnapping) nor chapter 709 (sexual abuse) of the Code define the terms "confines" or "removes."" *Rich*, 305 N.W.2d at 742. This Court then examined the various approaches used by other states. *Id.* at 742-45. Ultimately, this Court reached the proper test:

> Applying these principles of construction, we conclude that our legislature, in enacting section 710.1, intended the terms "confines" and "removes" to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse. Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection,

> or significantly facilitates escape following the consummation of the offense.

Rich, 305 N.W.2d at 745. This Court went on to find that, applying the above test, there were sufficient facts to support Rich's conviction for kidnapping. *Id.* at 745-46.

In *State v. Marr*, 316 N.W.2d 176 (Iowa 1982), this Court reached the opposite conclusion, finding that the confinement and removal at issue was insufficient to support submission of kidnapping to the jury. In *Marr*, the defendant grabbed the victim on the street and shoved her ten or fifteen feet into a gangway between two houses, where he sexually abused her. *Id.* at 177-78. This Court stated:

> Although it has been stated section 710.1(3) encompasses "an extremely wide variety of factual circumstances," 1 J. Roehrick, The New Iowa Criminal Code: A Comparison 110 (1978), we do not believe the facts of this particular case warranted the defendant's conviction for kidnapping. To hold otherwise merely exemplifies the defendant's assertion that every rape would thus constitute a kidnapping, as well as every robbery or other assault involving some minimal degree of confinement or removal. In the present case substantial evidence was not presented that the defendant's actions substantially increased

the risk of harm to the victim, that the risk of detection was significantly lessened, or that following the sexual abuse escape was significantly facilitated thereby. *See Rich*, 305 N.W.2d at 745. Moreover, the means by which control of the victim was secured and the duration of that control distinguish this case from *Rich*, as well as *Knupp*.

We conclude the State failed to sustain its burden of proof under the kidnapping charge that the confinement or removal definitely exceeded that normally incidental to the commission of sexual abuse. *See Rich*, 305 N.W.2d at 745. This conclusion is consistent with the weight of legal commentary. *See, e.g.,* J. Yeager & R. Carlson, Iowa Practice & Procedure § 236, at 66 (to be punishable as a separate offense "the acts of the kidnapper should be required to add substantially to the heinousness of the sexual abuse") (1979); Model Penal Code & Commentaries Part II § 212.1, Comment 1 (1980) ("many instances of forcible rape involve some coerced movement of the victim or unlawful restraint for enough time to complete the sex act .... (and) unless particular care is taken, trivial aspects of robbery, rape, or some other crime will end up classified as the most serious version of Kidnapping"); Note, A Rationale of the Law of Kidnapping, 53 Colum.L.Rev. 540, 556 (1953) ("virtually all conduct within the scope of Kidnapping law is punishable under some other criminal provision .... (and a kidnapping charge) is defensible only if an asportation or detention significantly increases the dangerousness of the defendant's behavior"). *See generally* 1 Wharton's

> Criminal Law & Procedure § 374, at 741-42 (R. Anderson ed. 1957).

Marr, 316 N.W.2d at 179-80.

Next, in *State v. Misner*, 410 N.W.2d 216 (Iowa 1987), this Court extended the principles set forth in *Rich* to cases not involving sexual abuse, finding under the facts of that case, that whether the confinement was "incidental" was a jury question.

This Court most recently addressed in depth the requirements for confinement or removal in *State v. Robinson*, 859 N.W.2d 464 (Iowa 2015). This Court examined the history of kidnapping law, noting that the broadening of kidnapping statutes by legislative bodies had greatly expanded the types of conduct potentially subject to those statutes. *Id.* 859 N.W.2d at 457-68. "Expanded kidnapping statutes, however, have proved problematic. Taken literally, the statutes could convert every robbery or every sexual abuse into kidnapping with significantly enhanced penalties, as these crimes invariably involve at least some confinement or removal." *Id.* at 468. This Court again discussed the development of the various approaches taken by

other States to the problem. *Id.* at 469-74. This Court then recounted its history of addressing the issue. *Id.* at 474-78.

After reaffirming this Court's adherence to the principles set forth in *Rich*, this Court moved to the question of how the test of *Rich* applied under the facts of *Robinson*. *See Robinson*, 859 N.W.2d at 478. "The challenge here is applying the *Rich* tripartite test to a case in which the evidence supporting independent confinement is markedly less than in many of our cases, but in which there is evidence showing something more than a mere "standstill offense."" *Id.* The victim had been dragged, in the defendant's apartment, from the hallway to the bedroom, where she was sexually abused. *Id.*, 859 N.W.2d at 466, 479.

After discussing a variety of different cases that this Court found pointed in different directions, this Court concluded that the confinement and removal involved did not meet the test of *Rich*:

> In the end, the question calls for an exercise of our judgment as to whether, on the totality of the circumstances, the State offered sufficient evidence that a jury could find beyond a reasonable doubt that the defendant's confinement of the victim *substantially* increased

> the risk of harm, *significantly* lessened the risk of detection, or *significantly* facilitated escape. Phrased somewhat differently, did the evidence of the tossing of the cell phone, the locking of the doors, the covering of the victim's mouth, and any additional confinement associated with movement of the victim from the hallway to the bedroom, all occurring within the enclosed apartment, provide a sufficient basis to allow the jury to regard the case as presenting more than sexual abuse but instead involving the much more serious crime of kidnapping with its substantially harsher penalties?
>
> We conclude that it does not. We note in particular the potential of sliding downhill into situations in which a person with limited additional criminal culpability suffers a dramatically increased penalty. In the words of Yeager and Carlson, the underlying crime must be substantially more heinous to give rise to a kidnapping conviction. Yeager & Carlson at 66. We conclude that this heinous concept underlies the *Rich* tripartite test with its attendant intensifiers. While there might be some marginal increase in the risk of harm, lessening of detention, or facilitation of escape, we conclude it is not sufficient to trigger dramatically increased sanctions under our kidnapping statute in this case.

Robinson, 859 N.W.2d at 481-82.

B. The Court of Appeals' Majority Decision Nullifies the Requirements of *Rich* and Its Progeny When Taking a Guilty Plea to a Charge of Kidnapping

Despite the above strong precedent holding that "confinement" in the context of kidnapping has a specialized meaning, the majority opinion states: "Sauser cites no authority for her proposition that the court was required to provide a legal definition for the term "confine" where there is no indication that term "under the statute has a specific meaning."" Add. 3-4. In fact, the majority opinion does not discuss *Rich* or the cases cited above, even though those cases were extensively discussed in Ms. Sauser's Brief. The majority's statement that there is no authority for a specialized meaning for "confinement" in the context of kidnapping is inexplicable.

Both the majority and the dissent, citing *Rhoads v. State*, 848 N.W.2d 22, 30, (Iowa 2014), agree with the general proposition that a specialized term that has a meaning different than its ordinary meaning must be defined for the defendant during a plea colloquy. Add. 3-4 (majority); Add. 5-6 (dissent).

The majority does not assert that "confinement" was defined in accordance with the definition set forth in *Rich* for Ms. Sauser at her plea hearing. The record does not support such a conclusion. The District Court proffered no definition of "confinement" during the plea colloquy. As set forth above, Ms. Sauser's attorney had an incorrect understanding of the legal requirements for "confinement." *Rich* and its specialized definition of "confinement" were not mentioned in the plea proceedings in the District Court. The District Court, Ms. Sauser's attorney, and the prosecutor appear to have been completely unaware of *Rich* and its specialized definition of "confinement." The District Court, in taking Ms. Sauser's plea, made no finding that the "confinement" at issue "substantially increase[d] the risk of harm to the victim, significantly lessen[ed] the risk of detection, or significantly facilitate[d] escape following the consummation of the offense." *Rich*, 305 N.W.2d at 745.

Thus, when Ms. Sauser admitted at her plea hearing that she "confined" Terry Sauser, there is no evidence that Ms. Sauser

understood the legal definition of "confinement" as set forth in *Rich* or that the specialized meaning of "confinement" had been explained to her by the District Court or by counsel. Ms. Sauser, her counsel, the State, and the District Court were all improperly applying the commonly understood definition of "confinement."

As found by the dissent, Add. 6. and as argued in Ms. Sauser's Brief, the evidence set forth in the Minutes do not establish "confinement" for the purpose of kidnapping as defined by *Rich*. The dissent aptly summarized the evidence:

> Furthermore, the minutes of evidence, in my opinion, do not establish a factual basis for the confinement element of the kidnapping charge. The facts in the record do not establish that Sauser confined Terry to the living room of their home. Nothing in the record establishes that she held him there at gunpoint. At best, the facts establish that, although Sauser had the gun hidden from Terry for some time prior to the shooting, there was only a short period of time between Sauser's display of the gun, Terry grabbing the gun, the ensuing struggle for the gun, and its discharge. The facts before us do not involve sufficient confinement to constitute kidnapping. *See State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982).

Add. 6.

As a final note, the Court of Appeals did not reach the question of the appropriate remedy, which was disputed by the parties. After finding that Ms. Sauser's conviction for kidnapping should be reversed, this Court will need to address that issue.

CONCLUSION AND RELIEF SOUGHT

For the above stated reasons, this Court should grant further review of the Court of Appeals' decision. Following further review, this Court should reverse the District Court's denial of Ms Sauser's Application for Post-Conviction Relief, vacate her convictions, and remand for further proceedings.

Respectfully Submitted,

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Date:___7/10/18____ By:___/s/ Webb L. Wassmer__
WEBB L. WASSMER

IN THE COURT OF APPEALS OF IOWA

No. 17-0807
Filed June 20, 2018

REVETTE ANN SAUSER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Delaware County, Thomas A. Bitter, Judge.

Revette Sauser appeals the district court's denial of her application for postconviction relief. **AFFIRMED.**

Webb L. Wassmer of Wassmer Law Office, P.L.C., Marion, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee State.

Considered by Doyle, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2018).

MAHAN, Senior Judge.

Revette Sauser pled guilty to kidnapping in the second degree, voluntary manslaughter, and going armed with intent, after fatally shooting her husband, Terry, in their home. Sauser filed a postconviction-relief application and an amended application alleging a variety of errors. The district court denied the application after a trial.

Sauser appeals, contending her trial counsel was ineffective in allowing her to plead guilty to kidnapping because the record lacked a factual basis for the charge. To prevail on her ineffective-assistance claims, Sauser must show (1) counsel breached an essential duty and (2) prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). "If we conclude [Sauser] has failed to establish either of these elements, we need not address the remaining element." *See State v. Thorndike*, 860 N.W.2d 316, 320 (Iowa 2015).

As relevant to this case, second-degree kidnapping has four elements: (1) Sauser confined Terry, (2) with the intent to inflict serious injury upon Terry, (3) knowing she did not have the consent of Terry to do so, and (4) while she was armed with a dangerous weapon. *See* Iowa Code §§ 710.1, 710.3 (2011). Sauser's challenge focuses on the confinement element of kidnapping. In Sauser's view, her statements to police "can only be construed as there being a very short time period between when she made the presence of the gun known to Terry, Terry grabbing for the gun, and the ensuing struggle for the gun and discharge of the weapon."

"Our cases do not require that the district court have before it evidence that the crime was committed beyond a reasonable doubt, but only that there be

a factual basis to support the charge." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). The factual basis can be discerned from "(1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence." *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010).

Here, Sauser admitted to all the elements of the crime during her plea colloquy with the court:

> COURT: On [April 3, 2011], did you bring a gun to your living room, knowing you were going to confine Terry Sauser?
> SAUSER: Yes.
> COURT: You knew you did not have the right to confine Terry Sauser during the argument that the two of you had. Correct?
> SAUSER: Correct.
> COURT: You also knew that you had the intent to inflict serious injury on Mr. Sauser, correct?
> SAUSER: Correct.
> COURT: You used the gun that you were carrying to keep Mr. Sauser confined in that space, correct?
> SAUSER: Correct.

"The defendant's admission on the record of the fact supporting an element of an offense is sufficient to provide a factual basis for that element."[1] *State v. Philo*, 697 N.W.2d 481, 486 (Iowa 2005).

Sauser acknowledges that she "admitted that she 'confined' Mr. Sauser," but she claims "that admission must be evaluated in context" because the district court "did not provide a specific definition of 'confine.'" Sauser cites no authority for her proposition that the court was required to provide a legal definition for the term "confine" where there is no indication that term "under the statute has a

[1] In its ruling on Sauser's application for postconviction relief, the district court found Sauser held the gun for thirty to forty-five minutes before she shot Terry and that while Sauser was sitting on her couch arguing with Terry, she texted with a friend "saying something to the effect of 'I've got my gun. He better leave me alone. I'll shoot.'"

specific meaning." *Cf*. *Rhoades v*. *State*, 848 N.W.2d 22, 30 (Iowa 2014) ("[T]he district court used technical language from the statute that was insufficient to establish a factual basis. The district court asked Rhoades if he had intimate contact with the victim. At most, we can surmise from Rhoades's affirmative response that he had some sort of sexual relations with the victim. Although we do not require a detailed factual basis, we do require the defendant to acknowledge facts that are consistent with the elements of the crime." (citations omitted)); *Ryan v. Iowa State Penitentiary*, 218 N.W.2d 616, 618 (Iowa 1974) (finding the defendant's affirmative response to the court's question "you, in fact, did what it charged you here in the county attorney's information" to be insufficient to establish a factual basis).

We determine Sauser has not shown trial counsel breached an essential duty in failing to challenge the factual basis for the kidnapping charge. *See Dempsey v*. *State*, 860 N.W.2d 860, 862 (Iowa 2015) ("Reversal is warranted only where a claimant makes a showing of both elements."). We affirm the denial of Sauser's postconviction-relief application.

AFFIRMED.

Bower, J., concurs; Doyle, P.J., dissents.

DOYLE, Presiding Judge (dissenting)

I respectfully dissent. I would reverse the judgment of the district court, set aside Sauser's sentence, and remand to give the State the opportunity to establish a factual basis for the kidnapping charge.

Sauser argues there was an insufficient factual basis for her guilty plea to the kidnapping charge and her counsel was therefore ineffective in allowing her to plead guilty. A factual basis to support a guilty plea is sufficient if the record at the time of the guilty plea, as a whole, discloses facts to satisfy each element of the offense. *See Rhoades v. State*, 848 N.W.2d 22, 29 (Iowa 2014); *State v. Ortiz*, 789 N.W.2d 761, 767-68 (Iowa 2010). The record does not need to support the defendant's guilt, but it needs to demonstrate facts that support the offense. *See Ortiz*, 789 N.W.2d at 768. In determining whether the record provides a sufficient factual basis to support the plea, we review the prosecutor's statements, the defendant's statements, the minutes of evidence, and "the presentence report, if available at the time of the plea." *Rhoades*, 848 N.W.2d at 29. Sauser argues her admission that she confined her husband Terry to the living room of their home cannot be used as a factual basis for her guilty plea to kidnapping because the legal definition of confinement was not explained to her by the court during the plea colloquy.

Sauser admitted during the plea colloquy that she knew she was going to confine Terry, knew she did not have the right to confine him, had the intent to inflict serious injury on him, and used the gun to confine him. However, the term "confine" was not defined by the court. In the context of the kidnapping statute,

> confinement . . . must exceed that normally incident to the underlying crime and that confinement or removal sufficient to support a charge of kidnapping may exist if the evidence shows the confinement or removal *substantially* increased the risk of harm, *significantly* lessened the risk of detection, or *significantly* facilitated the escape of the perpetrator.

State v. Robinson, 859 N.W.2d 464, 478 (Iowa 2015). Thus, the term has a specific legal definition different than its common meaning. Under the circumstances, the term should have been defined during the plea colloquy. "[T]he district court's reading of the technical terms in the information and having the defendant agree to those terms is not enough to establish a factual basis for those terms. *Rhoades*, 848 N.W.2d at 30.

Furthermore, the minutes of evidence, in my opinion, do not establish a factual basis for the confinement element of the kidnapping charge. The facts in the record do not establish that Sauser confined Terry to the living room of their home. Nothing in the record establishes that she held him there at gunpoint. At best, the facts establish that, although Sauser had the gun hidden from Terry for some time prior to the shooting, there was only a short period of time between Sauser's display of the gun, Terry grabbing the gun, the ensuing struggle for the gun, and its discharge. The facts before us do not involve sufficient confinement to constitute kidnapping. *See State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982).

So, with no knowing and intelligent admission as to the confinement element of the crime, or any other factual basis for the plea concerning the confinement element, I conclude Sauser's plea counsel was ineffective in allowing Sauser to plead guilty to the kidnapping charge. "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty

anyway, counsel has failed to perform an essential duty." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). In such a case, prejudice is inherent. *See id.*

I would reverse the judgment of the postconviction-relief court and remand the case back to the district court to enter judgment finding trial counsel was ineffective, to order the sentence in Sauer's criminal case be set aside, and—because it is possible the State can establish a factual basis—to order the court in the criminal case to give the State the opportunity to establish a factual basis. *See id.* at 33 (citing *State v. Gines,* 844 N.W.2d 437, 441 (Iowa 2014); *Ryan v. Iowa State Penitentiary,* 218 N.W.2d 616, 620 (Iowa 1974)). I would also direct the criminal court to further order that if the State cannot establish a factual basis, the plea is withdrawn, and the State can proceed accordingly. *Schminkey*, 597 N.W.2d at 33 (citing *Gines*, 844 N.W.2d at 442).

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
17-0807	Sauser v. State

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