IN THE SUPREME COURT OF IOWA

IN RE THE DETENTION OF THOMAS G. RUTHERS, JR., Respondent-Appellant.	SUPREME COURT NO. 17-1539

APPEAL FROM

THE IOWA DISTRICT COURT FOR MAHASKA COUNTY

HONORABLE JUDGES, DANIEL P. WILSON (MOTION TO DISMISS), JOEL YATES (MOTION FOR SUMMARY JUDGMENT, MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, AND TRIAL)

APPELLANT'S PROOF FINAL AND ARGUMENT

AND

REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE AND FILING

On the 25th day of April, 2018, the undersigned did serve the within Appellant's Final Brief And Request for Oral Argument on all other parties to this appeal through EDMS and by electronic transmission to CAmail@ag.state.ia.us, and upon the Respondent-Appellant by Regular United States Mail.

I further certify that on April 25, 2018, I will electronically file this document through EDMS with the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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ROUTING STATEMENT

This case presents substantial issues of first impression. Specifically, this case addresses the issue of whether the State may file a petition under Iowa Code chapter 229A alleging a person is presently confined for a sexually violent offense while the charge is pending before the criminal court without a guilty plea or adjudication, and without a finding that the person is not competent to stand trial or is not guilty by reason of insanity. It also raises the issue of whether the State may argue in a 229A action that a non-sexual offense is

sexually motivated when the criminal court did not find the offense to be sexually motivated. The Supreme Court should therefore retain this case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal filed by Respondent-Appellant Thomas G. Ruthers, Jr. (hereafter "Ruthers") from the November 19, 2012 order of the district court which denied his Motion to Dismiss; from the July 18, 2014 order of the district court which denied his Motion for Summary Judgment; from the August 18, 2017 order of the district court denying his second Motion to Dismiss; and from the district court's order finding him to be a sexually violent predator on September 13, 2017.

Course of Proceedings and Disposition in District Court: On March 19, 2012, the State filed its petition to have Ruthers civilly committed under Iowa Code chapter 229A. (Petition)(App. p. 55). At the time the petition was filed, Ruthers was residing at the Mahaska County Jail. He had been charged with Sexual Abuse in the Second Degree and

had made a plea agreement with the State. (Id.) (App. P. 55). After the petition was filed, the written guilty plea was presented to the district court and the district court found Ruthers guilty of Assault Causing Bodily Injury. (Guilty Plea in Mahaska County FECR063078/Respondent's Exhibit A) (App. P. 62), (Judgment Entry in Mahaska County FECR063078) (App. P. 58). A probable cause hearing was held in this case on March 22, 2012 after which the district court found probable cause to believe Ruthers was a sexually violent predator. (Order Finding Probable Cause) (App. P. 65).

On April 6, 2012, the State filed an amended petition in which set forth Ruthers' guilty plea to Assault Causing Bodily Injury and asserted that said offense was sexually motivated. (Amended Petition)(App. P. 67). On November 19, 2012, following hearing, the district court denied Ruthers' Motion to Dismiss (Order Denying Motion to Dismiss)(App. P. 78). On July 18, 2014, the district court denied Ruthers' Motion for Summary Judgment. (Order Denying Motion for Summary Judgment)(App. P. 124). On August 18, 2017 the district court denied Ruthers' second Motion to Dismiss on the explicit

basis of lack of subject matter jurisdiction. (Order Denying Motion to Dismiss)(App. P. 198).

This matter proceeded to trial before the district court on August 29, 2017. On September 13, 2017, the district court entered its Bench Trial Ruling finding Ruthers to be a sexually violent predator and committing him to the custody of the Iowa Department of Human Services. (Bench Trial Ruling)(App. P. 213). Ruthers filed his Notice of Appeal on September 26, 2017. (Notice of Appeal)(App. P. 223).

Statement of Facts: Ruthers was born on March 26, 1960. (TT, Day One, p. 56, ln. 16-17). On November 13, 1986, Ruthers pled guilty to and was later sentenced for of Sexual Assault in the First Degree in the West Virginia Circuit Court of Monongalia County. (Petition)(App. p. 55), (State's Exhibit 4)(App. p. 8), (TT, Day One, p. 102, ln. 1-16). He also pled guilty to and was sentenced for Transportation of Minors under 18 U.S.C. 2423, and Conspiracy under 18 U.S.C. 371. (Id.)(App. p. 8). Ruthers served approximately twelve years in prison, was placed on parole, had his parole revoked, and was

ultimately discharged in July, 2000. (TT, Day One, p. 139, ln. 19-p. 140, ln. 4).

In approximately March or April, 2006 Ruthers met Bobbie Shelton. Her son, R.S. would have been approximately seven years old at the time. (TT, Day One, p. 118, ln. 20-p.119, ln. 9). In October or November, 2007 Shelton and her son moved to Oskaloosa, Iowa. (TT, Day One, p. 119, ln. 10-13). Ruthers helped her with the move and accompanied her and R.S.. While in Oskaloosa, Ruthers stayed at the hotel and R.S. stayed with him all of the nights he was there, except one. (TT, Day One, p. 123, ln. 13-19).

In approximately August, 2010, the Oskaloosa Police Department began investigating Ruthers concerning possible sexual abuse of R.S. (TT, Day One, p. 8, ln.6-16). Thereafter, in September, 2010, a complaint was filed charging Ruthers with Sexual Abuse in the Second Degree alleged to have been perpetrated against R.S. In April, 2011 a trial information was filed charging Ruthers with the same offense. Because Ruthers had previously been convicted of sexual offenses involving minors, this charge was enhanced to a Class A

felony. Following discovery and plea negotiations, the State and Ruthers entered into an agreement where he would plead guilty to Assault Causing Bodily Injury and be sentenced to serve one year in the Mahaska County Jail, with credit for one year already served.

On March 19, 2012, counsel for Ruthers tendered Ruthers' written guilty plea to Assault Causing Bodily Injury. For the factual basis, it was stated "I did assault Bobbie Shelton and in so doing caused a bodily injury." Further it stated "Sex Abuse 2nd Degree be dismissed with prejudice. TR." (Guilty Plea in Mahaska County FECR063078/ Respondent's Exhibit A) (App. P. 62). The district court, the Honorable Judge Gamon, accepted the plea and entered judgment thereon. (Judgment Entry in Mahaska County FECR063078) (App. P. 58). That same day prior to the entry of the guilty plea, the State filed its petition under chapter 229A in this matter.

On March 22, 2012, a probable cause hearing was held pursuant to Iowa Code section 229A.5(2). At said hearing, Ruthers argued for dismissal because he was not confined for

a sexually violent offense since he pled guilty in his criminal case to a nonsexual assault of an adult female—Bobbie Shelton. (Transcript of Probable Cause Hearing). The Court denied the motion. (Order Finding Probable Cause and Appointing Counsel)(App. p. 65).

Thereafter, the State filed a Motion to Set Aside Guilty Plea in the criminal case, and on March 26, 2012, the district court entered a Supplement to Judgment Entry. In said order, the district court in the criminal case, reviewed the Minutes of Testimony filed in connection with the Sexual Abuse charge filed against Ruthers and found a specific factual basis for Ruthers' guilty plea to the Assault Causing Bodily Injury offense:

> On or about a date between October 1, 2007 and November 30, 2007, in Oskaloosa, Mahaska County, Iowa, the Defendant picked up the child victim, R.S., and threw him on the bed in a hard manner. The Defendant caused R.S. to hit his head on the board, causing a bump.

(Supplement to Judgment Entry/State's Exhibit 3)(App. p. 60). The State did not request that Ruthers be required to register

of the sexual offender registry and the district court did not require him to do so pursuant to Iowa Code section 708.15.

Subsequent thereto, Ruthers filed a motion in the criminal case seeking a determination as to whether he had to register as a sexual offender. In the hearing, the district court stated:

> . . . even if I was going to make a determination on the merits, I wouldn't do anything else beyond what I've already done because 708.15 indicates that the fact finder may make a determination that the offense was sexually motivated. I didn't make that determination. And I don't believe that 708.15 requires the Court to make the determination that it was not sexually motivated.

(Statement of Undisputed Facts and Memorandum of Authorities in Support of Motion for Summary Judgment)(quoting Transcript of Proceedings, January 10, 2013, page 7, lines 14-19)(App. p. 93).

Prior to trial, Ruthers filed a Motion to Dismiss (Motion to Dismiss)(App. p. 70), a Motion for Summary Judgment (Motion for Summary Judgment with Statement of Facts and Memorandum of Authorities)(App. pp. 85, 90), and Motion to

Dismiss for Lack of Subject Matter Jurisdiction)(App. p. 191). Each was overruled and denied by the district court. (Order Denying Motion to Dismiss)(App. p. 78), (Order Denying Motion for Summary Judgment)(App. P. 124), and (Order Denying Motion to Dismiss)(App. P. 198).

ARGUMENT I

THE DISTRICT COURT ERRED WHEN IT FOUND THAT RUTHERS WAS "PRESENTLY CONFINED" FOR A SEXUALLY VIOLENT OFFENSE WHEN THE STATE FILED ITS PETITION, AND IT SHOULD HAVE DISMISSED THE PETITION

A.
RUTHERS HAD NOT BEEN DETERMINED TO HAVE COMMITTED A SEXUALLY VIOLENT OFFENSE WHEN THE STATE FILED ITS PETITION, THEREFORE RUTHERS COULD NOT BE "PRESENTLY CONFINED" FOR A SEXUALLY VIOLENT OFFENSE

Standard of Review. The district court's construction of Iowa Code chapter 229A is reviewed for errors at law. *In Re the Detention of Geltz*, 840 N.W.2d 273 (Iowa 2013).

Preservation of Error: This issue was preserved by Ruthers in his Motion to Dismiss, Motion for Summary Judgment, and Motion to Dismiss for Lack of Subject Matter

Jurisdiction, each of which was overruled and denied by the district court. (Order Denying Motion to Dismiss)(App. p. 78), (Order Denying Motion for Summary Judgment)(App. P. 124), and (Order Denying Motion to Dismiss)(App. P. 198).

Discussion: Iowa Code section 229A.4 governs the State's petition for civil commitment. Section 229A.4 "plots two separate courses for the civil commitment of a sexually violent predator." *In re Detention of Stenzel,* 827 N.W.2d 690, 697 (Iowa 2013). In the first course, the State may only seek civil commitment of a person who is not confined but who has committed a recent overt act. Iowa Code § 229A.4(2). The second applies to persons who are presently confined. Section 229A.4(1). *Id.* The confinement described in section 229A.4(1) must be confinement for a sexually violent offense. *In Re the Detention of Gonzales*, 658 N.W.2d 102, 104 (Iowa 2003).

Allowing a chapter 229A petition only when (1) the person is confined for a sexually violent offense or (2) when the person commits a recent overt act implicates the jurisdiction or authority of the district court to hear a case under chapter 229A. Unless one of those conditions is met, the district court

does not have subject matter jurisdiction or the authority to hear the case, and it must be dismissed.

In the present case, the State filed its petition against Ruthers under both Iowa Code section 229A.4(1), alleging that he was "presently confined", and under section 229A.4(2) alleging that he had committed "recent overt acts". As it relates to being "presently confined", when the State filed its petition, Ruthers was merely charged with Sexual Abuse, and was in jail awaiting trial which was to commence on the following day. A mere charge of wrongdoing is not sufficient. "Section 229A.4(2) provides that without a conviction, someone merely 'charged with … a sexually violent offense' can be committed under this chapter only if found insane or incompetent to stand trial. Iowa Code § 229A.4(2)(*b*)-(*c*) (2011)." *In Re the Detention of Geltz*, 840 N.W.2d 273 (Iowa 2013), footnote 1.

Moreover, while section 229A.3(1) states in part that a 229A action commences prior to the discharge of a person convicted from total confinement, the Iowa Supreme Court has ruled that what is required is the fact that a person has

committed a sexually violent offense, and does not depend on the imposition of a judgment of conviction. *In Re the Detention of Willis*, 691 N.W.2d 726, 729 (2005)(Emphasis added). Unlike Ruthers, in *Willis*, a jury had found Willis guilty of a sexual offense but he had not been sentenced at the time the State filed its 229A petition. The *allegation* that the person has committed a sexually violent offense only becomes a *fact* when it is determined that the person has committed the act, whether it is by guilty plea, jury verdict, or judicial determination.

The importance of determining that the person in fact committed a sexually violent offense to support a petition is evident from reading other portions of chapter 229A. In cases where no such determination is made (where there is a finding of not competent to stand trial, or a finding of not guilty by reason of insanity), chapter 229A requires a hearing where the State must prove beyond a reasonable doubt that the person committed the act charged. See Iowa Code section 229A.7(1).

At the time the State filed its petition against Ruthers, he was merely charged with a sexually violent offense. Whether

or not he had committed a sexually violent offense had not become a fact because it had not been determined to be a fact by his guilty plea, by a jury verdict, or by a judicial determination.

B.
RUTHERS WAS FOUND TO HAVE COMMITTED A NON-SEXUAL OFFENSE SUBSEQUENT TO THE FILING OF THE STATE'S PETITION. THIS CANNOT SUPPORT THE STATE'S PETITION AND IT SHOULD HAVE BEEN DISMISSED

As stated previously, on the day the State filed its petition in this matter, Ruthers pled guilty to Assault Causing Bodily Injury. A determination of wrongdoing, made after the filing of the petition, cannot retroactively make the petition proper under the "presently confined" alternative. To begin with, such a methodology violates the statute, previous decisions by the Iowa Supreme Court, and raises serious due process implications. In *Gonzales*, 658 N.W.2d 102, 104 (Iowa 2003), the Court examined the "presently confined" alternative method of commitment under chapter 229A. The confinement relieved the State of the obligation to show a recent overt act, thereby satisfying due process. *Id.* at 105. Further, the

Court linked the "confinement" criteria with the requirement that such confinement be for a sexually violent offense. *Id.* at 104-105. Without such nexus or link, the "result would not be a reasonable application of the statute because the State would be allowed to reach back in time, seize on a sexually violent offense for which a defendant was discharged, and couple this with a present confinement for a totally different—or even perhaps a trivial—offense and use chapter 229A to confine the person." *Id.* at 105.

In the present case, at the time of filing the petition, there can be no nexus or link between the confinement and the requirement that the confinement be for a sexually violent offense because Ruthers' commission of a sexually violent offense had not yet been established or otherwise become a fact. If this were to be permitted, the State could create the custody by simply filing charges accusing the person of a sexually violent offense, and then couple that contrived confinement with a previous sexually violent sexual offense for which the person has been discharged. That would not be a reasonable application of the statute and would violate due

process because it would improperly excuse the State from showing a recent overt act.

C.
SUBSEQUENT TO THE FILING OF THE PETITION IN THIS MATTER, RUTHERS PLED GUILTY AND WAS FOUND GUILTY OF ASSAULT CAUSING BODILY INJURY. THIS OFFENSE CANNOT BE A "SEXUALLY VIOLENT"/"SEXUALLY MOTIVATED" OFFENSE UNDER THE CIRCUMSTANCES OF THIS CASE

A "sexually violent offense" means:

a. A violation of any provision of chapter 709.
b. A violation of any of the following if the offense involves sexual abuse, attempted sexual abuse, or intent to commit sexual abuse:
(1) Murder as defined in section 707.1.
(2) Kidnapping as defined in section 710.1.
(3) Burglary as defined in section 713.1.
(4) Child endangerment under section 726.6, subsection 1, paragraph "e". c. Sexual exploitation of a minor in violation of section 728.12, subsection 1.
d. Pandering involving a minor in violation of section 725.3, subsection 2.
e. An offense involving an attempt or conspiracy to commit any offense referred to in this subsection.
f. An offense under prior law of this state or an offense committed in another jurisdiction which would constitute an equivalent offense under paragraphs "a" through "e".
g. *Any act which, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated.*

Iowa Code section 229A.2(11)(emphasis added).

In the present case, the State has alleged, and the district court found, that the Assault charge to which Ruthers pled guilty was "sexually motivated" and therefore was a "sexually violent offense". The State will likely assert that under subsection "g" above, it may seek a determination of sexual motivation in either or both the civil commitment case under chapter 229A and in the underlying criminal case. Were this to be true, a district court would be required to relitigate those issues that have already been litigated and been determined. Were this to be true, this methodology would violate long standing and well-settled principles of res judicata.

> Issue preclusion, sometimes referred to as collateral estoppel, is a form of res judicata. Issue preclusion prevents parties " from relitigating in a subsequent action issues raised and resolved in [a] previous action." The doctrine "serves a dual purpose: to protect litigants from the "vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation," and to further "the interest of judicial economy and efficiency by preventing unnecessary litigation. " Issue

> preclusion also "tends to prevent the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question."

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012) (citations omitted).

The party invoking issue preclusion must establish four elements:

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Id.

In the present case, the issue of sexual motivation was identical in both the criminal case and in the pending 229A case. As stated previously, the district court in the criminal case was clearly aware that Ruthers was charged with offenses that were sexual in nature. Simply looking at the court file would reveal the issues involved. More importantly, the district court was made aware of the filing of the 229A action before it accepted Ruthers' written guilty plea and imposed

judgment on the same day the petition was filed. The same district court that accepted the plea set the probable cause hearing in this matter. In the criminal case, the State did not ask for, and the district court did not order Ruthers to be placed on the sexual offender registry. Iowa Code section 708.15 requires a district court to order a defendant to register on the sex offender registry if it finds an assault against a child to have been sexually motivated. When called upon to do so, the district court determined the factual basis for Ruthers' guilty plea. It reviewed the Minutes of Testimony filed with a Trial Information alleging Sexual Abuse. The factual basis found by the district court, however, is void of sexual overtones or findings of sexual misconduct. Most importantly, on January 10, 2013, when specifically asked by Ruthers if he had to register on the sex offender registry, the district court cited to section 708.15 and affirmatively refused to order Ruthers to register on the sexual offender registry.

The issue was raised and litigated in the criminal case because the district court in the criminal case considered it and made a conscious decision to act or refrain from acting

following that consideration. (See *Employers Mutual*, 815 N.W.2d at 22: Court's acceptance of a guilty plea satisfies the "raised and litigated" requirement since the Court is required to consider and make a finding of fact). The issue of sexual motivation was material and relevant to the disposition of the criminal case and was essential to the resulting judgment because the criminal court was required by section 708.15 to sentence Ruthers to registration on the sex offender registry if it found his offense to be sexually motivated.

In addition, the parties were identical. Ruthers was the Defendant, and the State of Iowa prosecuted the criminal action against him the same as it is prosecuting the present 229A action. Moreover, it is important to mention that the State had "significant connected interests" in both the criminal and 229A actions as described by the Court in *Employers Mutual*. Both actions stem from courses designed to incarcerate or confine Ruthers; and both were prosecuted by the Iowa Attorney General's Office with a keen awareness of the consequences to Ruthers under chapter 229A based upon the outcome of the criminal case.

The State failed in each of its attempts to comply with the jurisdictional requirements of filing an action under chapter 229A. At the time of the filing of the State's petition, the fact of Ruthers committing a sexually violent or sexually motivated offense had not been determined and had not become an established fact. It was merely an accusation brought by the State in the criminal case against him. Once that allegation was resolved through an agreement with the State, by a guilty plea by Ruthers, and adjudication by the district court, it was resolved contrary to a finding that Ruthers' conduct was sexually motivated. In other words, the district court was presented with the facts and circumstances of the case, and was given at least three (3) opportunities to rule that the Assault Causing Bodily Injury was sexually motivated. Each time, the district court chose NOT to find the offense to be sexually motivated. The State cannot disregard the effects of the district court's judgment in the criminal case. The issue of sexual motivation was litigated in the district court in the criminal case by the same parties to this action, and it was resolved against the State. Given that the State did not

request the court, under 708.15 to find sexual motivation for registry purposes, it should not be permitted to reserve that issue for civil commitment. *Keokuk State Bank v. Eckley*, 351 N.W.2d 785, 792 (Iowa 1984)("An estoppel may arise from certain circumstances from silence or inaction as well as from words or actions.") Said judgment precludes the State from relitigating the issue in this case.

II.
AS A MATTER OF LAW, RUTHERS DID NOT COMMIT A "RECENT OVERT ACT", SO THE STATE WAS NOT ALLOWED TO FILE A PETITION UNDER THAT ALTERNATIVE

Standard of Review. The district court's construction of Iowa Code chapter 229A is reviewed for errors at law. *In Re the Detention of Geltz*, 840 N.W.2d 273 (Iowa 2013).

Preservation of Error: This issue was preserved by Ruthers in his Motion to Dismiss, Motion for Summary Judgment, and Motion to Dismiss for Lack of Subject Matter Jurisdiction, each of which was overruled and denied by the district court. (Order Denying Motion to Dismiss)(App. p. 78),

(Order Denying Motion for Summary Judgment)(App. P. 124), and (Order Denying Motion to Dismiss)(App. P. 198).

Discussion: The second method by which the State is allowed to file a petition under Iowa Code chapter 229A is when a person who has previously been released from confinement, either as a result of discharging a sentence for a sexually violent offense or due to a finding that the person is not competent to stand trial or is not guilty by reason of insanity, commits a recent overt act. Iowa Code section 229A.2(7) defines recent overt act as "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm."

The State alleged that Ruthers committed recent overt acts in its initial petition. The State's theory of a recent overt act suffers from the same defects as does the State's "presently confined" theory. The acts alleged as recent overt acts are the same acts alleged in the Trial Information and Minutes of Testimony as Sexual Abuse in the criminal case. When the State chose to not proceed on its allegations of sexual misconduct, allowing Ruthers to enter a guilty plea to

a non-sexual offense, Assault Causing Bodily Injury, it cannot resurrect that issue in the 229A case.

In addition, the two methods by which a 229A petition may be filed are an "either or proposition". In other words, the existence of one theory precludes the existence of the other. *Stenzel*, 827 N.W.2d at 697 and 699.

"Recent" is not defined in Iowa Code chapter 229A. The *Gonzalez* Court shed some light on what recent meant, while explaining why the "presently confined" language of chapter 22A means confinement for a sexually violent offense:

> We believe the "confinement" relied on by the State means confinement for a sexually violent offense because (1) in each of the statutes, "confinement" and "sexually violent offense" or "sexually violent predator" appear in the same sentence; (2) by interpreting the statute as the State urges us (applying the "confined person" basis for commitment) the State would be relieved of showing a "recent overt act" (a matter we discuss later); and (3) the result would not be a reasonable application of the statute because it would allow the State to **reach back in time**, seize on a sexually violent offense for which a defendant was discharged, and couple this with a present confinement for a totally different--or even perhaps a trivial--offense and use chapter 229A to confine the person. . . .

Gonzalez, 658 N.W.2d at 105 (emphasis added).

> To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the **recent past** and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another.

Id. (quoting *Lynch v. Baxley*, 386 F.Supp. 378, 391 (M.D.Ala.1974))(emphasis added).

Merriam Webster Online Dictionary (www.merriam-webster.com) defines "recent" as "happening or beginning not long ago**;** having lately come into existence; new, fresh, of or relating to a time not long past."

In the present case, the State alleges, and the district court in the criminal case found, that Ruthers committed the crime in question between October 1, 2007 and November 30, 2007. The State filed its petition on March 19, 2012, approximately four and one-half years after the crime occurred, and after approximately three and one-half years where Ruthers was out of custody in the community. This is not "recent". What Ruthers did four and one-half years ago is not "not long ago", is not "lately", is not "new", "fresh", or

"relating to a time not long past". More importantly, what Ruthers did four and one-half years ago tells us nothing about his present dangerousness, and certainly doesn't satisfy the due process concerns referred to in *Gonzalez*. The fact that Ruthers was free in the community with access to potential victims and the ability to commit sexual crimes against them, coupled with the lack of evidence that he had committed any such crimes, leads to the opposite conclusion—Ruthers' recent conduct shows that he was not dangerous because there was a complete absence of any recent overt act, attempt or threat in the more than three years he was at liberty in the community. "The significance of a recent overt act in predicting future conduct is not the act but the inference against a particular propensity that arises from the absence of an overt act. The absence of sexually predatory acts in a setting of secure confinement does not paint the same picture as the absence of such acts in a normal life situation." *In Re the Detention of Willis*, 691 N.W.2d 726, 729 (Iowa 2005).

The State has failed to satisfy the second jurisdictional requirement to the filing of a 229A petition by failing to

establish the commission of a recent overt act. Like the other allegations of sexual misconduct contained in the criminal case, the allegations of a recent overt act were charged in the prosecution. Like the other allegations of sexual misconduct, these allegations were also consciously abandoned by the State when it entered into a plea agreement with Ruthers.

Moreover, the so-called recent overt acts were alleged to have occurred approximately four and one-half years before the State filed its 229A petition, and approximately three and one-half years before Ruthers was taken into custody on the criminal charge. During this time, Ruthers was free in the community. As a matter of law, these acts were not "recent and were not "recent overt acts". As a result, the district court erred by not dismissing the petition on this ground.

III.
ALLOWING THE STATE TO ATTEMPT TO CONFINE RUTHERS PURSUANT TO CHAPTER 229A, WHEN IT CHOSE NOT TO DO SO IN THE UNDERLYING CRIMINAL CASE, MAKES CIVIL COMMITMENT AN IMPERMISSIBLE SURROGATE FOR PUNISHMENT

Standard of Review. Claims of denial of Constitutional rights guaranteed by the United States and Iowa Constitutions are reviewed de novo.

Preservation of Error: This issue was preserved by Ruthers in his Motion for Summary Judgment, which was overruled and denied by the district court. (Order Denying Motion for Summary Judgment)(App. P. 124).

Discussion: Confinement pursuant to civil commitment laws has been determined to not violate the Ex Post Facto and Double Jeopardy Clauses due to the fact that they are "civil" rather than "criminal" in nature. *Kansas v. Hendricks*, 521 U.S. 346 (1997), *In Re Detention of Garren*, 620 N.W.2d 275 (Iowa 2000). However, when civil commitment is used as a mechanism for punishment, the distinction is lost and such laws become unconstitutional:

> If the civil system is used simply to impose punishment after the State makes an

> improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.
>
> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Hendricks, 521 U.S. at 370 (Justice Kennedy's Concurrence).

The State prosecuted Ruthers on a Class A felony sexual abuse charge. At some point, the State consciously chose to discontinue that prosecution and entered into a plea agreement with Ruthers. That agreement provided that Ruthers would plead guilty to a much reduced, non-sexual charge and be immediately released from custody with credit for already serving the maximum punishment. It could be said that the State determined that the plea agreement

reached with Ruthers was improvident on its part, except that the State knew it was entering an improvident plea agreement before it entered said agreement. The facts show that the State knowingly entered into what it knew to be an improvident plea agreement with Ruthers while at the same time pursuing "Plan B" with the 229A action.

The criminal case against Ruthers sought to convict him of a Class A felony sexual abuse and confine him in prison for the rest of his life. That case and the allegations of serious sexual misconduct were abandoned, and the State allowed Ruthers to plead guilty to a serious misdemeanor non-sexual assault with a maximum penalty of one year in jail, with credit for the one year he had already served since arrest. Under the plea agreement, Ruthers would walk free immediately upon sentencing.

Ruthers does not assert that the State is never able to pursue civil commitment under chapter 229A following a plea agreement with a defendant. What makes it troubling in this case is that the 229A case was commenced when the State realized that it could not convict and confine Ruthers in the

criminal case. The State commenced the 229A case in an effort to obtain what it could not obtain in the criminal case—Ruthers' confinement.

In this case, the State used the civil commitment action as a mechanism to obtain the confinement and punishment of Ruthers that it was not able to achieve or chose not to pursue in the criminal action. That is an unconstitutional misuse of the process and cannot be allowed to stand. For those reasons, the district court should have dismissed the petition against Ruthers.

IV.
THE EVIDENCE WAS INSUFFICIENT TO FIND RUTHERS TO BE A SEXUALLY VIOLENT PREDATOR.

Standard of Review. The Court's review of the sufficiency of the evidence is for correction of errors at law. *In Re the Detention of Altman, 723 N.W.2d 181, 184* (Iowa 2006).

Preservation of Error: Following trial to the district court and its Bench Trial Ruling, Ruthers filed a timely notice of appeal. (Notice of Appeal)(App. p. 223).

Discussion. At trial, the district court heard testimony from Lieutenant Troy Boston of the Oskaloosa Police Department, the State's expert witness Dr. Anna Salter, Ph.D., and from the R.S. who was alleged to be the victim of Ruthers' assault. The district court also heard the testimony of Ruthers' expert, Dr. Richard Wollert, Ph.D.

The district court in this matter made the following specific findings of fact:

> **III. FINDINGS OF FACT**
>
> The following have been established beyond a reasonable doubt:
>
> 1. State's Exhibits 3 and 4 establish that Ruthers has been convicted of a sexually violent offense.
>
> 2. Between October 1, 2007 and November 30, 2007, on at least eight occasions Ruthers stayed in a hotel room with R.S. Only those two stayed in the hotel room on these occasions.
>
> 3. R.S. was the same gender and age range of Ruthers' previous pedophilic interest. R.S. has behavioral and learning problems.
>
> 4. Ruthers and R.S. slept in the same bed together while at the hotel room. No other adults were present on the occasions.
>
> 5. R.S. on at least one occasion swam naked in the hotel room's hot tub. Ruthers would not allow R.S. to wear swimming trunks.
>
> 6. In Mahaska County Ruthers pled guilty to Assault Causing Bodily Injury, a Serious Misdemeanor. The factual basis for Ruthers' plea of

guilty as it relates to R.S. was as follows: “Picked him up and threw him on the bed in a hard manner” and that he “hit his head on the board and had a bump.” Ruthers humped R.S. The Minutes of Testimony go on to state that while Ruthers was throwing R.S. on the bed, it was in connection with sex acts performed by Ruthers on R.S.

7. The Mahaska County conviction for Assault Causing Bodily Injury was sexually motivated. The facts and circumstances around this offense bare striking similarity to the events which got Ruthers in trouble in the State of West Virginia.

8. Ruthers suffers from a mental abnormality, that being, Pedophilic Disorder.

9. Ruthers is likely to commit predatory acts of sexual violence if not confined for treatment. In fact, Ruthers is 97.2% more likely than other sexual offenders to recidivate, based on Dr. Salter’s scoring of the STATIC-99R.

10. Ruthers’ mental abnormality of Pedophilic Disorder causes him difficulty in his emotional and volition control.

11. The likelihood that Ruthers will commit predatory acts if not confined is based in part on his relationship with R.S. in Mahaska County, his lack of prior successful treatment, and the actuarial and empirical data identified by Dr. Salter.

12. Dr. Salter is focused on Ruthers’ likelihood to recidivate during his lifetime, not just the next five to ten years.

13. Ruthers has never successfully completed sex offender treatment. While in prison, he quit the program because of the facilitator.

14. The Court concludes that Ruthers’ involvement with R.S. which led to Ruthers pleading guilty constitutes a “recent overt act.” Specifically, the Court finds that Ruthers engaged in sexual

contact with R.S. which includes Ruthers humping R.S. and Ruthers forcing R.S. to touch his penis.

15. The above-described actions caused harm in a sexually violent nature.

16. Ruthers admits to having at least four or five sexual victims, with the youngest victim being eight or nine.

(Bench Trial Ruling)(App. p. 213).

These findings of fact are based upon allegations made in the criminal case that were not admitted to by Ruthers nor were they adjudicated by the criminal court. Further, the district court relied on evidence that was insufficient to sustain a finding that this case was properly filed or that Ruthers is a sexually violent predator.

Of note, R.S. claimed problems with his memory at trial. (TT. Day One, p. 38, ln. 9-19). Specifically, when asked what Ruthers did to him, R.S. responded that ". . . he sexually raped me." (TT. Day One, p. 51, ln. 11- 12). When questioned further, R.S. could not remember what had happened:

Q. Okay. You said that he raped you? Yes?
A. Yes.
Q. Tell me what he did.
A. It's still hard to remember back then.
Q. Okay. So you don't remember it?
A. I remember a little, but not all of it. I told you already what I remember.

Q. You remember being in a room with him?
A. Yes.
Q. Is that all you remember?
A. Yes, sir.

(TT, Day One, p. 52, ln.7-17). Over objection, the district court allowed into evidence a transcript of R.S.'s interview with St. Luke's Hospital, (State's Exhibit 1)(App. p. 200), and the discovery deposition of R.S. given in the criminal case (State's Exhibit 2)(App. p. 17), (TT, Day One, p. 38, ln. 20-p. 42, ln. 12). In the undated interview with DHS, R.S. gave an account of how Ruthers touched his "private part" and how Ruthers "humped" him. This interview would have been in connection with the police investigation of Ruthers initiated in approximately August, 2010. (TT, Day One, p. 8, ln. 6-19). In said interview, R.S. told how Ruthers had forced his hand down Ruthers' pants, and started slapping him in the face. (State's Exhibit 1 (App. p. 205), p. 18, ln. 6-p. 20, ln. 8). R.S. further stated that, at the hotel, Ruthers threw him on the bed and started humping him. He said he hit his head on the board and caused a bump on is head. (State's Exhibit 1, p. 21, ln. 3-4; p. 26, ln 1-21)(App. p. 205). R.S. stated that

Ruthers was naked, and pulled down R.S.'s pajama bottoms and underwear. (State's exhibit 1, p. 27, ln. 12-p.29, ln. 14; p. 36, ln. 5-11)(App. p. 205).

On October 21, 2011 and November 2, 2011 , R.S. was deposed by Ruthers in discovery depositions as part of the criminal case. The details of events given by R.S. in the depositions were materially different than the details given to the DHS. Moreover, the details given in the deposition were inconsistent with other details given in the same deposition. For example, on November 2, 2011, R.S. again described how Ruthers forced R.S.' hand down his pants. This time, however, R.S. denied that Ruthers slapped him. (State's Exhibit 2, p. 16, ln. 11-p. 19, ln. 10)(App. p. 20). With regard to what allegedly took place in the hotel room, R.S. testified that he was pushed onto the bed, not thrown. He did not hit his head, and did not have a bump on his head from anything Ruthers did. After which, R.S. stated that Ruthers gave him a "tap on the butt" and told him to go to bed. (State's Exhibit 2, p. 36, ln. 12-p. 44, ln. 13)(App. p. 25). R.S. then explains how he and Ruthers both went to bed, woke up the next morning,

and ran some errands. (State's Exhibit 2, p. 44, ln. 13-p. 49, ln. 22)(App. p. 27). After a long, recitation of events, when asked specifically if anything happened in the hotel room, R.S. finally states "he humped me". (State's Exhibit 2, p. 49, ln. 23-p. 50, ln. 6)(App. p. 29). R.S. then describes how Ruthers humped him, stating that Ruthers removed R.S.'s pajama pants, but did not remove his underwear as previously stated. Additionally, R.S. stated that Ruthers was clothed rather than naked as he had previously stated. State's Exhibit 2, p. 50, ln. 14-p. 65, ln. 21)(App. p. 29). Later in the same deposition, R.S. stated that Ruthers slipped his pants off and was naked. (State's Exhibit 2, p. 73, ln.-20)(App. p. 50).

R.S. received therapy for 17 sessions in 2008, 2010 and 2011 at New Directions. In the first session, R.S. said he was there because of "what Tom [Ruthers] did", but after that no mention was made about any alleged sexual impropriety by Ruthers. (TT, Day Two, p. 17, ln. 4-22). Finally, in his testimony in the present case, R.S. could not describe the specific conduct alleged to have been done by Ruthers. To quote Dr. Wollert, R.S. did not have a "coherent specificity to

[his] allegations." This is clearly not proof beyond a reasonable doubt and is not sufficient to sustain a finding that Ruthers is a sexually violent predator.

The district court allowed and relied upon inadmissible evidence in this matter. Said inadmissible evidence formed a basis for the district court's decision that Ruthers was a sexually violent predator. Said evidence took the form of allegations of sexual wrongdoing by Ruthers that went beyond what the convictions, the plea proceedings, and the trial records divulge. *In Re the Detention of Stenzel*, 827 N.W.2d 690, 709 (Iowa 2013).

Ruthers was initially charged with the crime of Sexual Abuse in the Second Degree, perpetrated against R.S., and Minutes of Testimony containing those allegations were made available to him and the district court. Those Minutes detailed essentially the same information as contained in R.S.'s statement to St. Luke's Hospital, (State's Exhibit 1)(App. p. 200), and his discovery deposition in the criminal case (State's Exhibit 2)(App. p. 17). However, these details were denied at all stages by Ruthers.

Instead, Ruthers plead guilty to and admitted that he "assaulted Bobbie Shelton and in so doing caused a bodily injury". As shown by the plea, Ruthers did not admit to the unproven allegations that he committed Sexual Abuse against R.S.. When the district court in the criminal trial was called upon to set aside Ruthers' guilty plea by the State, the district court made specific findings of fact in a process that was akin to a trial on the minutes of testimony. Those findings, which are the final judgment of the district court in the criminal case, and are the law of the case, are that Ruthers committed assault causing bodily injury by throwing R.S. onto a bed causing a bump to his head. The district court in the criminal case did not adopt or find any facts which would indicate that Ruthers engaged in any sexual misconduct or that the conviction was sexual in nature. In fact, when the issues of sexual motivation, Iowa Code section 708.15, and whether Ruthers was required to register on the Sexual Offender Registry, the district court declined to order the same.

The State's expert relied heavily upon this inadmissible information. It largely contributed to her opinions that

Ruthers suffered from the mental abnormality of pedophilic disorder, and his level of risk under an actuarial risk assessment instrument. (TT, Day One, p. 181, ln. 18-p. 184, ln. 24; p. 187, ln. 25-p. 188, ln. 1; p. 198, ln. 13-p. 199, ln. 25; p. 202, ln. 23-p. 206, ln. 13). The State's expert's opinion was not concerned with whether Mr. Ruthers actually committed a sexually violent or sexually motivated offense against R.S., only that he was accused of doing so. *Id.*

The issue of whether Ruthers actually committed a sexually violent or sexually motivated offense against R.S., as opposed to merely being accused of it, was important to Ruthers' expert. He testified that it affects the diagnoses, it affects the actuarial risk assessment instruments, and it should affect an evaluator's ultimate opinions. (TT, Day Two, p. 14, ln. 23-p. 15, ln. 7). Ruthers' expert detailed the criminal court process involving Ruthers, and detailed each of the decisions made by the criminal court where it repeatedly refused to find sexual motivation in Ruthers' acts. This was important to Ruthers' expert because, if Ruthers did not commit a sexual offense against R.S., he would have been in

the community without a sexual offense for approximately twelve years. According to research, being free in the community without being charged with a sexual offense for ten years would reduce a person's risk for sexual reoffending by approximately 75%. (TT, Day Two, p. 20, ln. 3-p. 21, ln. 19). Ruthers' commission of a sexually violent or sexually motivated offense against R.S. was not proven in the criminal case, and was not proven beyond a reasonable doubt in this case.

The district court in this case allowed such inadmissible evidence, then relied upon the State's expert who relied on it, and relied on it itself, to find Ruthers to be a sexually violent predator. In its Ruling, the district court cited to the Minutes of Testimony in the criminal case for the finding that "Ruthers humped R.S.", and that Ruthers' throwing R.S. on the bed was "in connection with sex acts performed by Ruthers on R.S.". Further, the district court found that Ruthers' conviction for Assault Causing Bodily injury was "sexually motivated". The district court cited to the State's expert's assessment that Ruthers "is 97.2% more likely than other sexual offenders to

recidivate". This testimony is based solely on said expert's reliance on an unadmitted and unadjudicated allegation.

This evidence, which amounted to unproven, unadmitted allegations, has no probative value whatsoever because it has not been admitted by Ruthers nor has it been tested by the trial process. It is not the kind of evidence reasonably relied upon by experts in the field, it is not the kind of evidence reasonable relied upon by courts, and is not the kind of evidence that supports a finding that Ruthers is a sexually violent predator.

CONCLUSION

Iowa Code chapter 229A allows a petition to be filed in two circumstances—when a person is "confined" for a sexually violent offense (defined in part as a sexually motivated offense), and when a person is not confined but has committed a recent overt act of a sexually violent nature. In the present case, the State has alleged that both of these criteria apply. Ruthers was charged with a sexually violent offense, Sexual Abuse in the Second Degree, in the criminal case. The State, represented by the Iowa Attorney General's Office, abandoned

this prosecution and entered into a plea agreement allowing Ruthers to plead guilty to Assault Causing Bodily Injury. The State made no request for Ruthers to register as a sexual offender, obtain sexual offender treatment, or make any other request that would indicate that Ruthers was pleading guilty to sexual or sexually motivated offense.

Before the plea agreement was consummated, the State, again the Iowa Attorney General's Office, had prepared and filed the 229A action in this case. After Ruthers plead guilty to the non-sexual assault, the State amended its 229A petition to allege that the assault charge was sexually motivated. The district court in the criminal case had at least four opportunities to determine Ruthers' conduct to be sexually motivated, the last time after Ruthers specifically asked. The district court declined each time.

After the district court in this case rejected Ruthers challenges to the filing of the 229A case against him, this matter went to trial to the court. The district court allowed and relied upon the mere allegations contained in the criminal case that went beyond what was admitted by Ruthers or

adjudicated by the criminal court. The evidence it relied upon was insufficient to show beyond a reasonable doubt that Ruthers is a sexually violent predator.

For these reasons, Ruthers prays the Court to remand this case for dismissal of the State's petition; or in the alternative, to remand the case for a new trial where the objectionable evidence will not be heard.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Counsel for the Respondent-Appellant respectfully requests to be heard in oral argument upon the submission of this case.

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Brief and Argument was $__0____, and that amount has been paid in full by the Office of the State Public Defender.

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CERTIFICATE OF COMPLIANCE

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 8,145 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: April 25, 2018

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