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IN THE SUPREME COURT OF IOWA

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

APPEAL FROM

THE IOWA DISTRICT COURT FOR MAHASKA COUNTY

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

APPELLANT'S RESISTANCE TO STATE'S APPLICATION FOR FURTHER REVIEW
(Decision dated: November 7, 2018)

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ARGUMENT

THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUES PRESENTED IN THIS CASE, AND THIS COURT SHOULD DENY THE STATE'S APPLICATION FOR FURTHER REVIEW

The State sets forth two Questions Presented for Review in its Application for Further 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?"

Application for Further Review, page 2.

These questions, however, are not relevant to the present case or the Court of Appeals' disposition of this case.

A. Iowa Code section 229A.2(11)(g)

The State asserts that the Court of Appeals' decision concerning section 229A.2(11)(g) "renders part of the General Assembly's legislation superfluous". Application for Further Review, page 3. The State asserts that 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.” Application for Further Review, page 5.

The Court of Appeals did not reach such a conclusion. The Court of Appeals concluded that Ruthers was not “presently confined” because he was merely *charged* with a sexually violent offense, and because there had been no determination or adjudication that he had done anything wrong. Slip Opinion at page 7-9.

The Court of Appeals considered this Court’s decision in *In Re the Detention of Wygle*, 910 N.W.2d 599, 607 (Iowa 2018), particularly the many decisions interpreting the phrase “presently confined”. It also considered this Court’s decision in *In Re the Detention of Willis*, 691 N.W.2d 726, 729-30 (Iowa 2005). The Court of Appeals rejected the State’s assertion that Ruthers was “presently confined” simply because he was charged with an offense, and was awaiting trial on a charge of a sexually violent offense. The Court of Appeals found that Ruthers was confined because he did not post bail, and unlike the respondent in *Willis*, there had been no adjudication that

Ruthers was guilty. The Court of Appeals thus found that Ruthers was not confined for a sexually violent offense. Slip Opinion, page 8-9.

B. "Recent Overt Act" and the timing of disclosure by a sexual abuse victim

In its Application for Further Review, the State sets forth a number of reasons why the Court of Appeals incorrectly decided that Ruthers did not commit a "recent overt act".

First, the State asserts that the Court of Appeals' decision is "contrary to a controlling decision of this Court interpreting an analogous statute", citing to *In Re. the Detention of Mohr*, 383 N.W.2d 539, 542 (Iowa 1986). According to the State, in *Mohr* this Court found the act of firing a gun 13 years prior to the filing of a Chapter 229 civil commitment was recent enough to show present dangerousness". Application for Further Review, p. 5. In fact, that is not what this Court said. This Court was concerned not so much with what took place years prior, but rather

Moher’s presently expressed view of what happened years prior:

> There is little real dispute over what the objective evidence was on the crucial element of endangerment but the parties are poles apart on how that evidence is to be interpreted. **Mohr is right in insisting that the one incident of violence, though alarming, does not qualify as recent.** It is suggested on his behalf that his present mental impairment is not threatening, that his behavior qualifies only as offensive, perhaps even repugnant to persons of average sensibilities. But Mohr is on firm ground in arguing that socially unacceptable behavior cannot suffice. He thinks the evidence points to no more.
>
> The evidence can be interpreted otherwise. **The attack involving Mohr's father occurred many years ago but <u>his presently expressed view of it</u> is certainly ominous and clearly portrays a sadly twisted frame of mind. With this background his sexual overtures to total strangers and his fantasies about sexual attacks take on a threatening nature.**

Mohr, 383 N.W.2d at 542 (emphasis added).

The State asserts that the Court of Appeals decision “effectively punishes child-sex-abuse victims for delayed disclosures”, and “will put numerous pedophiles outside the reach of Chapter 229A if their victims delay reporting, confounding legislative intent and affronting public policy”.

Application for Further Review, p. 6-7. This assertion is clearly erroneous and is reminiscent of this Court's concern that "because of the amorphous standards and community fear, fact finders are not able to identify a narrow class of persons subject to SVP commitment." *Wygle*, 910 at 605.

Delayed reporting by sexual abuse victims is not the issue in this case. The criminal statute of limitations for sexual abuse involving children is ten years after the child victim's 18th birthday. Iowa Code sections 802.2, 802A, and 802B. Thus, delayed reporting by a child victim may be addressed, arguably, within 28 years following the abuse.

Secondly, Ruthers was criminally charged with sexual abuse of R.S., a minor who was alleged to be under the age of 12 at the time of the abuse. This charge was filed almost four years after the abuse was alleged to have taken place. This charge, with sentencing enhancements was a Class A felony. No one punished the alleged victim for a delay in reporting. Instead, the State reached a plea agreement with Ruthers that he would plead guilty to a non-sexual assault causing bodily injury (a serious misdemeanor), and would receive credit for

time served. Then the State attempted to bootstrap a 229A petition onto the negotiated plea.

The State finally asserts that the Court of Appeals is essentially not capable of deciding the recent overt act issue without guidance from this Court. This Court has clearly provided guidance on this issue, and the Court of Appeals considered this Court's decisions in ruling on this appeal. See *In Re the Detention of Gonzales*, 658 N.W.2d 102 (Iowa 2003), *In Re the Detention of Swanson*, 668 N.W.2d 570 (Iowa 2003), *In Re the Detention of Willis*, 691 N.W.2d 726 (Iowa 2005), *In Re the Detention of Wygle*, 910 N.W.2d 599 (Iowa 2018), and *In Re the Detention of Tripp*, 915 N.W.2d 867 (Iowa 2018).

The Court of Appeals applied the correct standard to determine if Ruthers committed a recent overt act. It concluded that the relevant question is "whether a past act of sexual violence has become too stale to serve as a predictor of future acts". Slip Opinion, page 11 (Citing *Willis*, 691 N.W.2d at 729. Research has shown that sexual offenders who are released into the community, and who remain in the community without being charged or convicted of a sexual

offense, have a significant reduction in sexual recidivism risk. At five years in the community, the risk is reduced by 50%; at ten years, the risk is reduced by 75%. (Trial Transcript, Second Day, p. 20, ln. 7-p. 21, ln. 19.) Hanson, Harris, Letourneau, Helmus, and Thornton, *Reductions in risk based on time offense-free in the community: Once a sexual offender, not always a sexual offender*. Psychology, Public Policy, and Law, Vol. 24(1), 48-63 (February 2018).

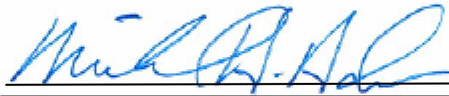
Of significance to the Court of Appeals, Ruthers was free in the community from 2007, when the acts allegedly took place, and 2010 when he was arrested and charged with a sexually violent offense. That charge was disposed of in March, 2012, when Ruthers pled guilty to a non-sexual charge. The Court of Appeals correctly determined that the conduct of 2007 was too stale to serve as a predictor of future acts.

CONCLUSION

For the foregoing reasons, Ruthers prays the Court to deny the State's Application for Further Review.

Respectfully submitted,

STATE PUBLIC DEFENDER'S OFFICE



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Dated: November 29, 2018