IN THE SUPREME COURT OF IOWA

No. 17-1539

Mashaska County No. CVEQ087132

IN RE DETENTION OF
THOMAS G. RUTHERS JR.
Respondent-Appellant

APPEAL FROM THE DISTRICT COURT IN
IN AND FOR MAHASKA COUNTY
THE HONORABLE JOEL YATES
JUDGE OF THE EIGHTH JUDICIAL DISTRICT

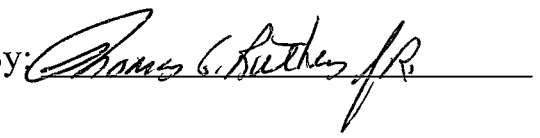
RESPONDENT-APPELLANT'S REPLY BRIEF

Thomas G. Ruthers Jr.
CCUSO
1251 W. Cedar Loop
Cherokee, Ia. 51012

CERTIFICATE OF SERVICE AND FILING

I, Thomas G. Ruthers Jr., Respondent-Appellant, hereby certify that I did file the within Respondent-Appellant's Reply Brief with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Ave., Des Moines, Iowa, 50319, by U.S. Mail.

Pursuant to Iowa Rules of Court, Rule 16.317(2) the undersigned person did serve a true and accurate copy of the within Respondent-Appellant's Pro Se Supplemental Page Proof Brief and Argument on the Clerk of the Supreme Court by sending same via U.S. Mail on this 24th day of April, 2018 to be served on all parties electronically.

By: 

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STATEMENT OF THE CASE

COMES NOW Respondent-Appellant, Thomas G. Ruthers Jr., pro se with the following Reply to the Appellee's Brief filed April 4 2018, pursuant to Iowa R. App. P. 6.903(4). Counsel for the Respondent-Appellant declined to file a Reply Brief therefore Respondent is filing under same standards afforded Counsel.

RESPONSE ARGUMENT

I. Willis is inapplicable to the Respondent's Case

The State in it's Petition, Para. 8 and it's Brief, pg. 31 constantly rely on *In Re Det. Of Willis*, 691 N.W.2d 726 (Iowa 2005) to justify it's petition and proceed with the civil commitment.

Respondent argues that *Willis* is not applicable to the Respondent's case.

The *Willis* Court as the State portrays it, "opined that the subject of an SVP petition need not "be convicted of a sexually violent offense before the petition is filed, " it was sufficient that the "basis for the sheriff's custody" was that the respondent "had committed a sexually violent offense." Id. At 729" Appellee's Brief, pg. 31

Willis had been found guilty by a jury of committing the offense of assault with intent to commit sexual abuse.

The *Willis* Court ruled that "We are convinced that the gap between the verdict and sentencing does not provide any basis for granting Willis relief . . " *Willis* at 691 N.W.2d at 729, finding that "The basis for the sheriff's custody of Willis at the time the petition was filed was the fact that he had committed a sexually violent offense." *Willis* at 729

The same finding simply doesn't not apply to the Respondent.

Using the same dicta, the basis for the Mahaska County Sheriff's custody of Respondent at the time the petition was filed on March 19, 2012 was he was awaiting trial for a charge of Sexual Abuse in the 2nd Degree with an pending written guilty plea that was entered 1 hour and 47 minutes after the petition was filed (Petition filed 1:11 pm and written guilty plea filed 2:57 pm) to an assault causing bodily injury of Bobbie Shelton, an adult female. Written Guilty Plea, (App.). See also Transcript March 22, 2012 Probable Cause Hearing, pg. 17-19, Direct and Cross Examination of Kenneth Duker and Record, Mahaska County No. FECR 063078[1], Transcript, March 26, 2012 pg. 12-13. It should be noted that Susan Krisko, Asst. Atty Gen. prosecuting the case declined cross-examining the Respondent. The entered written guilty plea requires the charge be dismissed with prejudice.

[1] The Record in FECR063078 was entered into the record in CVEQ 087132 under Judicial Notice at the Probable Cause Hearing. Transcript, March 22, 2012, pg. 15 L. 23-25, pg. 16, L. 1-7.

The Iowa Supreme Court has held 2 definitions of the word "convicted". *State v. Tong*, 805 N.W.2d 599, 601 (Iowa 2011) citing *State v. Kluesner*, 389 N.W.2d 370,372 (Iowa 1986) It is obvious that the *Willis* court was applying the second definition which "requires the post plea or post verdict judgment and sentencing have taken place." *Tong* at 601 citing *Kluesner*, at 372 since Willis had been found guilty by the jury of Assault with intent to commit sexual abuse prior to filing the petition.

It would be contradictory to the plain language meaning of §229A's definition of a sexually violent offense as the State pleaded in it's Original Petition that Respondent was presently confined under §229A.4(1) awaiting trial on the Sexual Abuse in the Second Degree charge. That would clearly require a finding of guilt either by plea or verdict as the statute requires "A violation of any provision of Chapter 709" Iowa Code §229A.2(11)(a).

The State also relying on *In Re Det. Of Shaffer*, 769 N.W.2d 169,174 (Iowa 2009) suggests Respondent is attempting to apply a "hypertechnical definition" to the term "presently confined".

As both parties agree, to be presently confined under §229A.4(1) a person must be confined for a sexually violent offense. *Shaffer*, at 174; *In Re Det. Of Gonzales*, 658 N.W.2d 102,104 (Iowa 2003)

If anybody is attempting a "hypertechnical definition" of §229A.2(11)(a), it's the State. To suggest as the State does that a person charged with a "provision of

Chapter 709" has committed "A violation" of that provision when charged with the offense is clearly a hypertechnical definition and borderline absurd. *Anderson v. State*, 801 N.W.2d 1, 7 (Iowa 2011). Additionally, holding that a person committed "A violation" of a sexually violent offense and presently confined for that offense under 229A.4(1) if charged awaiting trial would conflict with Iowa Code §701.3 titled "Presumption of Innocence" that "Every person is presumed innocent until proved guilty". *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978) ("Statutes will be construed in such a manner as to be consistent with each other.")

II. The Pro Se Claims regarding R.S. Testimony were properly preserved and have merit.

The State argument on preservation by counsel is meritless, the issues raised by Respondent regarding R.S. testimony and State's Exhibit's 1 and 2 were preserved by Counsel and if not, then the State is supporting Respondent's Pro Se preservation of error in his Supplemental Pro Se Brief (pgs. 20-21) that these claims can be heard under ineffective assistance of counsel.

A. Counsel's Preservation

The State raises that the only objection to the admission of the State Exhibit's 1 and 2 (Appellee's Brief, pg. 54-57, pg. 71) The record clearly shows that two (2) objections were made. (Trial Transcripts, Day One, pg. 39, L.1-16.

(Petitioner's Exhibit 1 was offered into evidence.)

THE COURT: Any objection?

MR. ADAMS: Yes, Your Honor. My first objection is under Article I, Section 10 of the Iowa Constitution. This is a case involving the liberty of Mr. Ruthers. Even though it's not a criminal case, he has a right to confront his accuser. If you allow this transcript into evidence, he is not being allowed to confront his accuser because the information is coming from a different source than his accuser. Secondly, this document does not bear the characteristics of trustworthiness that we would require of written documents. The individual -- The witness has stated that he has had memory problems since birth. Those are likely reflected in this document that was given seven years ago, or however many years ago it was. So for those reasons, I would object to that.

The Respondent states that the "trustworthiness" that was the basis of the second objection was a challenge to the "sufficiency of evidence" that the State claims Counsel failed to raise.[2] I*n Re Det. Of Betsworth*, 711 N.W.2d 280, 286-287 (Iowa 2006) Given that the only evidence presented by the State was R.S.'s "I don't remember" Trial Testimony and an inadmissible interview and sworn depositions that contradict themselves, the Trial Transcript refutes the State's claim. It is unclear whether the Trial Court used any of this evidence in it's decision as the Court refers only to the "minutes of testimony." It should be further noted that the issue as to any evidence or testimony regarding R.S. be withheld was properly raised in Counsel's

[2] On April 13, 2018 The Iowa Supreme Court decided two cases which discussed "presently confined" and "sufficiency of evidence". See *In Re Det. Of Wygle*, __ N.W.2d __, Iowa Sup. Ct. 16-1732 (April 13, 2018) and *In Re Det. Of Tripp*, __ N.W.2d __, Iowa Sup. Ct. 162141 (April 13, 2018). Respondent incorporates these decisions in his arguments.

Motion In Limine filed Apr. 20, 2015 , pg. 6, para. 8 which the Court did not hear. Should the Court decide that because Counsel failed to file a Motion to Enlarge and Amend and the issue is not preserved, then ineffective assistance of counsel must be examined and the issues heard.

Additionally, in Counsel's objection to State's Exhibit 2, Counsel clearly objected to the "Sufficiency of the Evidence" when he questioned the purpose of the depositions that the State relied upon:

THE COURT: Any objection to State's Exhibit 2?

MR. ADAMS: Yes, Your Honor. Same objection. In addition, Mr. Shelton was deposed in a discovery proceeding in the criminal case. He was asked questions that trial counsel would not ask in a trial. Essentially, the deposition was a fishing expedition to gather knowledge to discover what there was about the case. Open-ended questions were asked. The motivation to ask those questions is different than the motivation to ask someone questions in trial.
So for that reason, we would object to the introduction of State's Exhibit 2. Even though it is prior recorded statements -- or I'm sorry -- sworn statements, it's with a different purpose in mind than what we have here; and therefore, it violates the confrontation clause and should not be admitted. Thank you.

Trial Transcript Day One, pg. 41 L. 11-24

B. Respondent's Pro Se Ineffective Assistance of Counsel Preservation

As Respondent raised in numerous areas of his Pro Se Supplemental Brief, any issue not resolved by the Court or waived by counsel at trial is preserved under the

merits of ineffective assistance of counsel. *State v. Madsen*, 813 N.W.2d 714,723 (Iowa 2012); *State v. Rodriquez*, 804 N.W.2d 844, 848 (Iowa 2011); *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008); *State v. Horness*, 600 N.w.2d 294, 297 (Iowa 1999).

Additionally, Ineffective-assistance-of-counsel claims are generally preserved for postconviction relief proceedings, but "we will consider such claims on direct appeal where the record is adequate." *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (quoting *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999)); see also Iowa Code §814.7 (3); *State v. Fannon*, 799 N.W.2d 515, 519 (Iowa 2011)

If the State insists that counsel did not properly preserve them, then the State's argument surely would agree and support that counsel was ineffective and the issues should be heard under those merits. Respondent would raise if that Counsel was ineffective then the issues should be heard under those merits on direct appeal since the record "is adequate" for the Court to hear the claim. While §814.7 (3) involves criminal appeals, §229A.6 gives persons held as safekeepers under this statute the right to counsel therefore the same rules should apply given the liberty and due process interests afforded Respondents. *In Re Det. of Seewalker*, 689 N.W. 2d 705, footnote 1 (Iowa 2004).

C. R.S. Testimony does not contain "minor inconsistencies" but substantial inconsistencies which are absurd, impossible, or self-contradictory and lack experiental details.

The State alludes that "R.S.'s testimony may contain minor inconsistencies but has been consistent that the Respondent molested him in a Mahaska County hotel room by humping him." Appelle's Brief, pg. 71.

The fact is R.S's testimony, from his St. Lukes interview to his second deposition is far more than "minor inconsistencies." His trial testimony was a lot of "I don't remember" including how he was allegedly "raped." Trial Transcript, Day One, pg. 52 L. 7-13.

State's Exhibit's 1 and 2 are so inconsistent the State's Assistant Attorney General, Susan Krisko, prosecuting the case, abandoned the Sexual Abuse in the Second Degree charge for a non-sexual offense of Assault causing bodily injury after clear position that the Respondent would not plead to a sex offense.[3] (App.)

The Sentencing Court, a week after sentence was handed down for time served, changed the factual basis of the plea to Respondent picking up R.S. slamming him down on the bed and causing a bump on his head which R.S. clearly stated on two

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[3] Susan Krisko didn't write the written guilty plea, file an amended trial information and didn't even read the written guilty plea "close enough" prior to it's entry and made no objections or required any changes to it's entry. Record, Mahaska County No. FECR 063078[3], Transcript, March 26, 2012 pg. 4 L. 25, pg. 5 L. 1-3. It should be noted that the Court also admitted that they didn't read the agreement close enough either. Transcript, March 26, 2012, pg. 17 L. 15-16.

different occasions under oath in the Nov. 2, 2011 deposition never happened. Interview (State's Exhibit 1) [APP] pg. 26, L.3-19 yet during the Nov. 11, 2011 Deposition (State's Exhibit 2) [APP] pg. 37, L. 8-12, pg. 39 L. 13-25 through pg. 40 L. 1-9, pg. 65, L. 19-21.

The Court should ask these questions:

How could an act that the victim said didn't happen be sexually motivated?

Respondent had clear and convincing evidence to show that R.S. was lying but Trial Counsel, Mike Adams refused to enter this evidence including a hotel receipt that would have shown that the "hot tub" room (Room 204) were the alleged attacks occurred was only rented the first night they were in Iowa. One of the "minor inconsistencies" that the State claims, if R.S. is to be believed, he wasn't even in the hot tub room the only night it was rented because he has consistently stated that he didn't stay with Respondent the first night they were in Mahaska County. Deposition, Oct. 21, 2011, [APP] pages 29, L. 7-9, pg. 36 L. 12-14, and pg. 39, L. 21-25 and Deposition, Nov. 2, 2011, [APP] pg. 9 L. 25-pg. 10 l. 1-22.

He clearly describes events that cover a 3-day period in the hot tub room before the "humping" allegedly occurred. Respondent's Pro Se Supplemental Brief, pgs 23-24, para. C.

Anyone who would read these transcripts would not be able to find these acts occurred "by clear and convincing evidence" Iowa Code §229.12(3)(c), let alone by

"reasonable doubt," the standard required in civil commitment proceedings. Iowa Code §229A.7(5)(c).

As noted in Respondent's Pro Se Supplemental Brief, pgs.22-25 along with other "inconsistencies", R.S. even outright lied to the trial court during his "I don't remember" testimony that he had the fingerprint of the doctor that delivered him on his eyeball. Trial Transcript, Day One, pg. 48 L. 15-25 through pg. 49 L. 1-5.

III. The State lacked jurisdiction to file the Civil Commitment Proceedings and therefore did not properly invoke the Court's Jurisdiction/Authority

The State's broad arguments regarding the pro se claims, Appellee's Brief, pgs. 67-53 fails to address the main issue of the brief that the §229A Court lacked jurisdiction/authority of the case to find probable cause and proceed to trial because:

1. At the time the petition was filed Respondent was not "presently confined" under Iowa Code §229A.4(1) as there was no "violation of the provisions of Chapter 709" Iowa Code §229A.2(11)(a) when Respondent was awaiting trial for ~~charge~~ Charge of Sexual Abuse in the Second Degree.

Additionally, the State had already agreed to and the Respondent had already signed a written guilty plea dismissing the Sexual Abuse in the Second Degree.

2. At the time the petition was filed, the Recent Overt Acts (Iowa Code §229A.4(2)) that the State relied upon in their Petition, (a-c) were 1) not "recent" having occurred 4.5 years prior to the filing of the petition; 2) were uncharged or dismissed acts, *In Re*

Det. of Stenzel, 827 N.W. 2d 690,710 (Iowa 2013), especially c which was the same act for which the State used as "presently confined", the Sexual Abuse in the Second Degree charge that they had already agreed to dismiss and 3) violate the negotiations and terms of the written guilty plea.

Failing to specifically argue the jurisdiction/authority issue shows the State, as throughout the criminal and civil cases, obviously feels they do not have to have or invoke the court's jurisdiction/authority before they can file motions and proceedings. *Christie v. Rolscreen Co.*, 448 N.W. 2d 447, 450 (Iowa 1989) citing *Tombergs v. City of Elderidge*, 433 N.W. 2d 731, 733-34 (Iowa 1988). See also *Schrier v. State*, 573 N.W. 2d 242, 244-45 (Iowa 1997) (Court lacks authority to hear a particular case where a party fails to follow statutory procedures for invoking court's authority) While subject matter jurisdiction can be raised at anytime, this Court has held jurisdiction/authority of the Court must be raised in the district court in order to preserve error. *State v. Emery*, 636 N.W. 2d 116, 120 (Iowa 2001) citing *State v. Mandicino*, 509 N.W. 2d 480, 483 (Iowa 1993). ("Thus an objection to the Court's Authority to hear a particular case must be raised in that court in order to preserve error on this issue.") Given the record is clear that counsel never raised jurisdiction/authority of the case, only subject matter, this issue can and must be heard under the merits of ineffective assistance of counsel. *State v. Madsen*, 813 N.W. 2d 714,723 (Iowa 2012)

CONCLUSION

The CPC Interview (State's Exhibit 1) was inadmissible heresay under R. Evid. Rule 5.802 and cannot be an exception under R. Evid. Rule 5.803 *Recorded Recollection* as there is no date as to when the statement/interview was done, They were not given under oath, the State failed to enter the DVD in which that transcript was done and the Court Reporter, Bridget A. Swanstrom, never dated when the transcription was done nor testified at trial as to it's validity. See State's Exhibit 1, pg. 50. The document has nothing to prove that it is "authentic" thus heresay. Additionally, any person reading the Interview and the depositions would see the majority of the alleged sex acts were contradicted, recanted and lacking in experiential detail and could not be considered credible. Which in turn, would make the minutes of testimony(which were not presented at trial) relied on by the trial court as a basis of commitment note "facts of data" citing Iowa R. Evid. 5.703 and "unfair prejudice." Iowa R. Evid. 5.403.

The State's filing of the petition clearly suggests gamesmanship, agreeing to dismiss with prejudice the sex offense after a stipulation by Respondent's counsel for a plea to a non-sexual offense, only to argue presently confined or Recent Overt Acts for the same act(s) they dismissed nor charged the Respondent.

The State, not stipulating a factual basis, agrees to a plea for a serious misdemeanor in exchange for a dismissal of the felony sex offense with life

enhancement while in the background secretly begins processing Respondent for civil commitment.

The Attorney Generals Office, prosecuting the criminal case, didn't write the written guilty plea, admitted they didn't read it close enough and lets it be entered without filing a motion under Iowa Code §708.15 to have the crime registered of the Sex Offender Registry as "sexually motivated."

As the Record in Mahaska County FECR063078 shows, no amended trial information was filed contrary to the March 19, 2012 Judgment Entry which found the factual basis for the plea "Based on the written guilty plea of the defendant. . ." which clearly as all parties agree, states the victim as B.S. using the specific name.

The State continues to rely on the CPC Interview and that Respondent "grabbed R.S. and threw him on the bed" Appellee's Brief, pg. 17, which clearly shows gamesmanship because R.S. clearly stated under oath twice that Respondent never threw him on a bed and the Respondent never caused bump on his head. So the conviction that Judge Gamon found Respondent guilty never happened and the State lets that go but now wants it "sexually motivated".

Finally, the only issue regarding the Counterclaim and Request for Contempt charge is whether the Court violated the constitutional rights argued in his pro se brief by delaying hearing those issues until after the civil trial then saying they didn't have

jurisdiction. The merits of the counterclaim and Request for Contempt charges is not ripe for consideration.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Iowa R. App. P. 6.903(1) (g) (1) or (2) because it contains 3,225 words, excluding the parts of the brief exempted by the rule. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type face requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font 14.

By: _____ Date: April 24, 2018

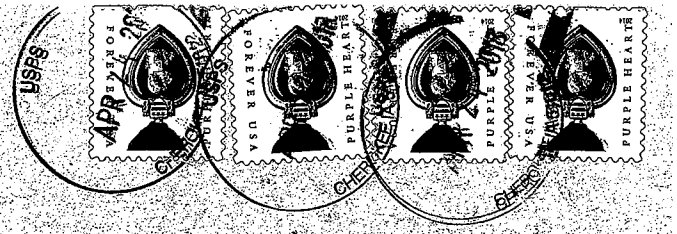
RESPONDENT'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.80, and that amount has been paid in full by Respondent.

_____

Thomas G. Ruthers Jr. CCUSO
1251 W. Cedar Loop, #6
Cherokee, Ia. 51012

Thomas G. Kuthers JR
CCUSO
1251 W. Cedar Loop
Cherokee, IA 51012



Clerk of Court
Iowa Supreme Court
1111 East Court Ave.
Des Moines, IA.
50319

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