

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/APPLICANT REVETTE ANN SAUSER'S
 FINAL BRIEF

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_____/s/ Webb L. Wassmer_____
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN ALLOWING REVETTE SAUSER TO PLEAD GUILTY TO KIDNAPPING IN THE SECOND DEGREE WHEN COUNSEL HAD A LEGALLY INCORRECT OPINION ON THE REQUIRED ELEMENT OF “CONFINEMENT” AND THERE WAS NO FACTUAL BASIS FOR THE PLEA?

Castro v. State, 795 N.W.2d 789(Iowa 2011)

Jamison v. Weaver, 46 N.W. 996 (Iowa 1890)

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II. WHAT SHOULD BE THE APPROPRIATE REMEDY?

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State v. Philo, 697 N.W.2d 481 (Iowa 2005)

Iowa R. Crim. P. 2.8(2)(a)

Iowa R. Crim. P. 2.8(2)(b)

Iowa R. Crim. P. 2.10(4)

STATEMENT OF THE CASE

Revette Ann Sauser was convicted on February 1, 2012, after pleas of guilty, pursuant to a plea agreement, to 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). The charges of conviction were set forth in an Amended and Substituted Trial Information. App. 64 (Amended and Substituted Trial Information, filed February 1, 2012). Ms. Sauser had originally been charged with Murder in the First Degree, in violation of Iowa Code § 707.2. App. 39 (Trial Information, filed April 18, 2011). 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 (Amended Application for-Post-Conviction Relief); App. 30 (Order, filed May 18, 2017).

The District Court decided five claims raised by Ms. Sauser. After review of the District Court's ruling, the record made, additional legal research, and consultation with Ms. Sauser, this appeal advances 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).¹

In denying this claim, the District Court reasoned:

¹ Counsel has concluded that the other issues raised by Ms. Sauser in the District Court lack significant merit and has chosen to focus on the one issue that Counsel believes has substantial merit. Ms. Sauser has been advised of her right pursuant to Iowa Rule of Appellate Procedure 6.901(2) to file a *pro se* supplemental brief raising any issue that counsel declines to raise. Counsel does not believe that Ms. Sauser intends to do so.

Pursuant to the terms of the plea agreement and the Amended Trial Information, Revette pled guilty to one count of Kidnapping in the Second Degree, a Class B felony. According to Iowa Code §710.3, Kidnapping in the Second Degree is kidnapping where the kidnapper is holding the victim for ransom or is armed with a dangerous weapon. “Kidnapping” is defined under Iowa Code § 710.1.

During the plea colloquy, the court informed Revette as follows: “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.” Attorney Goodman informed the court that he and Revette had discussed the Minutes, and that Revette was “prepared to stipulate that there’s sufficient evidence to support these charges.” Revette agreed. The court then proceeded to specifically and separately ask Revette if she had brought a gun to her living room, knowing she was going to confine Terry Sauser, if she knew she didn’t have the right to confine Terry there, and if she had the intent to inflict serious injury on Terry at that time. Revette said yes to each of those questions.

The court correctly determined that a factual basis existed for the guilty plea on the kidnapping charge. Attorney Goodman was not ineffective in allowing Revette to enter that plea.

App. 35-36 (Order, filed May 18, 2017, at 6-7).

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

THE COURT: Okay. All right. Now, what we're going to do is, I'm going to ask you a series of questions pertaining to the Minutes of Testimony, and again, the Minutes are attached to the Trial Information, and they are a recitation, or a spelling out, of what each one of the witnesses would be testifying to if we went to trial. So, for example, if an officer showed up at the scene, the officer would provide the County Attorney with a recitation of what he observed, and what he did, and that is what is called the Minutes of Testimony. You understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. So I'm going to ask you some questions about what these witnesses have provided in terms of information, and whether or not you believe -- you believe that based on the information that I have here, if the jury heard this, the jury would find you guilty. Okay?

THE DEFENDANT: Yes.

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. With regard to the Manslaughter, the elements of that offense would be that you caused the death of an individual named Terry Sauser under circumstances that would otherwise be murder. The Defendant, you, caused the death solely as a result of a sudden, violent, and irresistible passion, resulting from serious provocation sufficient to excite that passion, and there not being any tie between the provocation and the killing in which a reasonable person would retain control and suppress the impulse to kill. And that is contrary to Iowa Code Section 707.4.

The last, Count III, Going Armed with Intent, the State would then have to prove that you went armed with a dangerous weapon, without justification, with the intent to use that weapon against another, and contrary to and in violation of Iowa Code Section 708.8. A dangerous weapon would include a firearm.

Now, with regard to this incident, first of all

MR. GOODMAN: Your Honor she had received all of the Minutes, she's received the amended and substituted Trial Information, the supplemental Minutes. We didn't go through the deposition process largely because we didn't feel it was necessary, because the DCI had done such an extensive investigation in this matter, and we've been through pretty much what everybody is going to testify to. Is that correct, Revette?

THE DEFENDANT: Yes.

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: Do you have any questions about that statement that he just made?

THE DEFENDANT: No.

THE COURT: Do you understand what he's telling me?

THE DEFENDANT: Yes.

THE COURT: Okay. All right. So, let's just do this in a briefer format, then, so that I understand that you know what it is we're speaking about today. Okay?

THE DEFENDANT: Okay.

THE COURT: This incident occurred on or about April 3rd, 2011. Is that correct?

THE DEFENDANT: Correct.

THE COURT: It occurred at your home in Ryan, Iowa. Correct?

THE DEFENDANT: Correct.

THE COURT: Ryan is within the State of Iowa and in the County of Delaware, correct?

THE DEFENDANT: Correct.

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 also knew that you had the intent to inflict serious injury on Mr. Sauser, 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.

THE COURT: During the argument the two of you had, you intentionally shot and killed Terry Sauser as a result of a sudden, irresistible passion which was a result of serious provocation. Is that correct?

THE DEFENDANT: Yes.

THE COURT: And you understand all those words?

THE DEFENDANT: Yes.

THE COURT: Okay. Would you also agree that you did not have any time to regain control from the time that the provocation occurred to the time that you shot Mr. Sauser?

THE DEFENDANT: Yes.

THE COURT: And as a result of the shooting, Mr. Sauser died, correct?

THE DEFENDANT: Correct.

THE COURT: Does the State wish for any additional colloquy on the offenses?

MS. KRISKO: No, Your Honor.

THE COURT: Okay. Now, generally, also, Ms. Sauser, I spoke about the fact that we had many officers providing information that comprised these Minutes of Testimony. Do you think if all of these individuals were called in to testify, that they would pretty much say what these documents say?

THE DEFENDANT: Yes.

THE COURT: And you think that based on their testimony before the jury, the jury would find you guilty of these three counts?

THE DEFENDANT: Yes.

THE COURT: So you also do believe, then, that based on the information comprised by the State,

that the State would be able to received a conviction beyond a reasonable doubt?

THE DEFENDANT: Yes.

THE COURT: Do either counsel know of any reason why the Court cannot accept this plea today?

MS. KRISKO: No, Your Honor. I just would also supplement the record. I know we talked a lot about her medication. She has been seen by two psychiatrists, who both found her to be competent in this particular case.

THE COURT: Mr. Goodman, do you have any reason why the Court cannot accept this plea today?

MR. GOODMAN: No, Your Honor. And I concur with the statement just made by counsel.

THE COURT: Ms. Sauser, before I ask you about your guilt or innocence, is there anything else that you need to ask me?

THE DEFENDANT: No.

THE COURT: You fully understand what we have done so far?

THE DEFENDANT: Yes.

THE COURT: Okay. You've understood all the words that I've spoken to you?

THE DEFENDANT: Yes.

THE COURT: Revette Sauser, how do you wish to plead, then, to Count I, of the amended and substituted Trial Information, Kidnapping in the Second Degree, a Class "B" felony, in violation of Iowa Code Section 710.3?

THE DEFENDANT: Guilty.

THE COURT: Revette Sauser, how do you wish to plead to Count II of the amended and substituted Trial Information, to wit, Voluntary Manslaughter, a Class "C" felony, in violation of Iowa Code Section 707.4?

THE DEFENDANT: Guilty.

THE COURT: And Revette Sauser, lastly, to Count III, how do you wish to plead to the offense of Going Armed with Intent, a Class "D" felony, in violation of Iowa Code Section 708.8?

THE DEFENDANT: Guilty.

THE COURT: The Court finds that the Defendant has voluntarily entered into this plea, she fully understands the rights and consequences of this plea, and a factual basis exists for the plea. For the record, I want to express that I was the judge that signed the original Trial Information, when presented by County Attorney John Bernau, and I'm well aware of the facts and circumstances which have brought us here today. I have read those again, in anticipation of today's trial, and again with regard to the amended and substituted Trial Information. So I do

believe that there is a factual basis based on that. I also want to make sure for the record that Mr. Goodman's statement with regard to Ms. Sauser having reviewed all of the documentation, I do believe that she is fully aware of what it was she would be facing today, if we did go forward with a trial.

App. 72-80 (State's PCR Ex. A at 17-25 – Transcript of Plea and Sentencing held February 1, 2012).

Ms. Sauser also waived preparation of a Presentence Report, waived her right to file a Motion in Arrest of Judgment, and requested immediate sentencing. App. 80-81 (State's PCR Ex. A at 25-26 – Transcript of Plea and Sentencing held February 1, 2012). Thus, the District Court proceeded immediately to sentencing. App. 82-84 (*Id.* at 33-35).

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).² The Minutes list the State's witnesses, generally state that those witnesses will testify

² There were also Supplemental Minutes, filed February 1, 2012. The Supplemental Minutes do not contain any anticipated witness testimony that would be relevant to the issue before this Court.

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's prior statements appear to have been made before any officer read her any *Miranda* rights.

Ms. Sauser was interviewed at the scene, after advisement of her *Miranda* rights, by Delaware County Sheriff's Deputy Jill Rahe. App, 46 (Deputy Rahe). Deputy Rahe's report states:

Revette wanted me to get her phone out of the house for her. She advised that he phone would tell it all. I asked her what she meant by that, and she advised that she had been texting a girlfriend to tell her that he (Terry) would not let her leave. 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).

Ms. Sauser was interviewed the next day by Special Agent Jon Turbett of the Iowa Division of Criminal Investigation. App. 60 (SA Turbett). The Report attached to the Minutes states that the entire interview was recorded and the Report contains only a summary. *Id.* There is no indication in the record that the District Court, before accepting Ms. Sauser's guilty plea, reviewed the recording of the interview.

SA Turbett's report reflects an entirely different version of events. According to SA Turbett, Ms. Sauser stated that she and

Terry Sauser had made a mutual suicide pact. App. 60-61 (SA Turbett). The record as a whole does not reflect that anyone believed that explanation.

Also of significance to the issue before the Court is the 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).

ROUTING STATEMENT

This case should be transferred to the Court of Appeals of Iowa. The primary issues in this case, whether there was a factual basis for Ms. Sauser's plea of guilty to Kidnapping in the Second Degree and whether trial counsel provided ineffective assistance in allowing Ms. Sauser to enter that guilty plea, involve the application of settled legal principles to the specific facts of this case. *See* Iowa R. App. P. 6.1101(3)(a). Although the

secondary issue of the appropriate remedy might be appropriate for retention by the Supreme Court of Iowa as it has not squarely been address by the Supreme Court, it is appropriately resolved in the first instance by the Court of Appeals of Iowa.

SUMMARY OF ARGUMENT

The central issue in this appeal is whether trial counsel provided ineffective assistance by permitting Revette Ann Sauser to plead guilty to Kidnapping in the Second Degree without a factual basis. The Minutes primarily consist of police reports, which contain statements made shortly after the shooting by Ms. Sauser as to what had happened. The Minutes do not establish a factual basis for the “confinement” element of kidnapping.

Ms. Sauser's admission in the plea colloquy that she “confined” the victim, Terry Sauser (her husband) before shooting him, was deficient due to trial counsel's incorrect understanding of the law of “confinement.” In particular, trial counsel was of the opinion that Ms. Sauser momentarily pointing the gun at Terry Sauser was sufficient to prove confinement. It is not. Under this

Court's seminal decision in *State v. Rich*, 305 N.W.2d 739 (Iowa 1981), much more is required. Neither counsel nor the District Court discussed with Ms. Sauser the requirements of *Rich*. Thus, no factual basis for Ms. Sauser's plea of guilty to Kidnapping in the Second Degree was established as her “admission” during the plea colloquy was based on an incorrect legal definition of “confinement” provided by her attorney.

With respect to the remedy, the appropriate result is to remand the Kidnapping conviction to the District Court to give the State an opportunity to establish a factual basis for the plea. The lengthy discussion of what happens if the State cannot do so is set forth in the last section below.

ARGUMENT

I. **THERE WAS AN INSUFFICIENT FACTUAL BASIS FOR MS. SAUSER'S GUILTY PLEA TO KIDNAPPING AND TRIAL COUNSEL WAS INEFFECTIVE FOR PERMITTING MS. SAUSER TO PLEAD GUILTY TO KIDNAPPING**

A. Standard of Review and Preservation of Error

Post-conviction proceedings, including summary dismissals, are reviewed for errors at law. *See, e.g., Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011) (citations omitted). However, if a constitutional claim of ineffective assistance of counsel is raised, review is *de novo*. *Id.* (citations omitted).

The issues presented in this appeal were raised before the District Court and were decided by the District Court in its Ruling. App. 35-36. Error was preserved.

B. *There Was No Evidence Supporting the Requirement of “Confinement” for Kidnapping*

i. The Requirement of a Factual Basis for a Guilty Plea

Before accepting a guilty plea, the court must ensure that the plea is not only voluntarily and intelligently made, but also that it is supported by a factual basis. Iowa R. Crim. P. 2.8(2)(b). If an attorney allows a defendant to plead guilty to an offense for which there is no factual basis and to waive the right to file a motion in arrest of judgment, the attorney breaches an essential duty. *See State v Doggett*, 687 N.W.2d 97, 101-02 (Iowa 2004).

State v. Philo, 697 N.W.2d 481, 485 (Iowa 2005).

“A factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence. Moreover, we have held the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense.” *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010) (citations omitted). Further, “[t]he factual basis must be contained in the record, and the record, as a whole, must disclose facts to satisfy all elements of the offense.” *Id.* at 767-68 (citation omitted). “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.” *Philo*, 697 N.W.2d at 486 (citation omitted).

If counsel allows a defendant to plead guilty to an offense lacking a factual basis, prejudice is “inherent under the circumstances.” *See Philo*, 697 N.W.2d at 488 (citations omitted).

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

An essential element of kidnapping is “confinement.”³ This Court has explored the confinement necessary to constitute kidnapping in several cases because, in the strictest sense, 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

³ A kidnapping conviction can also be based on “removal,” *i.e.*, movement of the victim from one place to another. However, the State's theory was based on “confinement.” There was no evidence that Revette Sauser moved Terry Sauser from one place to another.

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.

iii. Applying *Rich* to the Facts of This Case

Whether a factual basis was established for Ms. Sauser's plea of guilty to kidnapping requires looking at two aspects of the plea proceeding. First, as the District Court relied upon the Minutes, the contents of the Minutes must be analyzed.⁴ Second, Ms. Sauser's statements during the colloquy must be considered, with reference to what her attorney, Mr. Goodman, explained (incorrectly) to her was required for the “confinement” element of kidnapping.

⁴ The prosecutor made no statements of relevance to the factual basis inquiry. As Ms. Sauser pled guilty at the start of trial, waived her right to file a motion in arrest of judgment, and proceeded to sentencing, the District Court did not have any presentence report before it.

The Minutes do not establish the required “confinement” for kidnapping.⁵ Revette Sauser and Terry Sauser were the only persons present at the time Terry Sauser was shot. Ms. Sauser gave two different versions of what happened to authorities, as set forth in the Minutes. Neither version suggests any confinement meeting the test of *Rich*.

In her statements immediately after the shooting, particularly to Deputy Rahe, Ms. Sauser stated that she had the gun hidden, she pulled the gun out, Terry grabbed the gun, there was a struggle and the gun discharged, *See generally* App. 46 (Rahe report). Ms. Sauser said that she and Terry had been arguing. Terry was sitting on the couch and had been drinking. “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 further argument, “she got the gun out. She pointed the gun at Terry and he grabbed on to the gun pushing it back

⁵ The record is somewhat ambiguous as to whether Ms. Sauser agreed that the Minutes were accurate or merely agreed that, if called, the witnesses would testify consistently with the Minutes. Because the Minutes, even if accepted as true by Ms. Sauser, do not establish a factual basis for “confinement,” it is unnecessary to resolve this issue.

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.”

In that scenario, there is no indication that Ms. Sauser held Terry Sauser in place for any appreciable length of time by pointing the gun at him and preventing him from leaving. Ms. Sauser's statements can only be construed as there being a very short period of time 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. There is no evidence that any incidental confinement “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” as required by *Rich*.

The second scenario, set forth in SA Turbett's interview of Ms. Sauser the next day, was that Terry Sauser was shot as the result of a mutual suicide pact. App. 60 (Turbett Report). Under

that scenario, there is also no confinement. Further, Kidnapping requires that the confinement be without the consent of the victim. If a mutual suicide pact, then Terry Sauser is present voluntarily and voluntarily agrees to be shot, *i.e.* consents to any confinement.

Thus, neither alternative scenario contained in the Minutes contains sufficient, or any, facts demonstrating the required element of confinement, as set forth in the *Rich* test.

The plea colloquy is fairly bare bones. The most significant exchange was as follows:

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 also knew that you had the intent to inflict serious injury on Mr. Sauser, 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. 76 (State's PCR Ex. A at 21 – Transcript of Plea and Sentencing held February 1, 2012).

Although Ms. Sauser admitted that she “confined” Mr. Sauser, that admission must be evaluated in context. The District Court did not provide a specific definition of “confine” for Ms. Sauser. Based on Mr. Goodman's testimony, Mr. Goodman had an expansive, and legally incorrect, definition of “confinement” which he presumably conveyed to Ms. Sauser. *See* Add. 93-95 (PCR Tr. Tr. at 104-06). Neither Mr. Goodman nor the District Court discussed the requirements for “confinement” set forth by this Court in *Rich*. In fact, neither the District Court nor Mr. Goodman indicated that they were even aware of the *Rich* decision or subsequent cases applying *Rich*.⁶

⁶ The kidnapping charge was proposed by the State shortly before trial. It may have been that Mr. Goodman and the District Court did not have adequate opportunity to consider and research the requirements for “confinement.” However, Mr. Goodman is presumed to know the law. *See Jamison v. Weaver*, 81 Iowa 212, 46 N.W. 996, 998 (Iowa 1890) (“Attorneys are presumed to be familiar with the law and rules of practice”).

Mr. Goodman's analysis of the requirements for “confinement” was deficient. His assumption was that Ms. Sauser momentarily pointing the gun at Terry Sauser was sufficient to prove “confinement.” *See* Add. 93-95 (PCR Tr. Tr. at 104-06). He did not specifically discuss with Ms. Sauser how long she pointed the gun at Mr. Sauser. Add. 94 (*Id.* at 105) (“How long she held that gun on him, I really don't know. We didn't discuss how long.”). There was no discussion as to whether Ms. Sauser “prevented him from leaving, told him he couldn't leave, [or] that he attempted to leave, wanted to leave, any of that?” *Id.* At 105-06.

There is no evidence that Mr. Goodman evaluated the factors set forth in *Rich* requiring analysis of whether the confinement “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. Mr. Goodman's analysis illustrates the problem discussed in *Rich* and *Robinson* that many crimes involve “confinement” to some degree and that, in order to constitute

kidnapping, the confinement must reach a higher level. The “confinement” at issue in this case falls far short of reaching that higher level. Any “confinement” resulting from Ms. Sauser pointing the gun at Terry Sauser for a short period of time was slight and inconsequential. Analogous to *Marr*, it would be kidnapping every time a defendant pointed a gun at someone else and did not pull the trigger in the same motion.

The last two factors are clearly not present. Ms. Sauser called 911 after shooting Terry Sauser and was still present when the authorities responded. Momentarily pointing the gun at Terry Sauser did not lessen the risk of detection or facilitate escape at all.

There is also no evidence that momentarily pointing the gun at Terry Sauser substantially increased the risk of harm to the him, particularly when Ms. Sauser stated during the plea colloquy that she had intended to harm him.

Ms. Sauser also stated that during the plea colloquy that she possessed the gun with the intent to confine Terry Sauser and to inflict serious harm upon him. App. 76 (State's PCR Ex. A at 21 –

Transcript of Plea and Sentencing held February 1, 2012).

However, kidnapping contains no specific intent element. *See State v. Hatter*, 414 N.W.2d 333, 337 (Iowa 1987) (“Defendant claims that the trial court erred in failing to give a proposed instruction on specific intent to confine or remove the victim. At the root of this claimed error, and the rejected instruction, is defendant's assertion that the State must prove not only that he confined or removed the victim as defined by *Rich*, but also that he had the specific intent to do so in a manner that exceeded the confinement or removal incident to sexual abuse. We reject this argument and hold that the trial court properly refused defendant's proposed instruction.”). Thus, whether Ms. Sauser intended to confine Terry Sauser is not relevant. It is only relevant if she actually confined him in circumstances meeting the test of *Rich*.

Overall, any admission by Ms. Sauser during the plea colloquy that she “confined” Terry Sauser was based on the erroneous opinion of Mr. Goodman regarding the requirements for

confinement. As such, her “admission” at the plea colloquy cannot be used to find a factual basis for her guilty plea to kidnapping.

In sum, neither Ms. Sauser's statements during the plea colloquy nor the Minutes establish a factual basis for “confinement” as required for conviction of kidnapping. Trial counsel was ineffective in permitting Ms. Sauser to plead guilty to the kidnapping offense.

C. The Proper Remedy

While the lack of a factual basis for Ms. Sauser's plea of guilty to kidnapping is straightforward as discussed above, the proper remedy in this case is more complex.

The remedy for a claim of ineffective assistance of counsel based on the lack of a factual basis for a guilty plea is to vacate the sentence and remand the case to allow the State an opportunity to establish a factual basis, unless the defendant was charged with the wrong crime. [citations omitted]. If the defendant was charged with the wrong crime, the plea is set aside. [citations omitted].

Philo, 697 N.W.2d at 488. *Philo*, which reversed and remanded a conviction for eluding, did not specifically discuss what should

happen with other charges that Philo had pled guilty to as part of his plea agreement or the effect of the plea agreement on the analysis.

This Court recently discussed the effect of a plea agreement on the proper remedy when a conviction to one count of multi-count conviction is set aside in *State v. Ceretti*, 871 N.W.2d 88 (Iowa 2015). *Ceretti*, however, did not involve the lack of a factual basis for one of the pleas. *Ceretti* involved the doctrine of merger and a conclusion that Ceretti could not be convicted of both voluntary manslaughter and attempted murder.

In *Ceretti*, this Court considered whether the conviction for attempted murder should be vacated and the case remanded for resentencing on the other counts involved or whether the plea agreement should be vacated. *See Ceretti*, 871 N.W.2d at 97. This Court, applying contract principles, concluded that when the plea agreement includes a bargain for an illegal sentence, the plea agreement should be vacated to avoid the possibility that a defendant obtains a favorable plea agreement, knowing that a

portion of the sentence is illegal, and is then able to obtain an even favorable disposition on appeal. *Id.*, at 97-98.

Thus, *Philo* and *Ceretti* point in different directions. *Philo* would suggest that the Kidnapping conviction and sentence should be remanded to the District Court for the State to have an opportunity to establish a factual basis for the plea to Kidnapping. If the State is able to do so, Ms. Sauser's conviction and sentence for Kidnapping, as well as the other two counts, would stand. If the State is unable to do so (which counsel believes will be the likely result as there appears to be no additional evidence that the State could produce to establish “confinement” under the requirements of *Rich*), then the Kidnapping count would be dismissed and Ms. Sauser's convictions and sentences for Voluntary Manslaughter and Going Armed with Intent would stand. Under that scenario, Ms. Sauser's prison time would be substantially reduced as the District Court imposed the sentences for the three offenses consecutively.

Ceretti, however, suggests that if the State is unable to establish a factual basis for Kidnapping, then the plea agreement

should be vacated and all charges reinstated. *Ceretti* also notes that "On remand, the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supported by the available evidence."

Ceretti, 871 N.W.2d at 97 (citation omitted). That would suggest that the State could reinstate the charge of Murder in the First Degree, although that charge was not "dismissed," it was supplanted by the three different charges by the filing of the Amended and Substituted Trial Information.

In resolving this issue, this Court should consider that the goal of a remedy for ineffective assistance of counsel is to put the defendant in the position, as near as practicable, to the position that the defendant would have been in if the ineffective assistance had not occurred.⁷ In other words, what would have been the result if the District Court had not found a factual basis for the Kidnapping charge at the time of the original plea proceeding?

The answer to that question is found in the Iowa Rules of

⁷ Ms. Sauser has served several years in prison. Obviously, that time cannot be given back to her. However, she should receive credit against any sentence remaining or imposed after resolution of her PCR for the time she has served.

Criminal Procedure. In addition to not involving the failure to establish a factual basis for a guilty plea, *Ceretti* did not address the effect of the Iowa Rules of Civil Procedure.

Rule 2.8(2)(a) provides that if the District Court “refuses to accept a guilty plea, the court shall enter a plea of not guilty.”

Rule 2.8(2)(b) provides that “The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.” Thus, if a factual basis was not established for the Kidnapping charge, the District Court would have refused to accept Ms. Sauser's plea of guilty and entered a plea of not guilty to the Kidnapping charge.

The District Court would then have had to decide whether to reject the plea agreement as a whole or to accept Ms. Sauser's pleas of guilty to Voluntary Manslaughter and Going Armed with Intent. Under Rule 2.10(4), if the District Court rejects the plea agreement, “the court shall inform the parties of this fact, [and] afford the defendant the opportunity to then withdraw the defendant's plea.” Significantly, the Rule does not give the State

any opportunity to withdraw from a plea agreement if the District Court rejects the agreement or if the District Court refuses to accept the guilty plea. Thus, if the District Court had declined to accept Ms. Sauser's guilty plea to Kidnapping for lack of a factual basis, the District Court would have had two options under the Rules:

1. accept the plea agreement, accept the pleas to Voluntary Manslaughter and Going Armed with Intent, reject the plea to Kidnapping and enter a plea of not guilty and set trial for the Kidnapping charge;
2. reject the plea agreement. Ms. Sauser would then have had to decide whether to withdraw her pleas to all three counts or only the Kidnapping count or persist in her pleas. The Rules do not appear to provide any basis for which the District Court could have rejected Ms. Sauser's pleas to Voluntary Manslaughter and Going Armed with Intent if Ms. Sauser had persisted in those pleas.

Overall, based on the above case law and the Iowa Rules of Criminal Procedure, the appropriate disposition is to:

1. vacate Ms. Sauser's conviction and sentence for Kidnapping due to trial counsel's ineffective assistance and the failure to establish a factual basis for her plea of guilty;

2. remand to give the State an opportunity to establish a factual basis for the Kidnapping charge;
3. if the State establishes the factual basis, the District Court would accept Ms. Sauser's plea of guilty to Kidnapping and resentence her on that charge. Her convictions and sentences for Voluntary Manslaughter and Going Armed with Intent would stand;
4. if the State fails to establish the factual basis, the District Court would refuse to accept Ms. Sauser's guilty plea, enter a plea of not guilty on that charge, and set the Kidnapping charge for trial. The District Court would then determine whether to accept or reject the plea agreement as a whole.
5. If the District Court accepts the plea agreement, Ms. Sauser's guilty pleas, convictions and sentences for Voluntary Manslaughter and Going Armed with Intent would stand. Trial would proceed on the Kidnapping charge unless that charge were resolved in some other way.
6. If the District Court rejects the plea agreement, Ms. Sauser would decide whether to persist in her guilty pleas or withdraw them.
7. If Ms. Sauser persists in her guilty pleas, Ms. Sauser's guilty pleas, convictions and sentences for Voluntary Manslaughter and Going Armed with Intent would stand. Trial would proceed on the Kidnapping charge unless that charge were resolved in some other way.

8. If Ms. Sauser withdraws her guilty pleas to all offenses, trial would proceed on all three charges unless those charges were resolved in some other way. If the State seeks to reinstate the charge of Murder in the First Degree, the District Court would have to determine if the State is permitted to do so.

Because this issue is complex, Ms. Sauser reserves the right to alter her position on the appropriate remedy after the State files its Brief and the State's position on an appropriate remedy is known.

CONCLUSION AND RELIEF SOUGHT

For the above stated reasons, the District Court's Order denying Appellant/Applicant Revette Ann Sauser's Application for Post-Conviction Relief must be reversed. This matter should be remanded for further proceedings as set forth above.

REQUEST FOR ORAL ARGUMENT

Appellant/Applicant Revette Ann Sauser requests ten minutes of oral argument.

Respectfully Submitted,

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