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 DANIEL P. WILSON & JOEL YATES, JUDGES

APPLICATION FOR FURTHER REVIEW
(Decision Date: Nov. 7, 2018)

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QUESTIONS PRESENTED FOR REVIEW

Does Iowa Code section 229A.2(11)(g) mean what it says: that the sexual motivation for a sexually violent offense can be proven "subsequently during civil commitment proceedings pursuant to this chapter?"

Does a child's failure to rapidly disclose sexual abuse prevent the State from relying on that abuse to prove a "recent overt act?"

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STATEMENT SUPPORTING FURTHER REVIEW

A divided Court of Appeals reversed the civil commitment of a self-described "pedophile" based on a misinterpretation of Iowa's Sexually Violent Predator ("SVP") Act. *See In re Det. Ruthers*, Sup. Ct. No. 17-1539 (Iowa Ct. App. Nov. 7, 2018). The Court of Appeals' resolution of whether the respondent was "presently confined" is contrary to the plain language of the statute, and the analysis of whether the respondent committed a "recent overt act" sets a dangerous precedent for child-sex-abuse cases that involve delayed disclosure. Lower courts "have no guidance with respect to the timeframe in which a 'recent over act' must occur prior the State's petition" under Chapter 229A. Slip. op. at *14 (Danilson, C.J., dissenting in part). This Court should grant further review.

First, the Court of Appeals decided an issue of first impression contrary to the plain language of an Iowa statute. Iowa R. App. P. 6.1103(1)(b)(2). One path for committing sexually violent predators under Chapter 229A requires the State to prove the person is "presently confined" for a "sexually violent offense." Iowa Code 229A.4(1) (2015); *In re Det. Willis*, 691 N.W.2d 726, 728–30 (Iowa 2005). The Code defines a "sexually violent offense" to include any

"sexually motivated" crime, and permits that sexual motivation to be proven "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). The Court of Appeals concluded, as a matter of law and contrary to the statute, that a person is not "presently confined" in the county jail if the State proves sexual motivation for an offense during civil commitment proceedings, rather than at the time of sentencing. Slip op. at *8–9. That decision renders the General Assembly's words superfluous, undermines separation of powers, and improperly curtails the State's authority to confine and provide treatment for the most dangerous pedophiles and rapists.

Second, the Court of Appeals decided the Chapter-229A recent-overt-act question contrary to a controlling decision of this Court interpreting an analogous statute. Iowa R. App. P. 6.1103(1)(b)(1). In *Mohr*, this Court found a schizophrenic firing a gun 13 years prior to the filing of a Chapter-229 petition was recent enough to show present dangerousness. *In re Det. Mohr*, 383 N.W.2d 539, 542 (Iowa 1986). Here, the State filed a petition to commit the respondent roughly four-and-a-half years after he sexually abused R.S., within 18

months of the child-victim disclosing the abuse and while a criminal prosecution was pending. SVP trial tr. p. 8, lines 11–24. *Mohr* cannot be reconciled with the Court of Appeals' conclusion that four-and-a-half years is inherently too long to be a valid predicator of dangerousness. Slip op. at *12. Moreover, the Court of Appeals decision is at odds with other state courts: the only supporting case law in this portion of the majority opinion comes in the form of a *"contra"* citation. Slip op. at *12 (citing Washington and Nebraska decisions that found acts five years before commitment were sufficiently "recent").

Third, the Court of Appeals expressly noted it has "no guidance" on the recent-overt-acts issue presented by this appeal. *See* Slip op. at *14 (Danilson, C.J., dissenting in part). Only the Supreme Court can provide the needed guidance as that term is not statutorily defined. Iowa R. App. P. 6.1103(1)(b)(2).

Finally, SVP commitments pursuant to Chapter 229A necessarily concern issues of broad public importance, particularly when the Court of Appeals effectively punishes child-sex-abuse victims for delayed disclosures. *See* Iowa R. App. P. 6.1103(1)(b)(4). Here, most of the four-and-a-half-year delay was because the child

victim did not disclose that he was sexually abused until three years after the abuse happened. A quarter of sexually abused children never disclose the sexual abuse, and another quarter wait more than five years before telling anyone. *See* Daniel W. Smith, et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 273 (Feb. 2000).[1] In other words, the three-year-delay here is common in child-sex-abuse cases, yet the Court of Appeals found it was too late. Permitting the Court of Appeals decision to stand will put numerous pedophiles outside the reach of Chapter 229A if their victims delay reporting, confounding legislative intent and affronting public policy.

This Court should grant further review, vacate the Court of Appeals opinion, and affirm the respondent's commitment as a sexually violent predator.

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[1] Even among the minority of adult victims who do report sexual abuse, more than half did not do so for "years." Laura M. Monroe et al., *The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment*, 20 J. Interpersonal Violence 767, 770 (2006).

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of a decision of the Court of Appeals. Iowa R. App. P. 6.1103.

Course of Proceedings

The Court of Appeals opinion adequately sets forth the procedural posture of the case. *See generally* slip op.

Facts

The respondent has sexually abused little boys for nearly thirty years. *See* trial tr. vol. I, p. 31, lines 1–9; p. 63, line 13 — p. 65, line 19; p. 66, line 2 — p. 67, line 14. In his 20s, he had "what [he] would call a relationship" with a 12-year-old boy. Trial tr. vol. I, p. 80, line 12 — p. 81, line 5. This "relationship" lasted three-and-a-half years and there was "a lot" of sexual contact—"[p]robably every weekend." Trial tr. vol. I, p. 81, lines 2–17. In 1985, the respondent repeatedly fondled and had oral sex with an 11-year-old boy in West Virginia. Trial tr. vol. I, p. 75, lines 1–9; p. 76, lines 15–18; p. 89, lines 1–7; p. 98, line 18 — p. 99, line 1. He also molested a 12-year-old boy in Baltimore that same year, after being introduced to the child by a fellow pedophile. *See* trial tr. vol. I, p. 95, line 17 — p. 96, line 11.

The respondent served time for state and federal convictions for abusing these boys. Trial tr. vol. I, p. 99, lines 9–17; p. 102, lines 1–25. He was paroled despite failing to complete sex offender treatment while incarcerated. *See* trial tr. vol. I, p. 108, line 17 — p. 109, line 18; p. 113, lines 2–3. 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.

The respondent sexually abuses R.S.

The respondent met R.S. 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] The respondent was a friend of R.S.'s mother, but R.S. did not know the respondent was a sex offender. Trial tr. vol. I, p. 35, line 1–4. R.S. does not remember a lot about first meeting the respondent, but does remember going to football games, that the respondent had a lot of stuffed animals, and that he appreciated (what he understood to be) the father-son-type relationship the respondent was pursuing. *See* trial tr. vol. I, p. 35,

[2] Exhibit 1 is a condensed transcript and references here refer to the internal pagination of the document, rather than its .PDF pagination.

lines 10–21; Exhibit 2: 10/21/2011 R.S. Depo., p. 21, lines 9–19; p. 55, lines 1–20.[3]

The respondent first molested R.S. in a car: in ten-year-old R.S.'s words, the respondent grabbed his hand and "[s]hoved it down [the respondent's] pants." Exhibit 1: CPC Interview, p. 13, line 16 — p. 21, line 1; p. 41, lines 6–7. 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. "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. Verdict, p. 2; App. 214. "R.S. was the same gender and age range of [the respondent's] previous pedophilic interest." Verdict, p. 2; App. 214. "[The respondent] and R.S. slept in the same bed together while

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

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 down R.S.'s PJ pants. 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.

The respondent told R.S. "not to tell anyone" about the sexual abuse. Trial tr. vol. I, p. 36, lines 11–15.

During the police investigation, the respondent describes himself as a "pedophile" and says that he likes having sexual "relationships" with kids.

After R.S. disclosed the abuse years later, police interviewed the respondent. 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. 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 findings that the offense against R.S. "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 [the respondent] in trouble in the State of West Virginia." Verdict, p. 3; App. 215.

The SVP trial: the respondent is a diagnosed pedophile who is more likely than not to commit future sexually violent offenses.

Today, the respondent admits to at least "four or five" victims as young as eight years old. Trial tr. vol. I, p. 133, lines 14–23. When the State's expert witness interviewed the respondent about how his victims reacted to the abuse, the respondent told her the little boys "enjoyed it." Trial tr. vol. I, p. 171, lines 1–8.

After hearing from competing expert witnesses, the SVP court concluded the respondent "suffers from a mental abnormality, that being, Pedophilic Disorder." Verdict, p. 3; App. 215. Expert testimony established that the respondent's pedophilia was a chronic

condition that did not and would not abate on its own. Trial tr. vol. I, p. 167, lines 16–20; p. 168, line 25 — p. 196, line 6.

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.

ARGUMENT

I. The Plain Language of Section 229A.2(11)(g) Permits the State to Prove Sexual Motivation at an SVP Trial. Also, the Sexual Abuse of R.S. Was Not Too Stale to Serve as a Recent Overt Act.

Standard of Review

There is some ambiguity regarding the appropriate standard of review. *See* slip op. at *6. 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). Questions of sufficiency require this Court to review "the evidence in a light most favorable to the [bench] verdict, disregarding all contrary evidence

and inferences[.]" *In re Detention of Altman*, 723 N.W.2d 181, 184 (Iowa 2006). Review of the denial of a motion to dismiss requires this Court to "accept as true the petition's well-pleaded factual allegations." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Merits

This Court should grant the application for further review because the State's petition to commit the respondent as a sexually violent predator can rest on either of two independent legal grounds. First, the respondent was presently confined for a sexually violent offense because the State proved the assault on R.S. was sexually motivated at the SVP trial. Second, the respondent committed a recent overt act when he sexually assaulted R.S.

A. The Code permits the State to prove sexual motivation for a sexually violent offense "during civil commitment proceedings." The Court of Appeals opinion renders part of the General Assembly's legislation superfluous.

The first path for committing persons as a sexually violent predator applies when the person is "presently confined" for a "sexually violent offense." *See In re Det. of Shaffer*, 769 N.W.2d 169, 173 (Iowa 2009); Iowa Code § 229A.4(1) (2015). "Sexually violent

offense" is defined by statute and includes both *per se* sexually violent offenses (like a sexual abuse conviction), as well as "[a]ny 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)(a), (g) (2015) (emphasis added). In other words, the State may prove that a crime that does not always have a sexual motivation (like assault or robbery) is a sexually violent offense by proving sexual motivation during civil commitment proceedings. Iowa Code § 229A.2(11)(g).

This statutory language informs the Court's interpretation of the term "presently confined." In *Shaffer*, this Court held that Iowa courts must reject "attempts to apply a hypertechnical definition of the phrase 'presently confined.'" *In re Det. of Shaffer*, 769 N.W.2d 169, 174–75 (Iowa 2009). Similarly, in *Willis*, this 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 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. Just as in *Willis*, the basis of the sheriff's custody here was that the respondent had committed a sexually violent offense.

In this case, following a contested bench trial, the SVP court ruled 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. The SVP court complied with the statutory procedure and correctly found that the respondent was presently confined for a sexually violent offense when served with the 229A petition. *See* Iowa Code § 229A.2(11)(g) (2015).

The Court of Appeals does not address the language of section 229A.2(11)(g) head-on.[4] Instead, the Court of Appeals assumes that the confinement was for a "non-sexual-act" because the State had not yet proven the issue of sexual motivation at the time the petition was filed. Slip op. at *8–9. But the statute expressly permits the State to

[4] While the Court of Appeals did cite section 229A.2(11)(g) in its recent-overt-acts analysis, section 229A.2(11)(g) is not about recent overt acts—it defines "sexually violent offense," which is a term of art related to whether the respondent is "presently confined." *See* Iowa Code § 229A.2(11); slip op. at *9–10.

prove sexual motivation *"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) (emphasis added). In this case, the State chose the latter route, consistent with this Court's holding in *Willis* that an SVP need not "be convicted of a sexually violent offense before the petition is filed[.]" *Willis*, 691 N.W.2d at 729.

The Court of Appeals' decision renders the latter half of section 229A.2(11)(g) superfluous, conflicts with *Willis*, undermines separation of powers, and functionally re-writes legislation passed with overwhelming support by the General Assembly. *See* 98 Acts, ch. 771 (77th G.A.). This Court should grant further review to clarify that sexual motivation, and relatedly whether an offense is "sexually violent" for purposes of Chapter 229A, can be proven during civil commitment proceedings, as authorized by the statute.

B. The Court of Appeals needs "guidance" on interpreting the recent-overt-act requirement of Chapter 229A. This Court should grant further review and find the abuse of R.S. was a recent overt act.

Even if the respondent was not presently confined, this Court should grant further review to address the Court of Appeals' recent-

overt-acts analysis. The recent-overt-acts discussion is contrary to case law from this state and other jurisdictions. It also punishes abused children for not coming forward to disclose sexual abuse sooner.

"Recent overt act" is a term of art in Chapter 229A. It does not actually have a temporal component, but rather "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). To the extent there is a judicially-created temporal component, it is only that which must cross the low threshold of satisfying due process, such that the State is not relying on an act that is "too stale to serve as a predictor of future acts of a similar nature." *Willis*, 691 N.W.2d at 729. The analysis does not turn on the act itself, but rather "the inference against a particular propensity that arises from the absence of an overt act." *Id.*

In *Mohr*, this Court affirmed the civil commitment of a schizophrenic respondent when the recent overt act at issue was the respondent 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) (interpreting Chapter 229). The Court, relying in part on

evidence regarding a psychiatric diagnosis and interviews with mental health professionals, concluded that the respondent was presently dangerous 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 540–42.

The Court of Appeals opinion cannot be reconciled with *Mohr*, as the facts here are more recent and more predictive: the respondent's molestation of R.S. was more recent than 13 years ago and happened on multiple occasions, demonstrating that he presents an ongoing danger. In light of the respondent's clinical diagnosis of pedophilia, 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 was a valid predicator of future dangerousness because it demonstrated propensity.

In addition to conflicting with *Mohr*, the Court of Appeals majority opinion is at odds with other state courts' decisions in this area. The Washington courts, interpreting a mostly analogous SVP

Act, have concluded that an act does not become stale in five years. *See Froats v. State*, 140 P.3d 622, 629 (Wash. Ct. App. 2006); *In re Pugh*, 845 P.2d 1034, 1039 (Wash. Ct. App. 1993). Nebraska has come to the same conclusion, interpreting the state's then-existing mental health commitment act. *See In re Interest of Blythman*, 302 N.W.2d 666, 672 (Neb. 1981).

Part of the Nebraska court's rationale for not putting a finite temporal limit on the definition of "recent" was that the analysis should focus on whether any delay between the act and the commitment indicated 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. *See Blythman*, 302 N.W.2d at 641.

The State was diligent here. 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 was no improper delay or lack of diligence, nor could there be. A quarter of sexually abused children never disclose the sexual abuse,

and another quarter wait more than five years before telling anyone. *See* Daniel W. Smith, et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 273 (Feb. 2000). The Court of Appeals decision fails to recognize this fact. It lacks common sense and offends public policy.

Sexually violent predators, by definition, are "extremely dangerous" and "likely to engage in sexually violent behavior" if not confined. Iowa Code § 229A.1 (2015). Their "likelihood of engaging in repeat acts of predatory sexual violence is high." Iowa Code § 229A.1. The respondent, a lifelong pedophile, falls within the heartland of offenders covered by Chapter 229A. His sexual abuse of R.S., coupled with his diagnosis of pedophilia and the empirical and clinical evidence of future dangerousness, is sufficient to conclude that the respondent is presently dangerous. The Court of Appeals' decision to the contrary should be reversed.

CONCLUSION

This Court should grant the application for further review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

- This application has been prepared in a proportionally spaced typeface using Microsoft Word in Georgia font, size 14, and contains **3,938** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

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