IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1539

IN RE: THE DETENTION OF
THOMAS G. RUTHERS, JR.,
Respondent–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MAHASKA COUNTY
THE HONORABLE JOEL D. YATES, JUDGE

APPELLEE'S BRIEF

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FINAL

CERTIFICATE OF SERVICE

On the 30th day of April, 2018, the State served the within Appellee's Brief and Argument on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties and by mailing one copy to the *pro se* defendant:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Respondent Was Presently Confined in the Mahaska County Jail Awaiting Trial for Sexual Abuse. The Respondent's Plea Was to a Sexually Violent Offense as Defined by Chapter 229A.

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17 (Iowa 2012)
In re Det. of Geltz, 840 N.W.2d 273 (Iowa 2013)
In re Det. of Gonzales, 658 N.W.2d 102 (Iowa 2003)
In re Det. of Johnson, No. 10-1462, 2012 WL 1860242 (Iowa Ct. App. May 23, 2012)
In re Det. of Shaffer, 769 N.W.2d 169 (Iowa 2009)
In re Det. of Willis, 691 N.W.2d 726 (Iowa 2005)
In re Detention of Altman, 723 N.W.2d 181 (Iowa 2006)
In re Matlock, No. 01-1094, 2003 WL 288999 (Iowa Ct. App. Feb. 12, 2003)
Shumate v. Drake Univ., 846 N.W.2d 503 (Iowa 2014)
Iowa Code § 229A.4
Iowa Code § 229A.2(6) (1999)
Iowa Code § 229A.2(10) (2015)
Iowa Code § 229A.2(11) (2015)
Iowa Code § 229A.2(11)(g) (2015)
Iowa Code § 229A.4(1), (2)(a)–(c) (2015)
Iowa Code § 229A.4(2)(b)–(c)
Iowa Code § 708.15 (2015)
Iowa Code §§ 229A.4(1), 229A.2(11)(g) (2015)
Restatement (Second) of Judgments § 27 (1982)

II. The District Court's Alternative Conclusion that the Respondent Committed a Recent Over Act Was Also Supported by Substantial Evidence.

In re Detention of Altman, 723 N.W.2d 181 (Iowa 2006)
Froats v. State, 140 P.3d 622 (Wash. Ct. App. 2006)
Hill v. County Board of Mental Health, 279 N.W.2d 838 (Neb. 1979)
In re Det. of Gonzales, 658 N.W.2d 102 (Iowa 2003)
In Re Det. of Swanson, 668 N.W.2d 570 (Iowa 2003)

In re Det. of Willis, 691 N.W.2d 726 (Iowa 2005)
In re Interest of Blythman, 302 N.W.2d 666 (Neb. 1981)
In re Pugh, 845 P.2d 1034 (Wash. Ct. App. 1993)
Matter of Mohr, 383 N.W.2d 539 (Iowa 1986)
In re Det. of Shaffer, 769 N.W.2d 169 (Iowa 2009)
Shumate v. Drake Univ., 846 N.W.2d 503 (Iowa 2014)
Iowa Code § 229A.2(8) (2015)

III. This Chapter-229A Proceeding Was Not an Impermissible Surrogate for Punishment.

Kansas v. Crane, 534 U.S. 407 (2002)
Kansas v. Hendricks, 521 U.S. 346 (1997)
In re Crane, 7 P.3d 285 (Kan. 2000)
In re Det. of Garren, 620 N.W.2d 275 (Iowa 2000)
In re Det. of Matlock, 860 N.W.2d 898 (Iowa 2015)
Iowa Code § 229A.1 (2015)

IV. The Respondent's Evidentiary Complaints Are Mislabelled and Without Merit.

City of Orange City v. Lot 10, No. 99-1565, 2002 WL 100681 (Iowa Ct. App. Jan. 28, 2002)
In re Det. of Risdal, No. 05-0739, 2006 WL 1896255 (Iowa Ct. App. July 12, 2006)
In re Det. of Stenzel, 827 N.W.2d 690 (Iowa 2013)
In Re Det. of West, No. 11-1545, 2013 WL 988815 (Iowa Ct. App. Mar. 13, 2013)
In re Det. Williams, 628 N.W.2d 447 (Iowa 2001)
In re W.G., No. 01-1276, 2002 WL 1332718 (Iowa Ct. App. June 19, 2002)
State v. Liggins, 557 N.W.2d 263 (Iowa 1996)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Henderson, 696 N.W.2d 5 (Iowa 2005)
State v. Lange, 831 N.W.2d 844 (Iowa Ct. App. 2013)
State v. Piper, 663 N.W.2d 894 (Iowa 2003)
State v. Trowbridge, No., 12-2272, 2014 WL 955404 (Iowa Ct. App. Mar. 12, 2014)
Weilbrenner v. Owens, 586, 68 N.W.2d 293 (Iowa 1955)
Iowa R. App. P. 6.903(2)(g)(1)

V. The Pro Se Claims Are Without Merit. The Sufficiency Questions Are Adequately Addressed Above, and the Other Claims in Division I Are Baseless.

Ruthers v. State, No. 16-0249, 2018 WL 739244 (Iowa Ct. App. Feb. 7, 2018)
State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971)
Iowa Code § 229A.2(11)(g) (2015)
Iowa R. App. P. 6.801

VI. The Pro Se Claims Regarding R.S.'s Testimony Were Not Preserved and Lack Merit.

State v. Smith, 608 N.W.2d 101 (Iowa Ct. App. 1993)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Liggins, 557 N.W.2d 263 (Iowa 1996)
State v. Henderson, 696 N.W.2d 5 (Iowa 2005)
State v. Rojas, 524 N.W.2d 659 (Iowa 1994)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)
Iowa R. Evid. 5.804

VII. The Pro Se Issues Related to the "Counterclaim" or "Contempt" Are Meritless.

Kruger v. Erickson, 77 F.3d 1071 (8th Cir. 1996)
Bensley v. State, 468 N.W.2d 444 (Iowa 1991)
In re Commitment of Butler, No. 09-13-00358-CV, 2014 WL 4364526 (Tex. App. Sept. 4, 2014)
In re Commitment of Dodson, 434 S.W.3d 742 (Tex. App. 2014)
In re Det. of Shaffer, 769 N.W.2d 169 (Iowa 2009)
In re Det. of Williams, 628 N.W.2d 447 (Iowa 2001)
In re Estate of Voss, 553 N.W.2d 878 (Iowa 1996)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Rivera v. Woodward Res. Ctr., 830 N.W.2d 724 (Iowa 2013)
Sjuts v. State, 774 So. 2d 783 (Fla. Dist. Ct. App. 2000)
Iowa Code §§ 669.3(2), 669.3

ROUTING STATEMENT

The respondent urges that this case warrants retention essentially because the precise factual circumstances of this action to commit a sexually violent predator have not been addressed in Iowa's appellate decisions. *See* Respondent's Prof Br. at 4– 5. Such a fact-bound determination does not ordinarily warrant retention, particularly when the existing legal framework can guide an interpretation of the plain language in Iowa Code Chapter 229A. This case can be decided based on existing legal principles and transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The respondent, Thomas G. Ruthers, appeals his commitment as a sexually violent predator ("SVP") pursuant to Iowa Code Chapter 229A. The respondent was found to be an SVP in a bench trial before the Mahaska County District Court, the Hon. Joel D. Yates presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The respondent, an admitted pedophile, has been committed as a sexually violent predator. Evidence at the SVP trial established the respondent has a 40+year history of molesting young boys, which manifested most recently when he "humped" and rubbed his penis against eight-year-old R.S. in Mahaska County. A forensic psychologist diagnosed the respondent with pedophilic disorder and, based on the use of actuarial instruments and dynamic risk factors, concluded the respondent was more likely than not to commit future sexually violent offenses if not confined in a secure institution.

The respondent has a history of sexually abusing little boys.

When he was around age 13, the respondent fondled and performed oral sex on little boys in the neighborhood, including his eight-year-old brother and his brother's nine-year-old friend. *See* trial tr. vol. I, p. 63, line 13 — p. 65, line 19. When he was around age 16 or 17, the respondent molested a 12-year-old boy that he was babysitting. *See* trial tr. vol. I, p. 66, line 2 — p. 67, line 14. He also had sexual contact with boys as young as sixth-graders while he was a senior in high school. *See* trial tr. vol. I, p. 65, lines 4–13; p. 71, line 6.

In the early 1980s, the respondent participated in a form of sex-offender treatment in Maryland. *See* trial tr. vol. I, p. 77, line 6 — p. 78, line 7. He began therapy in part due to his acknowledged sexual attraction to underage boys. Trial tr. vol. I, p. 78, line 21 — p. 79, line 9. During the treatment, the respondent learned that "it was kind of an outlet" for him to molest children—he did it to relieve stress. Trial tr. vol. I, p. 82, lines 1–13. He was diagnosed with "pedophilia" with a focus on young boys. Trial tr. vol. I, p. 83, lines 15–22. The respondent agreed with this diagnosis. Trial tr. vol. I, p. 84, lines 2–4.

Around the same time, the respondent (in his early 20s) was having "what [he] would call a relationship" with a 12-year-old boy. Trial tr. vol. I, p. 80, line 12 — p. 81, line 5. The respondent estimated this "relationship" lasted three and a half and years and there was "a lot" of sexual contact between them. Trial tr. vol. I, p. 81, lines 2–17. The respondent thought he probably had sexual relations with this child "[p]robably every weekend" while he could. Trial tr. vol. I, p. 81, lines 15–17. The "relationship" started to fade when the boy got older and started wanting to have sex with girls. *See* trial tr. vol. I, p. 91, lines 11–17.

In 1985, the defendant (age 25) was prosecuted for having oral sex with an 11-year-old boy. Trial tr. vol. I, p. 75, lines 1–9; p. 76, lines 15–18. The respondent admitted that he fondled or had oral sex with the 11-year-old boy on at least three occasions. Trial tr. vol. I, p. 89, lines 1–7. He later pled guilty to one count of performing oral sex on the boy in West Virginia. Trial tr. vol. I, p. 98, line 18 — p. 99, line 1; Exhibit 4: Certified Records from Monongalia County; App. 8–16.

Later that same year, the respondent went to Baltimore and molested another 12-year-old boy, who was introduced to the respondent by a fellow pedophile. *See* trial tr. vol. I, p. 95, line 17 — p. 96, line 11. The respondent performed oral sex on and fondled this child. Trial tr. vol. I, p. 96, lines 5–11. Around the same time, he was actively coaching youth soccer. Trial tr. vol. I, p. 92, lines 9–25. The respondent's team consisted of kids under the age of 14. Trial tr. vol. I, p. 92, lines 23–25.

The respondent was sentenced to 15 to 25 years in prison for the West Virginia charge. Trial tr. vol. I, p. 99, lines 9–17. He served this sentence concurrently to a separate guilty plea in federal court for the interstate transportation of minors for commercial purposes. Trial tr. vol. I, p. 102, lines 1–25. During his time incarcerated, the

respondent began sex offender treatment, but quit because he disagreed with or did not like the director of the program. *See* trial tr. vol. I, p. 108, line 17 — p. 109, line 18.

The respondent completed his prison sentence in 1998. Trial tr. vol. I, p. 113, lines 2–3. He claims at that point that he "swore off sex period" and was no longer attracted to pre-pubescent boys. Trial tr. vol. I, p. 113, lines 4–11. He admitted that he used to fantasize about pre-pubescent boys, but claims he stopped. Trial tr. vol. I, p. 113, lines 15–16.

The respondent was paroled to West Virginia, where he took part-time jobs. Trial tr. vol. I, p. 114, lines 10–23. Less than two years later, his parole was revoked, and he spent another five months in prison. Trial tr. vol. I, p. 115, lines 11–15; p. 117, lines 7–8.

At the SVP trial, the respondent admitted to at least "four or five" victims as young as eight years old. Trial tr. vol. I, p. 133, lines 14–23.[1] The respondent argued with the prosecutor at the SVP trial over how to define "victim," and said he does not include molesting his brother "because it was incest." Trial tr. vol. I, p. 132, lines 14–25. When the State's expert witness interviewed the respondent in 2012

[1] The respondent has inconsistently described his number of victims. *See* trial tr. vol. I, p. 201, lines 22–25.

about how his victims reacted to the abuse, the respondent told her the little boys "enjoyed it." Trial tr. vol. I, o. 171, lines 1–8.

In Mahaska County, the respondent sexually abused a boy named R.S. and pled guilty to assault causing bodily injury. The SVP court found this crime was sexually motivated.

R.S. met the respondent in West Virginia or Virginia when R.S. was around six or seven. *See* trial tr. vol. I, p. 34, line 19 — p. 35, line 4; Exhibit 1: CPC Interview, p. 13, lines 2–3.[2] R.S. was introduced to the respondent as a "friend of [his] mom's," but R.S. "didn't know [the respondent] was a sex offender" at the time. Trial tr. vol. I, p. 35, line 1–4. R.S. did not remember a lot of details about spending time with the respondent in Virginia, but he did remember that he went to football games with the respondent and that the respondent's house had stuffed animals. *See* trial tr. vol. I, p. 35, lines 10–21. R.S. appreciated the father-son-type relationship he had with the respondent, because R.S. thought his real dad "didn't give a crap

[2] Page references to Exhibit 1: CPC Interview refer to the internal pagination of the document, rather than its .PDF pagination. The exhibit is a condensed transcript.

about [him] at all." *See* Exhibit 2: 10/21/2011 R.S. Depo., p. 21, lines 9–19; p. 55, lines 1–20.[3]

Eventually, when R.S. was around eight years old, R.S., the respondent, and R.S.'s mother all traveled to Iowa. While driving from West Virginia to Iowa, the respondent grabbed R.S.'s hand and "[s]hoved it down [the respondent's] pants." Exhibit 1: CPC Interview, p. 13, line 16 — p. 21, line 1. The respondent threatened R.S. and told him that he would "slap" him if he didn't "shut up." Exhibit 1: CPC Interview, p. 18, lines 16–23. R.S. said that the respondent made him touch the respondent's "wrong spot," even though R.S. was trying to get his hand out. Exhibit 1: CPC Interview, p. 20, lines 12–15. R.S. "felt really bad" because he "didn't want to have [his hand] on the [respondent's] privacy." Exhibit 1: CPC Interview, p. 20, line 20 — p. 21, line 2. The respondent told R.S. that he "felt really, really good" while R.S. touched him. Exhibit 1: CPC Interview, p. 21, line 20 — p. 22, line 5.

Shortly after this trip, the respondent and R.S. stayed in a hotel room together, just the two of them, on at least eight occasions.

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[3] Exhibit 2 actually contains two non-consecutively paginated deposition transcripts. The State cites to the transcripts by date, though both are contained in the same .PDF file.

Verdict, p. 2; App. 214. "R.S. was the same gender and age range of Ruthers's previous pedophilic interest." Verdict, p. 2; App. 214. "Ruthers and R.S. slept in the same bed together while at the hotel room." Verdict, p. 2; App. 214; trial tr. vol. I, p. 37, line 20 — p. 38, line 4.

During this time in the hotel, the respondent "grabbed" R.S. and "threw [him] on the bed" and "then started humping [him]." Exhibit 1: CPC Interview, p 21, lines 2–4; *accord* Exhibit 2: 11/2/2011 R.S. Depo., p. 50, lines 5–6. When asked what "humping" meant, R.S. said: "Like girls and boys do … Like they hump each other. … It means they were having sex." Exhibit 1: CPC Interview, p. 26, line 22 — p. 27, line 4; *accord* Exhibit 2: 11/2/2011 R.S. Depo., p. 62, lines 12–21 . When the humping started, R.S. was wearing "PJ clothes" and the respondent was wearing "nothing." Exhibit 1: CPC Interview, p. 27, line 12 — p. 28, line 3. At some point during the humping, the respondent pulled R.S.'s PJ pants down. Exhibit 1: CPC Interview, p. 28, lines 4–17. The respondent pushed his "butt" against R.S.'s "wrong spot" or "private spot" by sitting on it. Exhibit 1: CPC Interview, p. 29, line 12 — p. 30, line 12. Then, the respondent "turned around and started humping" R.S. against his "private spot."

Exhibit 1: CPC Interview, p. 30, lines 9–24. R.S. said that the respondent's "private spot" "was all hairy" and "kept on moving" and was shaped "like a straight line." Exhibit 1: CPC Interview, p. 30, line 25 — p. 31, line 22; *accord* 11/2/2011 R.S. Depo., p. 73, lines 1–14.

In the course of the respondent throwing R.S. on the bed and molesting him, R.S. hit his head on the headboard. Exhibit 1: CPC Interview, p. 26, lines 5–14. This gave R.S. a "bump" that "hurt really bad." Exhibit 1: CPC Interview, p. 26, lines 10–12.

On another occasion, R.S. "swam naked" in the hotel room's hot tub. Verdict, p. 2; App. 214. The respondent "would not allow R.S. to wear swimming trunks." Verdict, p. 2; App. 214. The respondent admitted at the SVP trial that R.S., then eight years old, was naked in the hot tub. Trial tr. vol. I, p. 12, lines 8–12.

The respondent told R.S. "not to tell anyone" about the sexual abuse. Trial tr. vol. I, p. 36, lines 11–15. The next year, after the respondent had moved back to West Virginia, the respondent sent R.S. a videotaped message in which the respondent was surrounded by three-foot-tall stuffed animals and promised to give R.S. money for his birthday. *See* trial tr. vol. I, p. 129, line 13 — p. 131, line 2; Exhibit 5: DVD.

Although the abuse happened when R.S. was around eight, he did not tell anyone until years later, when he told his mother, who told the police. Trial tr. vol. I, p. 8, lines 17–24; p. 36, lines 16–19.[4]

The police arranged a controlled call between R.S.'s mother and the respondent, where she described some of the abuse reported by R.S. Trial tr. vol. I, p. 13, lines 3–13. The respondent made inconsistent statements to R.S.'s mother, including that he didn't recall or didn't remember if he "did it." Trial tr. vol. I, p. 13, lines 3–13. When a detective asked the respondent similar questions, the respondent said that he may have touched R.S. in the context of "wrestling with him." Trial tr. vol. I, p. 13, lines 14–24.

During an interview with police, the respondent admitted that he had stayed in a hotel room alone with eight-year-old R.S. and slept in the same bed with him. Trial tr. vol. I, p. 13, line 25 — p. 15, line 9. He also admitted that R.S. had swam in the hot tub naked. Trial tr. vol. I, p. 15, line 10 — p. 16, line 2. And he admitted to traveling in the

[4] By the time of the SVP trial in 2017, R.S. was 17 years old. Trial tr. vol. I, p. 34, lines 3–6. At trial, R.S. testified that the respondent had molested him, though his memory about the specifics was better at the time he was interviewed at the Child Protection Center and testified in depositions around 2011. Trial tr. vol. I, p. 37, lines 9–12, p. 51, lines 5–24. He also explained that, for his own mental health, he tries to keep "[w]hatever is in the past … in the past." Trial tr. vol. I, p. 54, lines 16–21.

car with R.S. Trial tr. vol. I, p. 18, line 23 — p. 19, line 5. The respondent described himself as being in a "mentoring" or father-figure-type relationship with R.S. *See* trial tr. vol. I, p. 16, lines 7–16.

When police asked the respondent if he had a sexual interest in R.S., he said that he did not, but that he would have been sexually interested if R.S. were a year or two older. *See* trial tr. vol. I, p. 29, line 23 — p. 30, line 6. The respondent specifically told police that he was a "pedophile" and "he likes having relationships with kids that would turn into a sexual situation." Trial tr. vol. I, p. 30, lines 10–15. He described his molestation of children as involving a "relationship" and "feelings." Trial tr. vol. I, p. 30, lines 10–15. He specifically admitted to a history of "relationships" and sex with "nine, ten, eleven-year-old boys." Trial tr. vol. I, p. 30, lines 19–22.

The SVP court made an explicit fact- and credibility-finding that the offense against R.S. in Mahaska County "was sexually motivated." Verdict, p. 3; App. 215. The SVP court decided this in part because "[t]he facts and circumstances around this offense bare striking similarity to the events which got Ruthers in trouble in the State of West Virginia." Verdict, p. 3; App. 215.

The experts: the district court found the State's expert credible and the respondent's expert not credible.

"To a large extent, this case was a battle of experts. In short, the Court found the testimony of [State's expert] Dr. Salter to be more convincing, believable, persuasive, and based in fact as opposed to the testimony of [respondent's expert] Dr. Wollert." Verdict, pp. 5–6; App. 217–18. "Dr. Salter's testimony was based on actuarial and empirical data. Her demeanor was knowledgeable. She was completely un-rattled on cross-examination." Verdict, p. 6; App. 218. In contrast, "Dr. Wollert seemed most concerned with attacking the credibility of [the presiding judge from the criminal case,] Judge Gamon." Verdict, p. 6; App. 218.

The respondent has a mental abnormality: pedophilic disorder.

"Ruthers suffers from a mental abnormality, that being, Pedophilic Disorder." Verdict, p. 3; App. 215. The diagnostic criteria for pedophilic disorder require evidence that:

> 1. Over a period of at least six months, the person has had recurrent, intense, sexually arousing fantasies, urges or behavior regarding sexual activity with pre-pubescent children;
>
> 2. The individual has acted on the sexual urges or the urges or fantasies cause

> marked distress or interpersonal difficulty; and
>
> 3. The individual is at least age 16 and at least five years older than the children they are attracted to.

Trial tr. vol. I, p. 165, lines 3–18.

Dr. Anna Salter opined that the respondent met all of the diagnostic criteria for pedophilic disorder:

> First of all, he has a lengthy history of child molesting. I believe he said today that he had four or five victims as an adult.
>
> [Second,] He has acted on it. …
>
> [And third,] Mr. Ruthers has acted on his sexual impulses at least multiple times since age sixteen, and he certainly is five years older than the children he's been molesting as an adult.

Trial tr. vol. I, p. 165, line 19 — p. 166, line 13 (line breaks added for clarity).

When asked about whether one can be in "remission" or suddenly stop being a pedophile, Dr. Salter explained, "Pedophilia is considered a chronic disorder. It doesn't simply disappear one day. It doesn't just disappear if you go to prison, for example, and you can see in the case of many adult pedophiles that they began molesting in their teens and that they continued." Trial tr. vol. I, p. 167, lines 16–

20. The Diagnostic and Statistical Manual for Mental Health Disorders (5th edition) describes pedophilia as a "lifelong condition." Trial tr. vol. I., p. 168, line 25 — p. 196, line 6.

In Dr. Salter's opinion, pedophilic disorder meets the statutory criteria for affecting the respondent's emotional or volition control:

> I think that the problem with strong urges to sexually abuse kids in this case, he has a very lengthy, consistent history of having strong urges and behaviors against younger children. I think that interferes -- in his case the strength of the interest interferes with his ability to control. I do believe that it's very difficult for Mr. Ruthers to control it.

Trial tr. vol. I, p. 173, line 19 — p. p. 174, line 2.

The respondent is more likely than not to commit future sexually violent offenses if not confined as an SVP.

The SVP court concluded that the respondent "is likely to commit predatory acts of sexual violence if not confined for treatment." Verdict, p. 3; App. 215. The actuarial instruments indicated that the respondent was in the top 3% for likelihood to re-offend compared to other sex offenders, and that he had more than five times the risk of re-offense as a median sex offender in a population distribution. Trial tr. vol. I, p. 189, lines 7–16; p. 193, lines 4–13; *cf.* Verdict, p. 3; App. 215. The instrument estimated that,

within 10 years, 42.8% of offenders with the same score as the respondent would be *convicted* of a new sexually violent offense. Trial tr. vol. I, p. 189, line 17 — p. 190, line 11. The respondent's estimated risk of re-offense is substantially greater, and in excess of 50%, because the vast majority of sex crimes are unreported (and thus necessarily do not lead to a conviction) and because the respondent has multiple validated dynamic risk factors that increase his likelihood of re-offense, including a preference for children, sexual impulsivity, offense planning, cognitive distortions, and a lack of emotional control. *See* trial tr. vol. I, p. 186, line 3 — p. 191, line 14. Dr. Salter also testified that there is research that indicates a sex offender who is kicked out of sex-offender treatment program is actually more likely to re-offend than someone who never participated in the program. Trial tr. vol. I, p. 196, lines 4–9.

The SVP court concluded that the respondent is more likely than not to commit future sexually violent offenses based on how his mental abnormality "causes hi[m] difficulty in his emotional and volition[al] control," the circumstances of his "relationship with R.S. in Mahaska County, his lack of prior successful treatment, and the

actuarial and empirical data identified by Dr. Salter." Verdict, pp. 3–4; App. 215–16.

The credibility of the respondent.

"Thomas G. Ruthers, Jr. has extreme difficulty taking any responsibility for his own actions." Verdict, p. 6; App. 218. He has repeatedly blamed the legal system for his poor decisions:

> In the 80's, Ruthers stated that he committed no federal offense, yet plea bargained guilty to federal offenses. Ruthers blames the system for his plea of guilty in Federal Court.
>
> Now fast forward to Mahaska County, Iowa, in 2010. Ruthers pled guilty but now places the blame on Judge Gamon and/or his attorney. Ruthers's initial plea of guilty was to a date that made no sense and to a victim who was not even listed in the Trial Information. Ruthers could have filed a motion in arrest of judgment but decided not to. He also voluntarily dismissed his appeal as to whether his plea of guilty was valid.
>
> Ruthers also blamed his facilitator in prison as to the reason why he did not successfully complete his sexual treatment program.
>
> Ruthers even went as far as to blame Judge Gookin for only scheduling his post-conviction relief trial for one day.

Verdict, pp. 6–7; App. 218–19 (line breaks added for clarity). The reference to Judge Gookin refers to the denial of postconviction relief affirmed by the Court of Appeals, in which the trial judge found the

respondent's "version of factual matters in dispute to be generally unbelievable and unworthy of credible consideration." *Ruthers v. State*, No. 16-0249, 2018 WL 739244, at *3 (Iowa Ct. App. Feb. 7, 2018). The Court of Appeals further found that, in the criminal case, the respondent attempted to "commit[] a fraud upon the court." *Id.* at *4.

ARGUMENT

I. The Respondent Was Presently Confined in the Mahaska County Jail Awaiting Trial for Sexual Abuse. The Respondent's Plea Was to a Sexually Violent Offense as Defined by Chapter 229A.

Preservation of Error

The State does not contest error preservation on the question of whether the respondent was presently confined.

Standard of Review

Questions of statutory construction related to Chapter 229A are reviewed for corrections of errors at law. *In re Det. of Shaffer*, 769 N.W.2d 169, 172 (Iowa 2009).

However, the Court of Appeals has noted that similar questions may be properly understood as challenges to the sufficiency of the evidence. *See In re Matlock*, No. 01-1094, 2003 WL 288999, at *1 n.1 (Iowa Ct. App. Feb. 12, 2003); *see also In re Det. of Johnson*, No. 10-

1462, 2012 WL 1860242, at *3–7 (Iowa Ct. App. May 23, 2012). Review of the sufficiency of the evidence would be for correction of errors at law, and this Court would view the evidence in a light most favorable to the bench verdict, disregarding all contrary evidence and inferences, and determines whether the evidence was sufficient for the fact-finder to have believed beyond a reasonable doubt that the respondent is a sexually violent predator. *E.g., In re Detention of Altman*, 723 N.W.2d 181, 184 (Iowa 2006).

In his brief, the respondent relies in part on a motion to dismiss for his claim that he preserved error. Respondent's Proof Br. at 12–13. If this issue is reviewed on the basis of a denial of the motion to dismiss, the standard of review is even more favorable to the State, as this Court must "accept as true the petition's well-pleaded factual allegations." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Merits

In the first Division of his brief, the respondent presents three somewhat interrelated subclaims: First, he argues that he was not presently confined when the SVP petition was filed; as explained below, this claim fails under the plain language of Chapter 229A. *See*

Iowa Code §§ 229A.4(1), 229A.2(11)(g) (2015).[5] Second, he complains that he thinks it unfair that the SVP court decided the issue of sexual motivation when the criminal court did not decide the issue; this claim fails because the district court followed the prescribed statutory procedure. *See* Iowa Code § 229A.2(11)(g). And third, he complains about some form of res judicata or collateral estoppel; this claim fails because the issue was not previously litigated—a court not deciding a claim is not the same thing as a court deciding a claim in favor of one party or the other.

A. The respondent was presently confined for a sexually violent offense as defined in the Code because the offense was found to be sexually motivated.

The respondent's argument on the issue of present confinement stems from a misunderstanding about Iowa Code section 229A.4. That section contemplates two paths for the civil commitment of a sexually violent predator: (1) if the person is presently confined; or (2) if the person was not presently confined, but committed a recent overt act. *See In re Det. of Shaffer*, 769 N.W.2d 169, 173 (Iowa 2009);

[5] All Code citations in this brief are to the 2015 Code. No statutory provisions specifically germane to this appeal have been modified within the last ten years, other than by renumbering.

Iowa Code § 229A.4(1), (2)(a)–(c) (2015). Only the first path is at issue in Division I of this brief.

The term "presently confined" is not expressly defined in Chapter 229A. But the Supreme Court has repeatedly interpreted it. In *Shaffer*, the Court was asked to determine whether a person erroneously or unlawfully held in custody was "presently confined" for purposes of Chapter 229A. *See Shaffer*, 769 N.W.2d at 175. The Supreme Court answered in the affirmative: a person erroneously confined is "presently confined." *Id.* at 174–75. Further, the *Shaffer* Court held, Iowa courts must reject "attempts to apply a hypertechnical definition of the phrase 'presently confined.'" *Id.* at 174–75. Similarly, in *Willis*, the Supreme Court held that a respondent was "presently confined" for a sex offense when he was in the county jail but not yet convicted of a sex offense. *In re Det. of Willis*, 691 N.W.2d 726, 728–30 (Iowa 2005). The Court opined that 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.

The only Iowa Supreme Court case to find a respondent was not presently confined was *In re Det. of Gonzales*, 658 N.W.2d 102 (Iowa 2003).[6] Gonzales was incarcerated for operating without consent, an offense that inarguably lacked a sexual motivation. *See id.* The Supreme Court opined that that the State should not be allowed to rely on the operating-without-consent sentence to support a 229A petition because it was related to a "totally different—or even perhaps a trivial—offense." *Id.* at 105. Instead, the Court determined that the term "presently confined" means presently confined for a "sexually violent offense." *See id.* at 105.

The term "sexually violent offense" is defined by statute to include:

> 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.

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[6] After the parties' proof briefs were filed in this case, the Supreme Court decided *In re Det. Wygle*, Sup. Ct. No. 16-1732, which held that persons on 903B special parole are not "presently confined." *Wygle*'s holding does not affect this appeal.

> (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 § 229A.2(11) (2015).

At issue in this case is alternative "g," which provides that any act "determined beyond a reasonable doubt to have been sexually motivated" qualifies as a sexually violent offense. Iowa Code § 229A.2(11)(g) (2015). The statute expressly provides that the determination for whether the act is sexually motivated can be made "either at the time of sentencing for the offense or subsequently

during civil commitment proceedings pursuant to this chapter." Iowa Code § 229A.2(11)(g). "'Sexually motivated' means that one of the purposes for commission of a crime is the purpose of sexual gratification of the perpetrator of the crime." Iowa Code § 229A.2(10).

Here, whether the offense was sexually motivated was determined "during civil commitment proceedings pursuant to this chapter." Iowa Code § 229A.2(11)(g).[7] Following the bench trial, the district court found that "[t]he Mahaska County conviction for Assault Causing Bodily Injury was sexually motivated." Verdict, p. 3; App. 215. The court made this finding "beyond a reasonable doubt." Verdict, p. 3; App. 215. Thus the real question presented by Division I.A of the respondent's brief must be whether there was sufficient evidence to determine that the assault was sexually motivated.

There was sufficient evidence to conclude the assault was sexually motivated. The respondent groomed R.S. for sexual abuse beginning around age six by acting as a father figure, showing him stuffed animals, and engaging in bonding activities. *See* trial tr. vol. I,

[7] The respondent, throughout his brief, seems to overlook that an offense can be found to be sexually motivated by the fact-finder in a 229A action, as expressly authorized by section 229A.2(11)(g). This case did not, as the respondent seems to imply, involve an unproven accusation—the accusation was proven beyond a reasonable doubt at the 229A trial. *See* Iowa Code § 229A.2(11)(g); Verdict, p. 3; App. 215.

p. 34, line 19 — p. 35, line 21; Exhibit 1: CPC Interview, p. 13, lines 2–3; Exhibit 2: 10/21/2011 R.S. Depo., p. 21, lines 9–19; p. 55, lines 1–20. While they were staying in an Oskaloosa hotel room together, the respondent "grabbed" R.S. and "threw [him] on the bed" and "then started humping [him]." Exhibit 1: CPC Interview, p 21, lines 2–4; *accord* Exhibit 2: 11/2/2011 R.S. Depo., p. 50, lines 5–6. The respondent, who was naked, pulled down R.S.'s PJ pants. *See* Exhibit 1: CPC Interview, p. 27, line 12 — p. 28, line 17. The respondent pushed his "butt" against R.S.'s "wrong spot" or "private spot" by sitting on it. Exhibit 1: CPC Interview, p. 29, line 12 — p. 30, line 12. Then, the respondent "turned around and started humping" R.S. against his "private spot." Exhibit 1: CPC Interview, p. 30, lines 9–24. R.S. said that the respondent's "private spot" "was all hairy" and "kept on moving" and was shaped "like a straight line." Exhibit 1: CPC Interview, p. 30, line 25 — p. 31, line 22; *accord* 11/2/2011 R.S. Depo., p. 73, lines 1–14. Also, "R.S. was the same gender and age range of Ruthers's previous pedophilic interest." Verdict, p. 2; App. 214. From this evidence, a reasonable fact-finder could—as this judge did—conclude that the offense was sexually motivated because one of

the reasons the respondent assaulted R.S. was for his sexual gratification. *See* Iowa Code § 229A.2(10) (2015).

In his brief, the respondent does not seem to really contest the factual basis for the sexual-motivation conclusion. He does spend a lot of time, however, discussing dicta from a footnote in *Geltz*. This footnote is easily disposed of because it concerns interpretation of the recent-overt-acts alternative discussed in 2249A.4(2)(b)–(c), not the presently-confined alternative discussed in section 229A.4(1) and addressed in this Division of the briefing. We know the footnote only relates to the recent-over-acts alternative because the Court said so when it cited and quoted from section 2249A.4(2)(b)–(c) [recent over acts], but did not cite or refer to section 229A.4(1) [presently confined]. *See In re Det. of Geltz*, 840 N.W.2d 273, 276 n.1 (Iowa 2013) (citing and quoting "Iowa Code § 229A.4(2)(b)–(c) (2011)"). *Geltz* does not inform the presently-confined analysis. Nor is it clear that *Geltz* has much relevance to the recent-over-act discussion in Division II, as the Court admitted in the footnote that it was dicta: "The State d[id] not contend Geltz can be classified an SVP under the 'or charged with' alternative in section 229A.2(11)." *Geltz*, 840 N.W.2d at 276 n.1. Finally, to the extent this footnote dicta is

arguably inconsistent with the holding of *Willis* on the issue of present confinement, the question was more squarely presented in *Willis* and there is no reason to think that holding has been overturned:

> Neither the language of section 229A.4(1), nor our interpretation of that statute in [*Gonzales*], requires that the subject of a petition for a sexually violent predator adjudication be convicted of a sexually violent offense before the petition is filed under section 229A.4(1). It is only necessary that the subject be "presently confined" for a sexually violent offense. ... 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. This satisfies the statutory requirement for the filing of the petition by the attorney general.

Willis, 691 N.W.2d at 729. The respondent's *Geltz* claim can be set aside.

In short, the State presented substantial evidence the respondent was presently confined for a sexually violent offense because the SVP court found the act was sexually motivated pursuant to the procedure set forth in the Code. *See* Verdict, p. 3; App. 215; Iowa Code § 229A.2(11)(g).

B. The SVP court appropriately found that the respondent's offense was sexually motivated during the SVP proceedings.

The respondent goes on to argue that he thinks it improper for the State to have filed the SVP petition before the respondent's guilty plea was entered of record in the criminal case. Respondent's Proof Br. at 16–17. Specifically, he complains that the petition could not rely on a presently-confined theory because the "commission of a sexually violent offense had not yet been established or otherwise become a fact." Respondent's Proof Br. at 17. Yet, as discussed above, Iowa Code section 229A.2(11)(g) expressly permits the determination of whether an offense is sexually motivated (and thus whether it qualifies as a sexually violent offense) to be made in "civil commitment proceedings pursuant to this chapter." Iowa Code § 229A.2(11)(g). That is what happened here, in conformity with the Code.

Also as discussed above, the Supreme Court in *Willis* expressly held that neither the case law nor the language of Chapter 229A "requires that the subject of a petition for a sexually violent predator adjudication be convicted of a sexually violent offense before the petition is filed." *In re Det. of Willis*, 691 N.W.2d 726, 729 (Iowa

2005). "It is only necessary that the subject be 'presently confined' for a sexually violent offense," as the respondent was, in light of section 229A.2(11)(g). *See id.* at 729. As in *Willis*, the sheriff's custody of this respondent was based on the commission of a sexually violent offense, and, as in *Willis*, this Court should find that the respondent was presently confined. *See id.*

But also, as a practical note, the argument put forward by the respondent would turn the issue of present confinement into a semantic game of timing. If the respondent is right that the petition had to be filed after the respondent pled guilty and before he was sentenced, it may have been impossible here to file a petition between those two events, as the guilty plea was for time served. *See* trial tr. vol. I, p. 148, lines 1–11. To the extent some kind of interstitial timing was possible, the State would have had to be standing nearby to file a petition in the second or seconds between when judgment was rendered and when the respondent discharged his time-served sentence. This runs counter to *Shaffer*, which requires courts to reject any "attempts to apply a hypertechnical definition of the phrase 'presently confined.'" *In re Det. of Shaffer*, 769 N.W.2d 169, 174 (Iowa 2009).

Finally, contrary to the respondent's assertion that affirming his commitment will permit the State to "create custody" or "contrived confinement," this method for pursuing sexually violent predators is expressly written into the Code, and it makes sense for public policy reasons: section 292A.2(11)(g) catches the variety of crimes that are not *per se* sexually violent crimes, but may nonetheless be sexually motivated. In addition to the assault in this case (which plainly had a sexual motivation), one can imagine a sexually motivated robbery, harassment, or theft, all of which might be sexually motivated but technically lack a sex act as defined in Chapter 709. Such crimes are appropriately considered in an SVP trial and the respondent's commitment in this case was proper in light of the procedures set forth in 229A.

C. Res judicata does not apply because the issue of sexual motivation was not decided in the criminal case.

The respondent complains in subdivision I.C. of his brief about res judicata and collateral estoppel, but his arguments misapply those concepts. Respondent's Proof Br. at 19–24. Specifically, the respondent claims that determining sexual motivation in the SVP action required the district court "to relitigate those issues that have

already been litigated and been determined." Respondent's Proof Br. at 19. This argument might have some appeal if the district court, in accepting the guilty plea in the criminal case, had expressly found that the offense was *not* sexually motivated. But that is not what happened.

Rather, as the respondent testified himself at the SVP trial, the judge did not make a finding *either way* on the issue of sexual motivation. *See* trial tr. vol. I, p. 150, lines 5–18; p. 155, line 17 — p. 156, line 5; *see also* 11/19/2012 Ruling on Motion to Dismiss, p. 2; App. 79 ("There was no finding by the Court [in the criminal case] that Ruthers' acts were sexually motivated … There was also no finding by the Court that Ruthers' acts in support of his plea were <u>not</u> sexually motivated." (emphasis original); 7/18/2014 Ruling on Motion for Summary Judgment, p. 8; App. 131 (quoting the criminal court as saying, "I am not going to make any determinations that are beyond what I have already made in this case."). As the aphorism goes, "Absence of evidence is not evidence of absence." Or, as the SVP court put it, this was "a reservation of judgment, as opposed to a declaration." 7/18/2014 Ruling on Motion for Summary Judgment, p. 8; App. 131. This Court must reject the respondent's unwarranted

assumption that to not rule on the question of sexual motivation means there was no sexual motivation.

To the extent this Court accepts the respondent's attempt to shoehorn this argument into the language of issue preclusion, even that approach offers him no help. To successfully invoke issue preclusion, four elements must be proven:

> 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.

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012). The issues presented in the criminal case and the SVP case were not identical because the former determined the defendant's guilt to a criminal offense and the latter whether the respondent is subject to commitment as an SVP. The issue was not litigated in the criminal case because no ruling was obtained. The issue was not material or relevant to the disposition of the criminal case because no party sought or obtained a disposition that depended on a sexual

motivation. And the issue of sexual motivation was not essential to the resulting judgment, as evidenced by the fact that no finding was made and no finding was needed for the plea to be accepted.

At times, the respondent seems to suggest the district court had an obligation to rule on the issue of sexual motivation in the criminal case. *See* Respondent's Proof Br. at 21. He is mistaken. The relevant Code provision for criminal proceedings reads as follows:

> A person convicted of any indictable offense under this chapter shall be required to register as a sex offender pursuant to the provisions of chapter 692A, if the offense was committed against a minor and the fact finder makes a determination that the offense was sexually motivated pursuant to section 692A.126.

Iowa Code § 708.15 (2015). Nothing about this section imposes an affirmative duty on the district court to rule on the issue of sexual motivation. Moreover, even if there were such a duty, the parties seem to agree the district court did not fulfill the duty, as the judge did not rule on the issue of sexual motivation. As the Restatement of Judgments recognizes, "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." Restatement (Second) of Judgments § 27 (1982).

Also, to the extent the respondent tries to establish some kind of antecedent relationship between section 708.15 and Chapter 229A, the legislative history of those provisions indicates no such relationship was intended by the General Assembly. Chapter 229A has permitted an SVP court to make a finding regarding sexual motivation since it was enacted in 1998. *See* 1998 Iowa Acts, ch. 1171, §2; Iowa Code § 229A.2(6) (1999). Section 708.15 was not enacted until 2010. *See* 2010 Iowa Acts, ch. 1104, §§ 15, 23; Iowa Code § 708.15 (2011). The respondent's implied assertion that an SVP court must rely on section-708.15 findings from a criminal case is plainly erroneous, given that SVP courts have been able to make that finding for more than a decade before the enactment of 708.15.

Finally, to the extent the respondent urges, as a matter of policy, that that the State "should not be permitted to reserve that issue [sexual motivation] for civil commitment," his complaint should be directed to the Legislature. The Code is unambiguous: whether an offense was sexually motivated may be determined "during civil commitment proceedings pursuant to this chapter." Iowa Code § 229A.2(11)(g) (2015).

II. The District Court's Alternative Conclusion that the Respondent Committed a Recent Over Act Was Also Supported by Substantial Evidence.

Preservation of Error

The State does not contest error preservation regarding the sufficiency of evidence the respondent committed a recent overt act.

Standard of Review

As with Division I, there is some ambiguity as to the appropriate standard of review. To the extent this issue concerns statutory construction, review is for correction of errors at law. *Shaffer*, 769 N.W.2d at 172. To the extent it is a question of sufficiency, this Court views the evidence in the light most favorable to the State. *Altman*, 723 N.W.2d at 184. To the extent this issues reviews denial of a motion to dismiss, this Court must "accept as true the petition's well-pleaded factual allegations." *Shumate,* 846 N.W.2d at 507.

Merits

The Code specifies that "recent overt act" means "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." Iowa Code § 229A.2(8) (2015). Whether there was a recent overt act that caused harm of a sexually violent nature is an objective assessment based on all of the

surrounding circumstances. *In Re Det. of Swanson*, 668 N.W.2d 570, 576 (Iowa 2003). "Determining whether a past act of sexual violence has become too stale to serve as a predictor of future acts of a similar nature is not a precise task." *In re Det. of Willis*, 691 N.W.2d 726, 729 (Iowa 2005). "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." *Id.* at 729.

The SVP court made a fact- and credibility-finding regarding whether the events in Mahaska County constituted a recent over act:

> The Court concludes that Ruthers's 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.
>
> The above-described actions caused harm in a sexually violent nature.

Verdict, p. 4; App. 216 (internal numbering omitted). It is beyond dispute that humping an eight-year-old child and making him touch an adult man's penis is harm of a sexually violent nature. The respondent instead hangs his argument on complaints about whether the act was "recent." *See* Respondent's Proof Br. at 24–29. Under the circumstances of this case, his complaint is unpersuasive.

The essence of the respondent's argument is that four and one-half years between the act and the filing of a petition is too long to constitute a recent overt act. Respondent's Proof Br. at 29. "'Recent' is not defined in the statute." *In re Det. of Gonzales*, 658 N.W.2d 102, 103 (Iowa 2003). Nor has the term been expressly interpreted by an Iowa court. But some guidance can be found in case law from other jurisdictions, such as Washington, where courts have rejected this kind of numbers-driven argument.

As an initial matter, the Washington courts disagree with how the respondent casts the inquiry, and find that the relevant time for determining recency is the amount of time between release from incarceration and the sexual act, not the time between the sexual act and the petition. *Froats v. State*, 140 P.3d 622, 629 (Wash. Ct. App. 2006) ("The passage of time since re-incarceration is not relevant in deciding whether a person was incarcerated for either a sexually violent offense or a recent overt act. The word 'recent' in this context is relative to the moment of incarceration, not the filing of the petition."); *contra* Respondent's Proof Br. at 29 (calculating the relevant time period from the time of filing the petition).

But more importantly, whether an act is "recent" in this context does not turn on numbers alone. Or at least if the number is relevant on its face, five years is not too long ago to be "recent." *See Froats*, 140 P.3d at 629 ("We disagree with [another] court's reasoning that an event five years in the past cannot be 'recent' [for purposes of the SVP law]…"); *In re Pugh*, 845 P.2d 1034, 1039 (Wash. Ct. App. 1993) (also finding a recent overt act despite five-year time period).

This conclusion is bolstered by decisions in which states have interpreted their mental health commitment laws' comparable "recent overt act" requirement. For example, in *Blythman*, the Nebraska Supreme Court upheld the use of conduct five years in the past to support a commitment under the state's then-existing mental health commitment act. *See In re Interest of Blythman*, 302 N.W.2d 666, 672 (Neb. 1981) ("Considering all of the factors, we cannot say that as a matter of law an act which occurred 5 years ago is too remote to be probative of the subject's present state of dangerousness."). The Nebraska court declined to put a finite temporal limit on the definition of "recent," instead reasoning that an act was "recent" if the delay between the event and the hearing did not indicate a lack of reasonable diligence under the circumstances. *Id.* at 641 (citing *Hill*

v. County Board of Mental Health, 279 N.W.2d 838, 841 (Neb. 1979)). In other words, an act is "recent" if the State pursued commitment with reasonable diligence. On this record, the State certainly complied with the requirement of Nebraska's interpretation of a recent overt act: R.S. disclosed the abuse in late 2010, depositions were held in the criminal case in October and November of 2011, the plea was entered on March 19, 2012, and the petition was filed the same day. *See* Respondent's Proof Br. at 8–9. There is no suggestion of improper delay or lack of diligence in this case, nor could there be, considering the complexity of the case and the needs of the child victim.

Support for a recent overt act in this case can also be found in case law interpreting Iowa's non-sexual mental health commitment law, Chapter 229. In *Mohr*, the schizophrenic respondent was committed because of the danger he posed to himself and others, and the recent overt act at issue was him firing a gun at his father some 13 years prior to the commitment petition. *Matter of Mohr*, 383 N.W.2d 539, 542 (Iowa 1986). The Iowa Supreme Court upheld the civil commitment, relying in part on substantial evidence regarding a psychiatric diagnosis and interviews with mental health

professionals. *See id.* at 542. The Court found the commitment presented substantial evidence of dangerousness even though, in his most recent hospitalization, the respondent "had never threatened staff or other patients," "never mentioned suicide or harming himself," and "had lived [on his own] for the past year without incident." *Id.* at 540–41. The evidence of a recent overt act in this case meets or exceeds that in *Mohr*: the respondent's molestation of R.S. was more recent than 13 years ago and happened on multiple occasions. In light of the respondent's clinical diagnosis, his admitted sexual preference for prepubescent boys, his past victims, and his failure to rehabilitate, the State offered sufficient evidence of dangerousness so as to satisfy the "recent overt act" requirement of Chapter 229A. *Cf. Mohr*, 383 N.W.2d at 542. This evidence, in short, was a valid "predictor of future acts of a similar nature" because it demonstrated propensity. *See Willis*, 691 N.W.2d at 729.

III. This Chapter-229A Proceeding Was Not an Impermissible Surrogate for Punishment.

Preservation of Error

The State does not contest error preservation on the question of whether Chapter 229A is an impermissible surrogate for punishment.

Standard of Review

To the extent a constitutional issue is presented, review is de novo. *In re Det. of Garren*, 620 N.W.2d 275, 278 (Iowa 2000).

Merits

The respondent next argues that filing the 229A petition in this case was an impermissible surrogate for punishment. This argument has been rejected by both the United States Supreme Court and the Iowa Supreme Court. *See Kansas v. Hendricks*, 521 U.S. 346, 368 (1997); *In re Det. of Garren*, 620 N.W.2d 275, 283 (Iowa 2000). The only authority the respondent marshals to support his claim is dicta from Justice Kennedy's concurrence in *Hendricks,* which points out an SVP law cannot be "used simply to impose punishment." *Hendricks*, 521 U.S. at 370 (Kennedy, J., concurring).

The Kansas Supreme Court, like the respondent, tried to make something out of nothing when analyzing that dicta following *Hendricks*, only to have their opinion vacated by the United States Supreme Court on petition for certiorari. *See In re Crane*, 7 P.3d 285, 292 (Kan. 2000), *vacated sub nom. Kansas v. Crane*, 534 U.S. 407,

415 (2002).[8] Yet even the Kansas Supreme Court's interpretation of the *Hendricks* dicta would not get the respondent the relief he wants: the Kansas Supreme Court recognized that "so long as the State has an evidentiary basis for filing the petition, its motive should not render the resulting judgment and commitment of the defendant to be punitive." *Crane*, 7 P.3d at 292. The Iowa Supreme Court made a similar observation in *Matlock*, when it noted in passing that the SVP law is not a "surrogate for punishment" if the record evidence adequately demonstrates future dangerousness. *See In re Det. of Matlock*, 860 N.W.2d 898, 905 (Iowa 2015). For the reasons identified in Divisions I and II of this brief, the State's petition under Chapter 229A was supported by adequate evidence, the State's motive is irrelevant, and the 229A proceedings were not an impermissible surrogate for punishment.

But even if an inquiry into the State's motive were permissible, the record here does not provide the respondent any basis for relief. In its subsequently-vacated opinion in *Crane*, the Kansas Supreme Court found that the State's motive did not provide a basis for finding

[8] The question on which the Supreme Court granted certiorari was not precisely the surrogate-for-punishment issue, but the Kansas Supreme Court's opinion was vacated in its entirety. *Crane,* 534 U.S. at 415.

that the proceedings were a surrogate for punishment even though the record demonstrated that prosecutors admitted their purpose in filing the 229A petition was "in order to prolong [Crane's] confinement." *Crane*, 7 P.3d at 292. No such evidence appears in this record. To the contrary, the only fact-finding related to the State's motive indicates a proper purpose, not an improvident plea bargain:

> The plea bargain and the petition occurred within hours of each other. This, if anything, suggests thoughtfulness on the State's part, not improvidence. It seems unlikely that the State would make an improvident bargain, realize its mistake mere hours later, and throw together the paperwork for the present petition

7/18/2014 Ruling on Motion to Dismiss, p. 9; App. 132.

As *Hendricks* and *Garren* both recognize, the purpose of the SVP law is not to impose punishment, but rather to compel treatment. *See Hendricks*, 521 U.S. at 368; *Garren*, 620 N.W.2d at 283. This is made crystal clear in the legislative findings that open Chapter 229A, which specify that a "small but extremely dangerous groups of sexually violent predators" cannot be adequately rehabilitated in prison and thus "a civil commitment procedure for the long-term care and treatment of the sexually violent predator is

necessary." Iowa Code § 229A.1 (2015). These legislative findings are supported by the record evidence in this case concerning the respondent's diagnosis of pedophilic disorder and the need for ongoing treatment: "Pedophilia is considered a chronic disorder. It doesn't simply disappear one day. It doesn't just disappear if you go to prison...." Trial tr. vol. I, p. 167, lines 16–20. Pedophilia, as the legislative findings suggest, requires lifelong treatment because it is a "lifelong condition." *See* trial tr. vol. I., p. 168, line 25 — p. 196, line 6. The commitment of the respondent is not a surrogate for punishment, but rather an attempt to compel the treatment needed to protect children from future molestation upon his release.

IV. The Respondent's Evidentiary Complaints Are Mislabelled and Without Merit.

Preservation of Error

Although the respondent phrases his challenge in Division IV as one grounded on the "sufficiency of the evidence," that does not appear to be the true nature of his claim. Defendant's Proof Br. at 33. His complaint seems to really be that he believes "[t]he district court allowed and relied upon inadmissible evidence in this matter." Respondent's Proof Br. at 40. The respondent is making an evidentiary objection, not a sufficiency challenge.

In light of the evidentiary nature of his complaints, the respondent's preservation-of-error section is confusing: he relies solely on the notice of appeal, *see* Respondent's Proof Br. at 34, yet "the notice of appeal has nothing to do with error preservation." *State v. Lange*, 831 N.W.2d 844, 846–47 (Iowa Ct. App. 2013). The respondent's failure to cite where in the record his claims were preserved should be fatal to his claim on appeal. *See* Iowa R. App. P. 6.903(2)(g)(1) (requiring "[a] statement addressing how the issue was preserved for appellate review, *with references to the places in the record where the issue was raised and decided*." (emphasis added)). Any alleged error is waived. *See State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545 (Iowa 2010); *In re W.G.*, No. 01-1276, 2002 WL 1332718, at *2 (Iowa Ct. App. June 19, 2002); *City of Orange City v. Lot 10*, No. 99-1565, 2002 WL 100681, at *1 (Iowa Ct. App. Jan. 28, 2002) [all finding waiver when appellants fail to identify where error was preserved].

The State has scoured the record in an attempt to pin down the objections to which the respondent must be referring, and has located

the following six overruled objections made by respondent's counsel in the trial transcript:

1. **A relevance objection to the respondent's admissions when confronted with R.S.'s disclosure of abuse.** Trial tr. vol. I, p. 11, line 15 — p. 12, line 17; *see also* trial tr. vol. I, p. 13, lines 14–17 (same or similar objection).
2. **An untimely objection to the word "Okay" stated by the prosecutor, following testimony regarding R.S. being naked in the respondent's hot tub.** *See* trial tr. vol. I, p. 15, lines 20–22.
3. **A relevance objection to the video of the respondent, surrounded by three-foot-tall stuffed animals, promising to give R.S. money for his birthday.** *See* trial tr. vol. I, p. 17, line 24 — p. 18, line 5.
4. **A "*Stenzel*" objection to whether R.S. fondled the respondent in the car.** *See* trial tr. vol. I, p. 19, lines 9–13.
5. **Hearsay or Confrontation Clause objections to the admission of Exhibit 1 (a CPC interview of R.S.) and Exhibit 2 (depositions of R.S.).** Trial tr. vol. I, p. 39, lines 3–16; p. 41, lines 10–24.
6. **A *Stenzel* objection to Dr. Salter testifying regarding her scoring of the respondent on the Static-99.** Trial tr. vol. I, p. 182, line 13 — p. 183, line 16.

To the extent the respondent intended to argue the objection related to #2 in the above list, that error was not preserved, for the objection came too late to address the testimony at issue. *See* *Weilbrenner v. Owens*, 586, 68 N.W.2d 293, 296 (Iowa 1955) ("Ordinarily an objection to an interrogatory must be made before the

answer is given unless it appears there was insufficient opportunity to then make the objection."); trial tr. vol. I, p. 15, lines 20–22.

At most, the respondent's brief challenges only the admission of evidence related to the sexual character of the assault(s) on R.S. (arguably objections #1, #2 and #4) and Dr. Salter's scoring of the Static-99 (arguably objection #6). Those are the objections addressed in this brief, with the understanding that the State maintains the appellate complaints should not be considered at all for failure to comply with the rules regarding error preservation. *See In Re Det. of West,* No. 11-1545, 2013 WL 988815, at *3 (Iowa Ct. App. Mar. 13, 2013) ("Judges are not like pigs, hunting for truffles buried in briefs." (internal citation and quotation omitted)).

Standard of Review

Evidentiary objections are reviewed for an abuse of discretion. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). "An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *Id.*

Merits

The respondent's evidentiary complaints are without merit. Evidence that he molested eight-year-old R.S. was clearly probative

on whether he is a sexually violent predator and the evidence was proven independent of his guilty plea. Dr. Salter properly relied on information in the record to conduct her analysis of the respondent's risk of re-offense using the Static-99. And to the extent the respondent presents another sufficiency question, the district court's credibility findings are binding on appeal. None of these grounds warrant relief.

A. Evidence regarding the respondent molesting R.S. was properly admitted at trial.

The State understands most of the complaints in Division IV of the respondent's brief to concern evidence that the respondent molested R.S. in Mahaska County. Respondent's Proof Br. at 33–44. However, the respondent, at most, only preserved objections to his admissions when confronted about the abuse (trial tr. vol. I, p. 11, line 15 — p. 12, line 17; p. 13, lines 14–17), how R.S. was naked in the hot tub (trial tr. vol. I, p. 15, lines 20–22), and how R.S. was forced to fondle the respondent in the car (trial tr. vol. I, p. 19, lines 9–13).

Although the exact nature of the respondent's complaint is difficult to ascertain, he repeatedly complains that he did not admit to doing all of these things—apparently he believes the lack of admissions means these could not be independently proven by the

State or considered by the SVP court. *See* Respondent's Proof Br. at 36 ("not admitted to by Ruthers"); 41 ("these details were denied at all stages by Ruthers"); at 44 ("on an unadmitted and unadjduciated llegation"); at 44 ("unproven, unadmitted allegations"). No authority holds that a sexually violent predator must admit to all of his past sex acts in order for the State to obtain civil commitment. Whether the respondent admits the allegations or not is irrelevant when the State offers independent evidence of the respondent's prior sex acts—and it did so here, through the live testimony of R.S., R.S.'s CPC interview, and R.S.'s deposition. While some of the acts (such as the hot tub) may not have been previously adjudicated in a court of law, that does not mean they are not admissible: whether the respondent spends time around or molests naked little boys within his pedophilic age-preference is plainly probative on whether or not the respondent is dangerous or has a mental abnormality.

To the extent the respondent relies on *In re Det. of Stenzel*, 827 N.W.2d 690 (Iowa 2013), that complaint must be limited to some argument directed at Dr. Salter's testimony, discussed in Division IV.B below. To the extent the respondent intended to argue that *Stenzel* somehow prevented R.S.'s testimony from being admitted,

that argument is without merit. As the prosecuting attorney put it at trial, *Stenzel* does not prohibit "independent evidence as to either a recent overt act or some uncharged offense." Trial tr. vol. I, p. 12, lines 5–10. In short, "there's no way that the legislature intended to simultaneously exclude any independent evidence of a recent overt act" while also permitting the State to base its petition on the occurrence of a recent overt act. Trial tr. vol. I, p. 19, lines 15–23. *Stenzel* does not provide any limitation on the State proving the respondent's past sexual offenses through the testimony of a victim. In fact, the appellate courts have concluded that even charges that were "ultimately dismissed" are relevant in 229A proceedings. *See In re Det. of Risdal*, No. 05-0739, 2006 WL 1896255, at *3–4 (Iowa Ct. App. July 12, 2006); *see also In re Det. Williams*, 628 N.W.2d 447, 456 (Iowa 2001) (rebuttal evidence of unprosecuted sex acts found relevant in 229A action). The district court did not abuse its discretion, particularly given that this case was tried to the bench, not a jury. *See State v. Trowbridge*, No. 12-2272, 2014 WL 955404, at *6 (Iowa Ct. App. Mar. 12, 2014) ("[L]egal training assists the fact finder in a bench trial to remain unaffected by matters that should not

influence the determination." (internal citation and quotation marks omitted)).

Finally, to the extent the respondent's argument is actually focused on how the SVP court briefly referred to the minutes of testimony when rendering its verdict, the respondent himself proves any reference to the minutes of testimony was harmless because he admits the minutes were cumulative to evidence admitted at trial. *See* Respondent's Proof Br. at 41 ("Those Minutes detailed essentially the same information as contained in R.S.'s statement to St. Luke's Hospital, (State's Exhibit 1), and his discovery deposition in the criminal case (State's Exhibit 2)."). The reference to the minutes thus did not affect the respondent's substantial rights because the exact same information was already in the record through the testimony of R.S., the transcript of his CPC interview, and the transcript of his depositions. Any error was harmless and the respondent is not entitled to relief.

B. Dr. Salter's testimony regarding the Static-99 was properly admitted at trial.

The only preserved objection related to Dr. Salter's testimony concerns her explanation of how she scored the respondent's predicted rate of recidivism, using the Static-99 actuarial instrument:

> **Q.** When you look at the scoring rules [for the Static-99] and you're trying to identify what the index offense is, what are you looking for?
>
> **A.** Well, I'll quote from the scoring rules on page 38 under index sexual offense, it says, (Reading) "The index sexual offense is generally the most recent sexual offense. It could be a charge, arrest, conviction, or rule violation depending." ... It says a little later that (Reading) "Charges for sex offenses can count as the index offense even if the offender is later acquitted."
>
> And that is based on research that shows that individuals who get more charges are more likely to re-offend than people who are never charged with sexual abuse. The number -- The high number of charges does correlate with re-offense risks.
>
> (Reading) "Anything that counts as either a charge or conviction can count as an index offense as long as it also meets the definition of a sex offense; i.e. is sexually motivated."
>
> **Q.** And so in Mr. Ruthers's case, what did you consider the index offense to be?
>
> **A.** Well, he was charged in, I believe, 2010.
>
> **[Counsel]:** Object to what Mr. Ruthers was charged with, Your Honor. It's not relevant under *Stenzel*.

Trial tr. vol. I, p. 181, line 18 — p. 182, line 17. After some back and forth, the State argued that the evidence was being offered to show why Dr. Salter "scored [the respondent] on the instrument the way

she did, and particularly in the research with this instrument in the field of psychology, they are obligated to look at the charge." Trial tr. vol. I, p. 181, lines 6–12. The State further argued that Dr. Salter should be allowed to explain her scoring of the index offense "without talking about the details of that offense." Trial tr. vol. I, p. 183, lines 13–15. The district court overruled the respondent's objection and, as the State indicated she would, Dr. Salter testified that she scored the index offense because the respondent was originally "charged with sexual abuse second degree." Trial tr. vol. I, p. 183, lines 16–19.

The respondent's objection to this testimony was not valid. *Stenzel* stands for the relatively uncontroversial proposition that it is improper for an expert witness to read aloud to the jury from unproven charging documents, like minutes of testimony or police reports. *See In re Det. of Stenzel*, 827 N.W.2d 690, 709 (Iowa 2013). In *Stenzel*, the State's expert testified to "numerous details" from these hearsay documents, including the facts of multiple crimes, such as the weapons used and the items stolen. *See id.* The Supreme Court held it was inappropriate to use these hearsay documents as substantive evidence—in other words, "as a factual ground for

committing [the respondent] as an SVP." *Id.* at 710. This case is easily distinguished from *Stenzel*.

Dr. Salter was not reading aloud from minutes of testimony or offering substantive evidence regarding the respondent's prior offenses. Instead, she was testifying regarding how she scored the respondent on the Static-99 actuarial instrument, in light of scoring criteria that require her to assign a point for a "charge" when evaluating the index offense. *See* trial tr. vol. I, p. 181, line 18 — p. 182, line 17. She testified only to the existence of the charge, not the underlying facts or her belief in the truth of any arguable hearsay, consistent with the requirements of the scoring rubric. *See* trial tr. vol. I, p. 181, line 18 — p. 182, line 17. This is the kind of limited evidence that *Stenzel* suggests is proper, as Dr. Salter's challenged testimony did not go "beyond what the convictions, the plea proceedings (if there was a plea), and the trial records (if there was a trial) divulge." *Stenzel*, 827 N.W.2d at 709. As Dr. Salter explained, the "charge" criterion does not depend on any assessment of whether the act was actually permitted, as even an acquittal for a sex crime has been found to correlate with an increased rate of recidivism, according to the Static-99. Trial tr. vol. I, p. 199, lines 11–25. In the

end, Dr. Salter's testimony relied on Rule 5.703 as intended: "to give experts appropriate latitude to conduct their work, not to enable parties to shoehorn otherwise inadmissible evidence into the case." *Stenzel*, 827 N.W.2d at 705.

But even if there were some arguable merit to the respondent's understanding of *Stenzel* as it applies to Dr. Salter's testimony about the "charge," that evidence was already in the record, admitted without objection during the respondent's own testimony:

> **Q.** Now, you were -- You were charged with sexual abuse in the second degree; right?
>
> **A.** Correct.

Trial tr. vol. I, p. 142, lines 23–25. Thus Dr. Salter's reference to the "charge" was cumulative to the respondent's in-court testimony, and her use of that evidence in forming her opinion was proper. *See Stenzel*, 827 N.W.2d at 710 (noting that a respondent's "own admissions, whether in the form of a plea, a statement in court, or a statement to [the State's expert], are not hearsay and do not raise the same level of concern" as the statements found to be error). Even under a rigid reading of *Stenzel*, then, the statements admitted were proper and Dr. Salter's testimony was cumulative and thus harmless.

C. To the extent the respondent actually presents a sufficiency challenge in Division IV of his brief, there was sufficient evidence he was a sexually violent predator.

The remaining complaints in Division IV of the brief filed by respondent's counsel really boil to arguments about credibility: that R.S. could not remember some of the details regarding the abuse at trial in 2017 and that he made some inconsistent statements between his CPC interview and the two discovery depositions. *See* Respondent's Proof Br. at 36–40. However, "A [fact-finder] is free to believe or disbelieve any testimony as it chooses to give as much weight to the evidence as, in its judgment, such evidence should receive." *Liggins*, 557 N.W.2d at 269. The district court was permitted to make precisely the kind of credibility findings it did, crediting R.S.'s testimony rather than the respondent's. *See generally* Verdict; App. 213–21. The same fate awaits the respondent's complaint about his expert's testimony, in comparison to the State's expert: the SVP court made explicit credibility findings that State's expert Dr. Salter's testimony was "more convincing, believable, persuasive, and based in fact " than the testimony of defense expert Wollert. Verdict, p. 5; App. 217. The respondent offers no basis for this Court to second-guess those credibility findings, made after the

opportunity to assess the witnesses' demeanor in candor in person, on the basis of a cold appellate record.

V. The Pro Se Claims Are Without Merit. The Sufficiency Issues Are Adequately Addressed Above, and the Other Claims in the Pro Se Brief's First Division Are Baseless.

Motion to Strike

In the conclusion section of his pro se brief, the respondent makes assertions that are not supported by the record and appear to be misrepresentations of outside-the-record proceedings. For example, in footnote four of the pro se brief, the respondent refers to statements "in other proceedings." Pro Se Br. at 31 b.4. As those proceedings are not part of this record on appeal, they cannot be considered and must be stricken. *See* Iowa R. App. P. 6.801.

Preservation of Error

The State does not contest error preservation for the portions of the pro se brief that repeat the claims addressed in Divisions I and II of this brief. The State contests error preservation for any other claims arguably raised in Division I of the pro se brief.

Standard of Review

To the extent the respondent re-hashes the arguments addresses in Divisions I and II of this brief, those same standards of review apply.

Merits

In Division I.A.1, portions of Division I.A.4, and portions of Division I.B of the pro se brief, the respondent essentially levies the same complaints discussed in Division I of this brief. *See* Pro Se Br. at 10, 15–17. That claim is adequately addressed above, as Chapter 229A expressly permits the determination of whether an offense is sexually motivated "during civil commitment proceedings pursuant to this chapter." Iowa Code § 229A.2(11)(g) (2015). To the extent the respondent requests this Court add words to Chapter 229A, specifying that the finding of sexual motivation must be found "by a guilty plea or verdict," this Court must deny that request: the Legislature is its own lexicographer. *E.g., State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971).

In Division I.A.2, portions of Division I.A.4, and portions of Division I.B of the pro se brief, the respondent raises the same claim addressed in Division II of this brief. *See* Pro Se Br. at 11–12, 15–17. That claim is adequately addressed above. *See* Division II.

To the extent the respondent also attempts to complain about an alleged plea agreement in the criminal case, that claim fails for lack of citation to the record and a failure to preserve error. Pro Se

Br. at 13–15. There is no record evidence whatsoever that the State bargained its ability to file a Chapter 229A petition when it entered into a plea agreement with the respondent. Moreover, such a bargain would have made no sense, given the timing: the respondent admits he was served with the 229A petition before he pled guilty. *See* trial tr. vol. I, p. 154, line 16 — p. 155, line 1; *Ruthers v. State*, No. 16-0249, 2018 WL 739244, at *1 (Iowa Ct. App. Feb. 7, 2018) (affirming denial of Ruthers' application for postconviction relief, noting that he was served with the 229A petition "earlier in the day" that he pled guilty). Contrary to the respondent's argument, the dismissal of one felony count with prejudice does nothing to prevent a 229A proceeding; a civil commitment proceeding under Chapter 229A and a criminal prosecution under Chapter 709 are not the "same cause," for the elements, procedures, and available remedies materially differ. *Compare* Iowa Code Ch. 229A *with* Iowa Code Ch. 709 (2015).

To the extent the respondent complains that the State agreed to a "non-sexual offense," he is mistaken. Pro Se Br. at 14. While the State agreed to a conviction on a crime outside Chapter 709, the State made no agreement with regard to sexual motivation or whether the offense was a sexually violent crime. The statute expressly permits

the SVP court to find "[a]ny act" to be "sexually motivated" "during civil commitment proceedings." Iowa Code § 229A.2(11)(g) (2015).

To the extent the respondent also complains about what he erroneously refers to as a "change" in the factual basis of his plea, that claim cannot be heard as it has been fully litigated in the postconviction action. *See Ruthers*, 2018 WL 739244, at *1 n.1. Procedendo issued in the postconviction appeal on March 12, 2018, and that decision resolves the issue with finality. Moreover, a 229A proceeding is not a valid mechanism for challenging a guilty plea: the place for those claims was a direct appeal (which the respondent voluntarily dismissed) or a postconviction action (which the respondent lost in the district court, appealed, lost again in the Court of Appeals, and failed to obtain further review on before the Supreme Court). *See Ruthers*, 2018 WL 739244, at *1.

Finally, to the extent the respondent attempts to rely on concepts related to res judicata, that claim is adequately addressed in Division I.C above.

VI. The Pro Se Claims Regarding R.S.'s Testimony Were Not Preserved and Lack Merit.

Preservation of Error

The argument presented in the pro se brief regarding Exhibits 1 and 2 was not raised or decided in the district court and cannot be heard. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Although an objection was made to the exhibits, the grounds were solely that their admission violated the Confrontation Clause or rules of evidence. Trial tr. vol. I, p. 39, lines 3–16. Different arguments are advanced on appeal, where the respondent essentially complains that he doesn't think the evidence was credible and should be deemed a "nullity." *See* Pro Se Br. at 20–26. That argument, to the extent it is a coherent one, was not preserved and cannot be heard. *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999).

Standard of Review

Evidentiary objections are reviewed for an abuse of discretion. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005).

Merits

To the extent this Court is inclined to reach the respondent's unpreserved contention that a trial court may "strike the testimony of a witness" pursuant to cases like *Lopez*, *Smith*, or *Mitchell*, that

complaint is without merit. Those cases concern sufficiency review and do not provide an independent evidentiary basis on which a party can move to strike testimony. *E.g.*, *State v. Smith*, 608 N.W.2d 101, 103 (Iowa Ct. App. 1993). Moreover, *Smith* has never—not once—been relied on as the basis for overturning a jury verdict in the 60+ Iowa appellate decisions that have cited the opinion. If anything is to be done with *Smith*, its majority opinion should be overturned, for it consists of little more than rape myths packaged in legal terminology.

The respondent's real complaint is that he wishes the district court judge had believed him, rather than R.S., the police, and the State's expert. Credibility determinations belong solely to the fact finder. *E.g.*, *Liggins*, 557 N.W.2d at 269. R.S.'s testimony may contain minor inconsistencies, but he has been consistent that the respondent molested him in a Mahaska County hotel room by humping him. This Court has no basis on which to usurp the fact-finding function of the district court.

Finally, in a passing comment, the respondent asserts that the CPC interview transcript was "hearsay" for the sole reason that it was "from a video intentionally withheld from the trial court." Pro Se Br. at 21. This does not raise any valid evidentiary objection

comprehensible to the State, let alone one that was preserved. R.S. was unavailable within the meaning of Rule 5.804 and the CPC interview was admissible. *See State v. Rojas*, 524 N.W.2d 659, 662–65 (Iowa 1994); Iowa R. Evid. 5.804.

VII. The Pro Se Issues Related to the "Counterclaim" or "Contempt" Are Meritless.

Preservation of Error

On the limited question of whether the SVP court had jurisdiction or authority to consider the respondent's "counterclaim" or "contempt," the State does not contest error preservation. To the extent the defendant also claims some kind of constitutional violation related to these claims, the district court did not rule on those claims and they cannot be heard. *See Lamasters*, 821 N.W.2d at 864.

In terms of arguments presented in this brief, the State preserved error with its motion to dismiss the counterclaim and joinder. *See* 11/18/2014 Motion to Dismiss Counterclaim and Joinder; App. 142–45. In addition, for purposes of addressing this issue, this Court "can uphold a trial court's ruling on any ground appearing in the record, whether urged in the trial court or not." *Bensley v. State*, 468 N.W.2d 444, 445 (Iowa 1991) (addressing the

State's contention related to the State Appeal Board, even though it was raised for the first time on appeal).

Standard of Review

Questions of statutory construction related to Chapter 229A are reviewed for corrections of errors at law. *In re Det. of Shaffer*, 769 N.W.2d 169, 172 (Iowa 2009).

Merits

In an October 7, 2017 order, the SVP court ruled that it could not hear what the respondent refers to as a "counterclaim" and "contempt" because the matter was on appeal. 10/4/2017 Order; App. 227. The SVP court was correct that it does not have jurisdiction to hear a counterclaim or contempt action seeking money damages, particularly one filed by a sexually predator against persons who are not party to the 229A action.

As an initial matter, no other claims may be joined with a commitment action held pursuant to Chapter 229A: "There is only one issue on trial in a case like this—whether the respondent is a sexually violent predator." *In re Det. of Williams*, 628 N.W.2d 447, 455 (Iowa 2001). Thus no "counterclaim" or "contempt," as the respondent styles his demands for money damages, can be filed or

joined in this case number. To even seek civil damages, the respondent must file a petition in a separate case number stating his alleged cause of action and desired remedy. *Cf. Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996) (noting a federal habeas action is limited to remedies affecting the conviction or confinement and thus a request for money damages is not properly considered).

But even if some kind of civil damages claim could be filed under the SVP case number, the respondent has failed to properly invoke the jurisdiction of the district court, given the nature of his alleged action: money damages against State actors or State employees. Civil claims against the State may only be brought pursuant to the Iowa Tort Claims Act, Chapter 669. *See Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 727 (Iowa 2013); Iowa Code Ch. 669 (2015). The first step in this process is to file a claim with the Department of Management, which is then reviewed by the Attorney General, who must make a final disposition of any claim before it can be heard in the district court. *Rivera*, 830 N.W.2d at 727 (citing Iowa Code §§ 669.3(2), 669.3 (2015)). "Improper presentment of a claim … depriv[es] the district court of subject matter jurisdiction." *In re Estate of Voss,* 553 N.W.2d 878, 880 (Iowa 1996). Here, the claim

was presented improperly: there is no evidence it was filed with the Department of Management or reviewed by the Attorney General pursuant to Chapter 669. "[A] claimant is not permitted to file a lawsuit in district court pending the completion of the administrative review." *Rivera*, 830 N.W.2d at 728 (citing *Bensley*, 468 N.W.2d at 445–46). As a result, the district court lacked subject matter to consider the claim. *Voss*, 553 N.W.2d at 880.

Finally, the respondent's attempt to join other persons or entities—including the Office of the Attorney General, Thomas Miller, Susan Krisko, John McCormally, RoseAnn Mefford, and "Mahaska County"— is not permitted. Other courts hearing SVP appeals properly conclude that a counterclaim against additional parties or government agencies may not be heard in an SVP as the "proper parties" are not before the district court in the SVP action. *See In re Commitment of Dodson*, 434 S.W.3d 742, 749 (Tex. App. 2014); *In re Commitment of Butler*, No. 09-13-00358-CV, 2014 WL 4364526, at *4 (Tex. App. Sept. 4, 2014); *Sjuts v. State*, 774 So. 2d 783, 785 (Fla. Dist. Ct. App. 2000).

The district court declining to rule on the "counterclaim" or "contempt" is not reversible error because it did not affect the substantial rights of the respondent. Such claims were not viable.

CONCLUSION

This Court should affirm the SVP court's finding that the respondent is a sexually violent predator.

REQUEST FOR NONORAL SUBMISSION

This case can be decided on the briefs. In the event argument scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **13,978** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

Dated: April 27, 2018

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