ELECTRONICALLY FILED MAY 16, 2023 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

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| IN RE THE DETENTION OF<br><br>STEWART SCHUMAN,<br>Respondent-Appellee. | SUPREME COURT NO. 22-1521 |

APPEAL FROM

THE IOWA DISTRICT COURT FOR STORY COUNTY

THE HONORABLE JAMES C. ELLEFSON, JUDGE

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# APPELLEE'S FINAL BRIEF AND ARGUMENT

AND

# REQUEST FOR ORAL ARGUMENT

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MICHAEL H. ADAMS, AT0000357
Local Public Defender, Special Defense Unit

Lucas State Office Building, Fourth Floor
321 East 12th Street
Des Moines, Iowa 50319
Telephone: (515) 288-0578
Facsimile : (888) 293-0206
Madams@spd.state.ia.us

ATTORNEY FOR RESPONDENT-APPELLEE

**CERTIFICATE OF SERVICE AND FILING**

On the 16th day of May, 2023, the undersigned did serve the within Appellant's Final Brief and Request for Oral Argument on all other parties to this appeal through EDMS, and upon the Respondent-Appellee by Regular United States Mail.

I further certify that on May 16, 2023, I will electronically file this document through EDMS with the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

STATE PUBLIC DEFENDER'S OFFICE

MICHAEL H. ADAMS, AT0000357
Local Public Defender, Special Defense Unit
Lucas State Office Building, Fourth Floor
321 East 12th Street
Des Moines, Iowa 50319
Telephone: (515) 288-0578
Facsimile : (888) 293-0206
Madams@spd.state.ia.us

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## ROUTING STATEMENT

This case presents substantial constitutional questions as to the validity of a statute, presents a substantial issue of first impression, and requires the Court to reconcile seemingly conflicting statutory and constitutional rights. For that

reason, this case should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a), (c), and (f).

## STATEMENT OF THE CASE

**Nature of the Case and Course of Proceedings and Disposition in District Court:** Schuman accepts the State's rendition of the Nature of the Case and Course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

**Statement of Facts:** Schuman was civilly committed pursuant to Iowa Code chapter 229A on December 12, 2012. Since that time, he has resided at the Civil Commitment Unit for Sexual Offenders (CCUSO) at the Cherokee Mental Health Institute.

At the time of his Final Hearing, he was 67 years of age. (Trial Transcript, p. 13, ln. 20-21). Schuman was raised in a broken home, in foster care, and in state school from approximately age ten (10) until eighteen (18). Respondent's Exhibit B, p. 1(Conf. App. p. 35). He was subjected to physical and sexual abuse, and began physically and sexually abusing other students. *Id.*

He has been married twice, and has a son and two daughters. *Id.* at p. 2. (Conf. App. p. 36).

Schuman has been convicted of variety of non-sexual crimes, and has been convicted twice of sexual crimes involving his son and nephew. He also states that he has had seven (7) sexual abuse victims aging from six to ten. *Id.*

Schuman has participated in Sexual Offender Treatment Program (SOTP) for approximately ten (10) years. *Id.* at p. 3 (Conf. App. p. 37). There are five (5) Phases in the SOTP program at CCUSO as set forth in the State's Annual Report dated January 1, 2022:

> 1 Treatment Engagement/Interfering Factors
> 2 Identification of Dynamic Risk Factors/Long Term Vulnerabilities
> 3 Specific Interventions for Dynamic Risk Factors/Long Term Vulnerabilities
> 4 Maintenance of Change
> 5 Transitional Release

(Conf. App., p. 18). During the course of his treatment at CCUSO, Schuman has submitted to polygraph examinations, penile plethysmographs (PPG), and Abel screens. Id. at p. 8 (Conf. App. P. 14). In approximately 2018, Schuman had attained Phase 4, level 5, which is

the highest phase before Transitional Release, and the highest level of good behavior and privileges in the program. (Trial Transcript, p. 22, ln. 20-23). During approximately four and one-half (4 ½) years in Phase 4, Level 5, Schuman developed several Relapse Prevention Plans that were submitted to his treatment providers at CCUSO. (Trial Transcript, p. 38, ln. 20-p. 39, ln. 3; p. 62, ln. 10-19). Schuman was not aware if his therapist was even reading his relapse prevention plans. *Id.*

In 2021, Schuman submitted to two polygraph examinations on March 26, 2021 and September 22, 2021 which the polygrapher deemed "untruthful" or "failures". CCUSO staff then demoted Schuman from Phase 4, Level 5 to Phase 3, as a result of his failure to pass two (2) polygraph examinations. (Trial Transcript, p. 22, ln. 15-19), *Id.* at 4 (Conf. App. P. 10). While in Phase 3, Schuman again submitted his Relapse Prevention Plan to his treatment providers at CCUSO, and again, heard nothing from them. (Trial Transcript, p. 63, ln. 20-p. 64, ln. 4).

On March 21, 2022, Schuman persuaded the district court to grant him a Final Hearing. See Iowa Code section 229A.8(5). That Final Hearing was held on July 6, 2022. Schuman's expert, Dr. Luis Rosell, opined that Schuman was appropriate for discharge, (Respondent's Exhibit B, p. 20 (Conf. App. p. 54), (Trial Transcript, p. 149, ln.11-15), but Schuman testified that he didn't want discharge. Rather, he wanted to go to the Transitional Release Program to build up his finances. (Trial Transcript, p. 39, ln. 10-p. 40, ln. 3). Dr. Rosell also found that Schuman was suitable for placement in the Transitional Release Program, and that the criteria set forth in Iowa Code section 229A.8A should be deemed satisfied. (Respondent's Exhibit B, p. 20)(Conf. App. p. 54). With regard to Schuman's Relapse Prevention Plan, Dr. Rosell attached it as an appendix to his report, Respondent's Exhibit B. (Conf. App. p. 55).

Further facts will be set forth below as the same become pertinent.

## ARGUMENT I.
## THE STATE DOES NOT HAVE A RIGHT OF APPEAL IN A CHAPTER 229A CASE WHEN THE DISTRICT COURT PLACES A COMMITTED PERSON IN THE TRANSITIONAL RELEASE PROGRAM.

Following the decision of the district court, the State filed a notice of appeal. Schuman filed a motion to dismiss, asserting that the State did not have a right of appeal where a district court places someone in the Transitional Release Program because it was not a final judgment. In *Gaal v. Iowa District Court for Linn County*, 2002 WL 31113863 (Iowa Ct. App. 2002), the Iowa Court of Appeals found that Gaal's appeal from the district court's denial of his request for a Final Hearing was not appealable because such denial was not a final order or judgment. Iowa Code section 229A.2(4) defines "discharge" as "an unconditional discharge from the sexually violent predator program. Once a person is committed under Iowa Code chapter 229A, that person is under the court's *continuing jurisdiction* until the person is

unconditionally released. *Id*. at 1. (quoting *In Re the Detention of Petersen*, 138 Wash.2d 70, 90 P.2d 1204 (Wash.1999)). Until such an unconditional release, and while the person is under the continuing jurisdiction of the court, there can be no final judgment.

Similarly, a person released from a secure facility into a transitional release program, like Schuman, or released with supervision is not considered to be "discharged." Because Schuman was not unconditionally released, and remained under the court's continuing jurisdiction, the State had no right to appeal the district court's ruling. Instead, the State should have challenged the district court's order through a petition for writ of certiorari. A writ of certiorari is applicable where the district court has acted illegally. Illegality exists when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law. Iowa Rule App. P. 6.107, *Sorci v. Iowa District Court*, 671 N.W.2d 482, 489 (Iowa 2003).

In response to Schuman's motion to dismiss the State's appeal, the State asked that its appeal be treated as a petition for writ of certiorari. Because the district court's ruling did not lack evidentiary support, and because the district court did not incorrectly apply the law, this Court should deny the State's petition for writ of certiorari.

## ARGUMENT II.

## IOWA CODE SECTION 229A.8A(2)(d), AS WELL AS CCUSO'S RULES, RELATING TO THE ACCEPTANCE OF RELAPSE PREVENTION PLANS VIOLATE SCHUMAN'S RIGHT TO DUE PROCESS AND ARE PUNITIVE BECAUSE THEY DO NOT ALLOW THE COURT TO BALANCE THE LIBERTY INTEREST OF THE INDIVIDUAL WITH THE INTEREST OF THE COMMUNITY ON A CASE-BY-CASE BASIS

The fighting issue in this case is whether the district court can place a person in the Transitional Release Program when "[a] detailed relapse prevention plan has [not] been developed and accepted by the treatment provider which is appropriate for the committed person's mental abnormality and sex offending history", as set forth in Iowa Code section

229A.8A(2)(d). This issue must be examined within the framework of the annual review and final hearing process.

Iowa Code section 229A.8(6)(d) provides in pertinent part:

> The following provisions shall apply to a final hearing:
> . . .
>
> d. The burden of proof at the final hearing shall be upon the state to prove beyond a reasonable doubt either of the following:
>
> (1) The committed person's mental abnormality remains such that the person is likely to engage in predatory acts that constitute sexually violent offenses if discharged.
>
> (2) The committed person is not suitable for placement in a transitional release program pursuant to section 229A.8A.

As stated previously, Schuman stated that he did not want to be discharged. He wanted to be placed in the transitional release program so that he could gain employment and establish sufficient finances before being discharged. The district court therefore confined its findings to whether Schuman was suitable for placement in a transitional release program.

Section 229A.8A sets forth ten (10) criteria that determine a committed person's suitability for placement in a

transitional release program. The district court examined each of said criteria, and set forth its reasoning and findings with respect to each item. Generally speaking, the district court found that Schuman's expert, Dr. Rosell, was more reasonable and persuasive than the State's expert, Dr. Salter. The district court found that the State had failed to meet its burden of proof that Schuman was not suitable for placement in the Transitional Release Program. Order on Annual Review, p. 23-4 (App. p. 28-9).

Iowa Code section 229A.8A(2)(d) provides in pertinent part:

> A committed person is suitable for placement in the transitional release program if the court finds that all of the following apply:
> . . .
>
> d. A detailed relapse prevention plan has been developed and accepted by the treatment provider which is appropriate for the committed person's mental abnormality and sex offending history
> . . .

The State asserts that the clear language of section 229A.8A requires a fact-finder to answer each criteria of section 229A.8A in the affirmative, otherwise the person is not

suitable for placement in the Transitional Release Program. Further, this language does not allow a district court to exercise any discretion to inquire into the circumstances of the lack of such an approved plan. If the State is correct, the lack of treatment provider approval of a relapse prevention plan amounts to a "veto" of the district court's exercise of discretion, authority, and options. As the district court properly noted in the present case, if the State's assertion is correct, "the concept of judicial review would be defeated . . ." (Order on Annual Review, p. 21 )(App. p. 26). More importantly, if the State's position is correct, section 229A.8A(2)(d) prevents the district court from performing its obligation to balance the liberty interest of the individual with the interest of the community on a case-by-case basis. This violates the committed person's right to substantive due process.

Involuntary civil commitment is a "massive curtailment of liberty", and a grievous loss. *In Re the Detention of Wygle*, 910 N.W.2d 599 (Iowa 2018)(quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), and a "grievous loss," *Id.* (quoting *Vitek v.*

*Jones*, 445 U.S. 480, 488 (1980)). "The Due Process Clause of the United States Constitution bars a state from 'depriv[ing] any person of life, liberty, or property without due process of law.'" *In Re the Detention of Matlock*, 860 N.W.2d 898, 903 (Iowa 2015) (quoting U.S. Const. amend. XIV, § 1). "Our Iowa Constitution provides 'no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. We have 'traditionally considered the federal and state due process provisions to be equal in scope, import, and purpose.'" *Id.* (quoting *In Re the Detention of Garren,* 620 N.W.2d 275, 284 (Iowa 2000).

> Substantive due process prohibits the State from engaging in arbitrary or wrongful acts "'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100, 113 (1990) (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 668 (1986)). At the core of the liberty protected by the Due Process Clause is a person's interest to be free from bodily restraint by arbitrary government actions. *See Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992). However, this liberty interest is not absolute. *Garren,* 620 N.W.2d at 284.

*Matlock*, 860 N.W.2d at 903.

To civilly commit someone, due process requires that they must suffer from a mental illness, disorder, or abnormality, and be dangerous as a result. *Foucha*, 504 U.S. at 75. The committed person is entitled to release when he has recovered his sanity or is no longer dangerous. *Id.* at 77. He may be held as long as he is both mentally ill and dangerous, but no longer. *Id.*

In the case of a person committed under chapter 229A, if that person still suffers from a mental abnormality, but the State cannot prove he or she is likely to engage in acts of sexual violence upon release, the Courts must release that person. Otherwise, continued confinement violates that person's due process rights under the Iowa and the United States Constitutions and becomes a surrogate for punishment. *Matlock*, 860 N.W.2d at 905 (citing *Foucha,* 504 U.S. at 77). "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *In Re the Detention of Betsworth*, 711 N.W.2d 280, 279 (Iowa

2006) (quoting *Jackson v. Indiana,* 406 U.S. 715, 738 (1972)).

> [t]he basis for his confinement is rehabilitation and treatment. Any standards for release must be based on this nature of commitment, given the overriding concern for the public safety. Any consideration of punishment has no place in a proceeding on the question of conditional release. There has been no criminal act to punish.... There is no criminal to incarcerate. There is, however, a patient to be treated.

*Matlock* at 906 (quoting *State v. Carter,* 64 N.J. 382, 316 A.2d 449, 459 (1974), *overruled on other grounds by State v. Krol,* 68 N.J. 236, 344 A.2d 289, 305 (1975)). "Courts must balance the liberty interest of the individual with the interest of the community on a case-by-case basis. Conditions that are necessary for the treatment of some individuals may not be for others and therefore, would be punitive." Id. at 907 (citing *Campbell v. Dist. Ct.,* 195 Colo. 304, 577 P.2d 1096, 1098 (1978)). "Again, these principles are equally applicable to persons committed under the Sexually Violent Predator Act." *Id.*

Matlock was a person released with supervision from a 229A civil commitment pursuant to Iowa Code

section 229A.9A. He was in the community being supervised by the Judicial District Department of Correctional Services. Matlock challenged the conditions of his supervision on substantive due process grounds. The Iowa Supreme Court determined that the state could impose restrictions on persons released from a 229A civil commitment as long as the person continued to suffer from a mental abnormality, and as long as the restrictions comport with due process. *Id.* at 908.

While Schuman is seeking placement in the Transitional Release Program rather than seeking discharge or release with supervision as did Matlock, he is still seeking *release* into the Transitional Release Program. That release must comport with due process. The Court must balance the liberty interest of the individual with the interest of the community on a case-by-case basis. Conditions that are necessary for the treatment of some individuals may not be for others and therefore, would be punitive.

The requirement that Schuman have a relapse prevention plan that is approved by his treatment provider to enter the Transitional Release Program relieves the State from its obligation to prove that continued confinement is necessary and appropriate for Schuman as an individual, and prevents the district court from balancing the liberty interest of the individual with the interest of the community on a case-by-case basis. A lack of the provider's approval without proof that the approval was properly withheld at the very least amounts to giving the captor the power to decide, over the district court, that continued confinement is in accordance with the law. That is contrary to our system of jurisprudence.

In the present case, the district court made detailed findings of fact and conclusions of law. Schuman's Relapse Prevention Plan is in the record attached as an appendix to Dr. Rosell's report. Dr. Rosell unequivocally testified that, based on his 30 years of experience treating and evaluating sexual offenders, that the plan is

appropriate to Schuman's mental abnormality and sexual offending history. (Trial Transcript, p. 174, ln. 1-p. 176, ln. 8). The State did not offer evidence to the contrary. In fact, as the district court found, Dr. Salter simply relied on the fact that Schuman was reduced from Phase 4 to Phase 3 because he failed two polygraph examinations, and relapse prevention plans are not accepted by the CCUSO program until the individual is in Phase 4. (Trial Transcript, p. 90, ln. 5-p. 93, ln. 4). The district court also found that there was no evidence about the polygraph and penile plethysmograph examinations themselves, no evidence about the qualifications of the examiners, the techniques employed by the examiners, or evidence tending to establish the reliability of the equipment and methods used by the examiners. The district court found that reducing Schuman to Phase 3 based on polygraph results, especially given their questionable admissibility and reliability, was not a reliable reason for demoting Schuman from Phase 4 where his relapse prevention plan could have been

examined. Due process requires that the State justify its continued restraint of, and conditions placed on, Schuman's liberty. Schuman's plan must be scrutinized by the district court, but that ability is denied if the language of the statute is read in isolation and without regard to the district court's duties to uphold the United States and Iowa constitutions. The reading of the statute suggested by the State makes this requirement punitive and unconstitutional.

Statutes are presumed to be constitutional, *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022), *Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682 (Iowa 2002). The legislature is presumed to know the law. *State v. Adams*, 810 N.W.2d 365 (Iowa 2012). In its enactment of section 229A.8A(2)(d), it makes sense that the legislature would want a committed person to have a genuine, legitimate, and appropriate relapse prevention plan before it would allow the person to be placed into the Transitional Release Program, and it also makes sense that the legislature would want that determination to come from a person qualified to make that

determination. The legislature surely did not intend to prohibit judicial examination of the issue or give the treatment program veto power over the district court. The Supreme Court can uphold the intent of the legislature by reading the statute to require the district court to hear evidence about the relapse prevention plan and make decisions concerning the completeness and appropriateness as well as the circumstances of the plan as did the district court in this case. The parties could present expert opinions about the plan, and the district court could resolve disputes and make a decision as to whether the plan met the legislative requirements.

Last, CCUSO's rule or practice that provides that the relapse prevention plan won't be considered until Phase 4, likewise violates Schuman's right to due process. Rather than the "case-by-case", individualized treatment and evaluation that is required by due process, the CCUSO rule or practice is to treat everyone the same with a "one-size-fits-all" approach. It is for this reason, among other reasons, that judicial review is essential to accomplish the goals of the legislature, while considering

the safety of society and the individual circumstances of a committed person.

## CONCLUSION

For the foregoing reasons, the undersigned prays the Court to affirm the judgment and ruling of the district court in this matter.

Respectfully submitted,

STATE PUBLIC DEFENDER'S OFFICE

MICHAEL H. ADAMS, AT0000357
Local Public Defender
State Public Defender's Special Defense Unit
Lucas Building, Fourth Floor
Des Moines, Iowa 50319
Telephone : (515) 288-0578
Facsimile : (888) 293-0206
Email: madams@spd.state.ia.us

## REQUEST FOR ORAL ARGUMENT

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

STATE PUBLIC DEFENDER'S OFFICE

MICHAEL H. ADAMS, AT0000357
Local Public Defender
State Public Defender's Special Defense Unit
Lucas Building, Fourth Floor
Des Moines, Iowa 50319
Telephone : (515) 288-0578
Facsimile : (888) 293-0206
Email: madams@spd.state.ia.us

## ATTORNEY'S COST CERTIFICATE

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

MICHAEL H. ADAMS, AT0000357
Local Public Defender
State Public Defender's Special Defense Unit

## CERTIFICATE OF COMPLIANCE

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,316 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 16, 2023

MICHAEL H. ADAMS, AT0000357
Local Public Defender