

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
(Central Division)

Wayne Atwood, Arthur Jennings and  
Daniel Bellman, on behalf of themselves and  
all present and future Iowa Code Chapter  
229A pretrial detainees, and Loren G. Huss  
Jr., John Henry Nachtigall, Timothy  
Gusman, and Lanny Taute, on behalf of  
themselves and those similarly situated,  
Petitioners/Plaintiffs

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.  
} Civil Action  
} 4-02-CV-90359  
.  
.

vs.

The Hon. Thomas J. Vilsack, et al.  
Respondents/Defendants

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**BRIEF**

In support of  
Motion for Summary Judgments and Adjudications

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COME NOW Petitioners Atwood, Jennings and Bellman, class  
representatives for the equitable claims herein and, on behalf of  
themselves and the class, submit their brief to the Court in support of  
their Motion for Summary Judgments and Adjudications.

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## STANDARDS FOR DISPOSITION

This is a motion for summary judgment and for partial summary adjudication under Fed. R. Civ. Pro. 56 (a) and (d). Most issues briefed will be fully dispositive of claims made in Plaintiffs Complaint; others will fix the “law of the case” on the remaining claims prior to trial so that they may be tried with greater efficiency. See, Americans Disabled for Accessible Public Transp. (ADAPT) v. SkyWest Airlines, Inc., 762 F.Supp. 320, 1 NDLR P 296 (D.Utah 1991) citing Wright, Miller & Kane, Federal Practice and Procedure Civil 2d § 2737 on the distinction between partial adjudications and summary judgment). Generally where a ruling under Fed. R. Civ. Pro. 56 is less than dispositive of an entire claim it only constitutes an interlocutory ruling.

The standard for granting summary judgment is firmly established. Federal Rule of Civil Procedure 56 provides that summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir.1990)...; Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir.1990).

A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences that can be drawn from the facts.

Matsushita v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 993, 8 L.Ed.2d 176 (1962)); Burk v. Beene, 948 F.2d 489, 492 (8th Cir.1991).

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wabun-Inini, 900 F.2d at 1238. The Eighth Circuit, however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554- 55, 91 L.Ed.2d 265 (1986)); Hartnagel v. Norman, 953 F.2d 394, 396 (8th Cir.1992).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." Hartnagel, 953 F.2d at 395 (citing Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53). The moving party is not required by Rule 56 to support its motion with affidavits or other similar materials negating the opponent's claim. Id.

Rawlings v. Iowa Department of Human Services, 820 F. Supp. 423, 424-6 (N.D. Iowa 1993); Rowson v. Kawasaki Heavy Indust., 866 F. Supp. 1221 (N.D. Iowa 1994). Here, certain of Plaintiffs' claims are pursued purely as a matter of law, therefore an extensive presentation of undisputed facts is unnecessary.

## A R G U M E N T

### A. Denial of Speedy Justice and Imposition of Double Jeopardy

#### 1. Speedy Justice.

Speedy justice rights of pretrial civil detainees are governed by due process and speedy trial provisions of Iowa's own Bill of Rights and the due process clause of the Fourteenth Amendment. Iowa Constitution, Art. I, Secs. 9 & 10, U.S. Const., Amendment 14. The Respondents cannot escape speedy justice and due process limitations simply because Chapter 229A commitment proceedings are "civil" in nature. Section 10 of the Iowa Constitution applies to all "cases involving the life, or liberty of an individual..." as well as "criminal prosecutions," and due process applies to all restraints upon liberty.

In spite of weakening amendments,<sup>1</sup> Iowa Code Chapter 229A still makes a gestures toward speedy case processing, but unlike the speedy trial statutes and rules established for criminal defendants, the requirements of Chapter 229A do not fully frame the right of speedy trial. Specifically, there is no civil equivalent to a speedy arraignment. Although a potential commitment candidate must be administratively identified at least 90 days prior to release from prison, there is no longer

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<sup>1</sup> See 1999 Iowa Acts, Ch. 61 (S.F. 216) eliminating some deadlines and lengthening others.

any time limit within which the petition must be filed.<sup>2</sup> The 90 day deadline for commencement of the trial may be postponed at the request of either party or by the district court. And, there are no statutory sanctions or consequences for failure to abide by the statutory guidelines. The only remedy is to seek equitable relief from the denial of constitutional rights.

The Safekeepers' speedy justice contentions are not a simple complaint that commitment trials are not commenced within 90 days. Rather, the Safekeepers argue that the Respondents are exceeding their permissible discretion<sup>3</sup> under the constraints of speedy trial and due process by deliberately delaying the administrative initiation of every case under Chapter 229A until post-imprisonment detention of the candidate becomes a certainty. [See, Answer ¶ 17 admitting ¶ 21<sup>4</sup> of the Complaint] Where the Safekeepers have been acted upon collectively and the statute provides no individual remedy, class-wide equitable relief is appropriate.

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<sup>2</sup> A 75 day limit for filing the petition was eliminated in 1999. See fn. 16 *infra*.

<sup>3</sup> Petitioners do not contend that the Respondents lack authority to delay the initiation of an **individual** case as a matter of discretion in an appropriate circumstance. *E.g.*, where needed information about the candidate is not yet available or the date of discharge from prison could not be anticipated. They only challenge the overall policy of deliberate delay which is being imposed across-the-board.

<sup>4</sup> “[21]. In practice, actions for commitment under Chapter 229A are not even filed until a candidate’s discharge from prison becomes imminent.” [Complaint].

Nothing in the commitment statute itself either commands or defends this uniform practice of calculated delay. The results are purely sinister: It is a policy certain to result in lengthy, post-punishment, close confinement of every commitment candidate, including those who will never, in the end, be committed.<sup>5</sup> Though most candidates for commitment under Chapter 229A are serving lengthy sentences in full, and can be identified well in advance discharge through a series of routine administrative screenings, not one of them will ever see daylight once his or her sentence of confinement has expired. This is by deliberate design of the Respondents.

By intentionally postponing the initiation of proceedings to run well past a prisoner's discharge date, Respondents both guarantee that every person whom they single out will suffer a lengthy post-sentence confinement irrespective of how meritorious the State's case may be, as well as maximize the time that the targeted individuals will spend in lockup. In consequence, all Safekeepers are being forced to endure an extra measure of lengthy, harsh and unproductive detention. There are no services offered. The time spent on the Safekeepers' Unit is "dead

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<sup>5</sup> Already there have probably been half a dozen individuals who, after lengthy pretrial detentions were ultimately successful in resisting commitment as SVP's.

time,” counting toward nothing in either the lives of the detainees or in the pursuit of the State’s avowed justification of rehabilitation.

Speedy trial norms are not measured simply from the time of formal arraignment, but also from the time that a person is first held in restraint. There is unacceptable delay permitted in Iowa’s SVP proceedings between the time that an inmate is or could easily be singled out by the executive branch for sexual offender commitment and the date upon which the formal petition is filed. Delay in bringing formal proceedings may often be a matter of discretion, but even that discretion must yield to a rule of reason when a person is already in custody for the problems to be addressed and is simply waiting for a decision on the initiation of formal proceedings.

The United States Supreme Court has established three objectives to be served by enforcement of the right of speedy trial.

This guarantee is an important safeguard

- 1) to prevent undue and oppressive incarceration prior to trial,
- 2) to minimize anxiety and concern accompanying public accusation and
- 3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.

U. S. v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L. Ed2d 627 (1966) {enumeration supplied}.

In Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) the U.S. Supreme Court rejected simplistic temporal measurements of the right to speedy trial. Instead, the Supreme Court suggested that a balancing approach required cases to be analyzed in terms of at least four factors: “Length of delay, the reason for delay, the defendant’s assertion of his right, and prejudice to the defendant.” Id. 407 U.S. at 530. The high court noted that a lengthy pretrial incarceration results in serious “societal disadvantages” such as overcrowding of facilities and conditions that have a “destructive effect on human character and makes the rehabilitation of the offender much more difficult.”<sup>6</sup>

To quote further, “even more serious consequences ensue for the accused, including the imposition of “dead time” devoid of recreational or rehabilitative programs, and disruption of gainful employment and family life. The accused must live under a cloud of “anxiety, suspicion, and often hostility.” Id. 407 U.S. at 532-33.

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<sup>6</sup> Id. 407 U.S. at 520 fn.12 quoting “Testimony of Director of Bureau of Prisons, Hearings on Federal Bail Procedures... 88th Cong, 2nd Sess, 46 (1964) [*emphasis added*].

In Dillingham v. United States,<sup>7</sup> a unanimous Supreme Court summarily reversed a Sixth Circuit decision permitting a 22 month delay between arrest and indictment even though the defendant did not make a showing of actual prejudice. The Supreme court presumed prejudice from the circumstances of delay itself and held that such a lengthy pre -indictment delay was impermissible. The Court quoted its prior precedent holding that “[i]nvocation of the speedy trial provision thus need not await indictment, information or other formal charge .” Id., 423 U.S. at 65; 96 S. Ct at 304. [emphasis added]

The Iowa Supreme Court has also recognized this principle: “[A] sovereign may not deny an accused person a speedy trial even though he is incarcerated in one of that sovereign’s penal institutions.” Hottle v. District Court in and for Clinton County, 233 Iowa 904, 11 N.W.2d 30, 32-3 (1943). “[T]he circumstance that one is convicted does not alter the degree of diligence required of the prosecuting officials... in giving him a speedy trial...” Id.

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<sup>7</sup> 423 U.S. 64, 96 S. Ct. 303, 46 L. Ed. 2d 205 (1975).

In this case we have at issue a civil commitment statute that clearly authorizes proceedings to be initiated while the “accused” is still in prison, and which still reflects a legislative concern for diligence. Prisoners are subjected to months and even years of uncertainty wondering if threatened proceedings will be brought. Delay in filing the formal petition results in an unnecessary, useless, period of detention, and the coercive effect of additional “dead time” interferes substantially with the ability of Safekeepers to engage in legal resistance. [Judge Wilke, App. G(97-98); Reitman Op., App. A(14); Dr. Rogers App. G(64)]. These are the very three factors described in Dillingham supra . The right of speedy trial is being affronted by Respondents’ practice of delay.

“Society, as well as the Respondent, has an important interest in assuring prompt prosecution...” including allowing “authorities to start the rehabilitation.” People v. Staley, 41 N.Y.2d 789, 792, 364 N.E.2d 339, 342 (1977). Unexplained or inexcusable pre-indictment delay in bringing charges violates due process and requires dismissal of a criminal case. Id. Safekeepers do not here seek dismissal, rather they simply seek injunctive relief to end deliberate delay in the commencement of Chapter 229A proceedings for the apparently vindictive or gratuitous purpose of imposing additional incarceration.

## 2. Double Jeopardy

If prolonged pretrial civil detention is unnecessary in most Chapter 229A cases for the reason that proceedings need not be purposely delayed until candidates are released from prison, then the purpose or consequence of securing such a result must be punitive. Moreover, it is a consequence that attends solely to convicted offenders who have discharged their normal sentence and is imposed in recognition of their past crimes. A punitive measure inflicted on the basis of a prior offense that has already been punished offends double jeopardy. Kansas v. Hendricks<sup>8</sup>

The decision in the landmark sexual predator commitment case, Kansas vs. Hendricks, must be first contrasted with the claims made in this case. In Hendricks the majority stated:

Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been

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<sup>8</sup> Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) "Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from "punishing twice, or attempting a second time to punish criminally, for the same offense." Witte v. United States, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995)" *Id.* 521 U.S. at 369.

historically so regarded. Cf. *id.*, at 747, 107 S.Ct., at 2101-2102. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. *Id.*, at 748-749, 107 S.Ct., at 2102-2103. If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent.

Hendricks, 521 U.S. 346 at 363, 117 S.Ct. 2072 at 2083).

Thus, the issue in Hendricks was whether a potentially indefinite period of civil commitment necessarily constituted punishment; here the issue is whether an across-the-board policy of administrative delay for the very purpose of imposing an additional period of "dead time" incarceration (under severe circumstances), must be legally tolerated as a non-punitive "civil" measure.

Justice Kennedy, whose concurrence in Hendricks provided the crucial 5th vote warned:

Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish .  
See Baxstrom v. Herold, 383 U.S. 107, 111- 112, 86 S.Ct. 760, 762-763, 15 L.Ed.2d 620 (1966).\* \* \*

If the civil system is used simply to impose punishment ... then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, ... our precedents would not suffice to validate it.

Hendricks, 521 U.S. at 372-3 , 117 S.Ct. at 2087. [emphasis added].

The Iowa SVP commitment statute has become a “mechanism for retribution” under the policies and practices of the Respondents. It is not the statute itself which imposes an unconstitutional punishment, but rather the actions of the Respondent; and the appropriate remedy is not to invalidate the law, but to enjoin the practices at work.

Courts have held that where pretrial detention effectively becomes tacked on to a sentence of punishment, it may be recognized as “punishment” in considering whether double jeopardy has been violated. E.g., Taylor v. Gray, 375 F.Supp. 790, 792 (E.D.Wis. 1974) {“At the outset it is noted that the deprivation of liberty by detention in the County Jail whether as a preconviction detainee or postconviction prisoner awaiting sentence or delivery to prison constitutes

punishment.”} Indeed, here, the pretrial legal status of the detention does nothing to detract from the penal character of the severe prison conditions that are actually imposed. See Op. Judge Reade. [App. C].

The Respondents’ policy or practice of deferring proceedings to maximize “dead time” pretrial detention of civil commitment candidates should be measured by the criteria set forth in Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

The factors identified in Mendoza-Martinez provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose....

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." ...

Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless --a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees....

Bell, 441 U.S. at 538-9, 99 S.Ct. at 1873-4) [citations, footnotes omitted]

It is unlikely that post-prison pretrial detention serves any lawful purpose when it is the unnecessary result of calculated delay that undercuts the state's primary objective of timely rehabilitation. In the words of the statute, the Department of Corrections must initiate Chapter 229A referrals "When it appears that a person who is confined may meet the definition of a sexually violent predator" Iowa Code Chapter 229A.3(1) and, in any case, "no later than ninety days prior to [discharge]." Id. {emphasis added}. Upon a preliminary finding of probable cause, The Iowa District Court must determine whether to keep a prisoner-candidate at the penal institution or transfer the prisoner to an "appropriate secure facility" —for "an evaluation"— "pending the outcome of the proceedings." No provision is made for post-prison detention simply for the sake of restraint. Iowa Code Chapter 229A.5. The Iowa legislature intended that commitment proceedings would usually precede prison discharge.

In practice, that is not happening. Deliberate postponement of proceedings and detention serve no purpose other than to mete out an additional confinement so completely at odds with the State's ultimate objective of rehabilitation that a "reasonable relation to a legitimate goal" cannot be established. Under Bell this must be recognized for the punishment that it actually is. Double jeopardy is being affronted.

## B. Detention in Contravention of Statute

Iowa Code Chapter 229A establishes the purpose of pretrial detention as being “for an evaluation as to whether the respondent is a sexually violent predator.” Iowa Code Chapter 229A.5(5) In practice, the Safekeepers are being detained for periods that tremendously exceed that needed for “an evaluation,” in conditions that frustrate evaluation and during which, no evaluation is actually occurring. [Reitman Op., App. A(12-15); Dr. Rogers Test., App. G(83)].

Safekeepers reason that where, as here, a statute provides the sole authority to detain, there is no authority to keep a person in custody longer or for purposes other than what the statute expressly provides. Cf., State v. Hernandez-Lopez, 639 N.W.2d 226, 236 & 241 (Iowa, 2002) {Applying strict scrutiny to Iowa’s material witness statute<sup>9</sup> the court noted the lack of common law authority for such, and that “authority to confine material witnesses is largely statutory,” and that strict compliance with the statute and constitutional standards was required.}

The statute does not say that a respondent shall be transferred to an appropriate secure facility “until completion of the trial;” rather it says

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<sup>9</sup> “We have previously found an individual’s interest in freedom from bodily restraint to be at the core of the liberty interests protected by due process” *Id.* 639 N.W.2d at 638.

that the respondent must be held “for an evaluation.” The Iowa Supreme Court is steadfastly opposed to ignoring such plain statutory language:

[W]e have repeatedly held, even under the rule of liberal construction, courts may not extend, enlarge, or otherwise change the terms of a statute, but must seek always for legislative intent by what the legislature said, rather than what it should or might have said. See Radosevich v. City of Ottumwa, 173 N.W.2d 522, 525 (Iowa); Sueppel v. City Council of Iowa City, 257 Iowa 1350, 1354, 136 N.W.2d 523; cf.... [O'Keefe], 246 Iowa 1182, 1186-1187, 69 N.W.2d 534.”

Davenport Water Company v. Iowa State Commerce Commission, et. al., 190 N.W.2d 583, 594-5 (Iowa 1971) [emphasis added].

This rule of construction gains even more force and consequence when the statute in question is one that must be both strictly construed and strictly scrutinized. State v. Finchum, 364 N.W.2d 222 (Iowa 1985) {strict and narrow interpretation of statute required where the State sought to broaden concept of “commitment” in effort to secure harsher sentence}; Hernandez-Lopez, fn.9 supra {“strict scrutiny” is required where a person’s bodily freedom is at stake.}

The Iowa Supreme Court has recognized that the classification of a person as an SVP does not indicate that the individual will either immediately or even inevitably re-offend. In re Ewoldt 634 N.W.2d 622

(Iowa 2001).<sup>10</sup> Moreover, the initial probable cause determination in Chapter 229A proceedings do not even address the issue of whether the respondent (who is facing potential lifetime commitment) is imminently likely to re-offend if released just prior to trial.

Data from several long-term studies of 4,724 sex offenders released from prisons in the United States and Canada after 1980 show that after 10 years, one in five had been arrested for a new sexual offense.... After 20 years that figure rose to more than one in four. Among men who had victimized children in their own families, an even lower fraction—about 1 in 10—committed a new sexual offense during the first 20 years after release from prison.

Results of studies as reported in: 162 Science News, July 27, 2002 “Men of Prey”, p. 59, 60. Thus, given what is actually known about the rate of recidivism of sex offenders following imprisonment, this Court should not jump to the conclusion that the Iowa legislature had an unspoken purpose of “preventative detention” so clearly in mind that those words and procedures must be judicially written into the statute.

Even if Iowa Code Chapter 229A somehow implied legislative decision to detain Chapter 229A commitment candidates for reasons other than performance of a necessary evaluation, it would clearly be

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<sup>10</sup> “We cannot accept defendant's argument that the legislature,...., required the State to prove that an alleged sexual predator is expected to re-offend within a period of one year. Iowa Code section 229A.2 requires the State to prove that respondent is "more likely than not [to] engage in acts of a sexually violent nature," but does not include a time frame as to when the acts should be expected to occur.” *Id.* 634 N.W.2dat 624

unconstitutional for reasons of both substantive and procedural due process. See, United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)<sup>11</sup> {preventative detention statute upheld, but only if strictly limited}; Hernandez-Lopez, 639 N.W.2d at 241 {mandating procedural and substantive due process safeguards for material witness detentions including the right to be heard on the availability of “less restrictive alternatives”<sup>12</sup>}.

When interpreting a statute, the Iowa Supreme Court attempts to remove constitutional infirmities. Hernandez-Lopez. Reading both language and intent into Chapter 229A in order to impose a scheme of “preventative detention” would introduce so many constitutional flaws that the statute would have to be invalidated. The Iowa General Assembly surely did not intend such a result.

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<sup>11</sup> Unlike Iowa Code Chapter 229A, the federal statutory scheme in *Salerno* was expressly designed to address the constitutionally sensitive area of preventative detention. Preventative detention was not permitted on a class-wide basis simply based on the allegations made. The *Salerno* court expressly declined to hold that Congress had the power to define **whole classes of Respondents** who could not be admitted to bail. *Id.*, 481 U.S. at 754.

Other important distinctions with *Salerno* are evident. For example, in *Salerno*, the preventative detention provisions could only be applied to persons accused of the “most serious of crimes.” *Id.*, 481 U.S. at 747. By contrast, Chapter 229A proceedings apply to some crimes that would not be deemed to be “the most serious” by most people: e.g., indecent exposure {Iowa code §709.9}, or sexual contact with a former client (Iowa code §709.15(f)(3)). The procedures authorized in *Salerno* include “a full-blown adversarial hearing, [*in which*] the government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.” *Id.*, 481 U.S. at 750. Thus, *Salerno* approved a scheme providing for carefully litigated individualized determination of a strong likelihood of imminent, uncontrollable, lawlessness—elements that are missing from Iowa Code Chapter 229A probable cause findings.

<sup>12</sup> “ In addition, we think it is important to emphasize that the material witness should be provided an opportunity to be heard at a later time similar to a preliminary hearing under rule of criminal procedure 2(4). The defendant should be permitted to be heard on all of the relevant issues, **including whether a less restrictive alternative is a viable option**,... Francisco M., 103 Cal.Rptr.2d at 805-06. An opportunity for the defendant to be heard is an essential aspect of the procedure to be adhered to under the material witness statute.” *Id.* at 804.

## C. Denial of Bail

### 1. Bail as the Legal Norm

In asserting their right to bail, the Safekeepers are advancing a conservative legal position supported by centuries old law and tradition. Bail is, quintessentially, a judicially devised common law remedy and its availability is a proper matter for this court to affirm.

We do not think the constitutional assignment of a duty to the legislature to provide a general system of practice for the courts vests the power to adopt rules of practice in the legislature exclusively. Where the legislature has not acted, courts possess a residuum of inherent common-law power to adopt rules to enable them to meet their independent constitutional and statutory responsibilities.

Iowa Civil Liberties Union v Critelli, 244 N.W.2d 564 (Iowa 1976).

{Upholding power of Iowa Courts to promulgate substantive rules of practice in criminal proceedings} [emphasis added].

The issue of bail for alleged SVP's is not an unprecedented proposition; but its denial is. The Iowa Supreme Court has previously noted the availability of bail for alleged "criminal sexual psychopaths" facing involuntary commitment as one ground for upholding the constitutionality of Iowa's prior sexual offender commitment scheme. See, State, ex rel. Fulton v. Scheetz, 166 N.W.2d 874, 878 (Iowa 1969).

This practice of providing bail in such cases apparently ended in 1975 only because the state repealed Iowa Code Chapter 225A abandoning its first experiment in civilly committing repeat sexual offenders.

## 2. Bail in “Criminal” proceedings.

It is true that there is no absolute right to bail affirmatively granted in criminal proceedings under the specific language of the Eighth Amendment to the United States Constitution. Salerno, supra, but despite that fact, the right to bail even in criminal proceedings was recognized as nearly absolute in federal statutes well into our times. See, Bail in the United States: 1964, Freed & Wald, Published under the sponsorship of the U. S. Department of Justice, May 1964, pp. 2-4. In many states, the right to pretrial bail in criminal proceedings is absolute. Iowa is no exception; there being an absolute right to bail provided under the Iowa Constitution which commands in direct language that all persons except those charged with a “capital offence” shall “be bailable.” Art. I, Sec. 12. Thus, in Iowa, there is no preventative detention for criminal defendants. Why should there be no bail for civil detainees?

The Respondents may argue that Article I, Sec. 12 only protects criminal Respondents, but not even the United States Supreme Court has been willing limit bail to criminal actions in determining whether the more limited bail protections of the federal constitution apply. E.g., Carlson v. Landon, 342 U.S. 524, 544-546, 72 S. Ct. 525, 96 L. Ed. 547, 563 (1952) [declining an invitation to limit the right of bail to criminal cases, and adopting conclusion that Eighth Amendment principles may inform the due process requirements of bail in civil contexts such as deportation proceedings.] The decision in Carlson nearly commands extension of Iowa’s own constitutional bail guarantees to civil Respondents as a element of “due process.”

### 3. Bail in “Civil” proceedings.

The “right to bail” is not, in fact, a creation of the Eighth Amendment or of Iowa’s constitutional guarantees, but rather of our common law foundations. “Although not expressly declared to be part of the law of this state by constitution or statute, the common law has always been recognized as in force in Iowa.” ICLU v. Critelli, supra., 244 N.W.2d 568. In determining what common law rights lay enshrined within our own state Constitution, our courts have looked

most frequently and with authoritative confidence to Blackstone's Commentaries on the Laws of England [Blackstone, Commentaries,].<sup>13</sup>

Sir William Blackstone divided his Commentaries into four volumes, two of which treat upon the subject the subject of Bail. In Volume IV dealing with criminal offenses, he devotes much attention to distinguishing between offenses and situations in which bail must be afforded and those in which the provision of bail may be denied. The rules, generally, and not surprisingly, establish the sentiment found in our own state constitution guaranteeing pretrial bail except in capital cases. Blackstone, Commentaries, Vol IV, pp. 294-7.

But Blackstone had even more important things to say on the subject of bail in civil actions. At page 294 of Volume IV [criminal law] he states "What the nature of bail is, hath been shewn in the preceding book" [Vol. III dealing with civil wrongs and cases]. Thus, Blackstone first introduces the concept of bail as a civil remedy. An examination of Volume III on civil actions shows that he treats the subject extensively describing the evolutionary process by which various courts of England

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<sup>13</sup> "Blackstone provides a wonderfully handy guidebook to a system that has largely vanished, yet still, in *Maitland's* enduring phrase, rules so much of our thinking from its grave.<sup>3</sup> **Particularly in the United States, where the Bill of Rights has constitutionalized the English law/equity division of the late eighteenth century,**<sup>4</sup> Blackstone's taxonomy of departed courts and procedures still has an eerie relevance." Introduction of Langbein to Vol. 3 *Blackstone Commentaries*, Facsimile Ed., Univ. Chicago (1979), p. iv. {*emphasis added*}.

extended their power and influence by devising various writs of *capias* giving them the means to acquire personal jurisdiction over both Respondents and the subject matter of disputes. Gradually the use of writs of *capias* became universal in all civil cases. Under a writ of *capias* the Respondent would be taken into custody at the initiation of the suit. He would then be admitted to bail which would either be “general” or “special” depending on the size of the dispute—a greater undertaking for bond being required for “special” bail. See, Blackstone, Commentaries, Vol III, pp. 281-292.

Of utmost importance to this case are Blackstone’s assertions that, at common law, bail was available in all civil cases and that in civil matters there existed an unquestioned right to bail:

In civil cases we have seen that every Respondent isailable; but in criminal matters it is otherwise.

Blackstone, Commentaries, Vol IV p. 294 [emphasis added]. Thus, should the Respondents argue “there is no absolute right to bail,” or that “there is no bail at all in civil matters,” they would be arguing for an interpretation of the law that would have confounded the framers of our own state constitution.

The unequivocal right to bail in civil cases was well established and recognized by our courts at the time Iowa became a state and adopted its own Constitutional guarantees. There was observed in this state at the time of our founding constitutional conventions, the very same writ of *capias* described by Blackstone. In the Iowa tradition, a potential judgment debtor who posed a risk of flight could be taken into custody and held until bond was posted at which point the alleged debtor was admitted to bail. See, e.g., Westbrook v. Westbrook, 2 Greene 598, (Iowa 1850) {enforcing 1844 act abrogating arrest and holding-to-bail of persons in civil cases.}; e.g., Darlington v. Irwin, Morris 421 (Iowa Terr. 1845).

Of course today, we would consider the “writ of *capias*” to be a gross due process violation, ripe for abuse by those who might seek the arrest and detention of others upon nothing more than an accusation—which explains why the writ was so long ago abolished. Since then, bail in civil cases has rarely been a reported legal issue. What would Iowa’s early jurists think, however, of a law that permitted persons to be taken into custody on a civil complaint absent any right of bail at all! They would doubt the concepts of ordered liberty contained within our Bill of Rights had evolved toward any path leading to enlightenment.

#### 4. Dangerousness

Respondents may further argue that the Safekeepers should not be afforded bail simply because they are potentially dangerous. But neither the Attorney General nor the Respondents are free to argue for limits on the right to bail on grounds that they have more sense than what the Constitution or common law provide. As Justice Scalia warned:

...“interest-balancing” analysis [should not be undertaken] where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.

Maryland v. Craig 497 U.S. 836, 870, 110 S.Ct. 3157, 3176 (1990)

[dissenting op.]

Iowa’s Constitution recognizes that bail may only be denied in “capital offenses where the proof is evident, or the presumption great.” Iowa Const., Art. I, § 12. Construing an identical bail provision in its state Constitution, the California Supreme Court held that “preventative detention” was not allowed. In re Underwood III, 9 Cal.3d 345, 349-350, 508 P.2d 721, 724, 107 Cal. Rptr. 401 (1973). Cf., Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) [dangerousness alone is insufficient reason for commitment in the civil context].

5. Due process and the right to defend liberty.

So beyond the common law, what constitutional provisions are here involved? The Safekeepers have asked this Court to enforce their right to bail under the Iowa Constitution's defense of liberty, and due process clauses as well as under state provisions guaranteeing reasonable bail and the federal due process clauses. [Complaint, p. 30-33]. It would be strange indeed if Iowa permitted greater pretrial protections to criminal Respondents who have the entire criminal and civil consequences of their alleged crimes still lying before them, than it does for civil detainees who have paid their "debt to society" and are entitled to their freedom.

The Iowa Constitution goes well beyond the United States Constitution in expressing special concern for the "due process" rights of those facing civil actions. Article I, Section 10 applies specific due process guarantees typically associated with criminal proceedings to all cases "involving the... liberty of an individual;" Section 12 guarantees the right to bail except in capital cases and Article I, Section 1 of the Iowa Constitution acknowledges the "inalienable right" of all persons to "defend" their "liberty". *Id.* "Defense of liberty" would be impossible if a remedy for loss of pretrial freedom did not exist.

Chapter 229A is unique among modern civil commitment statutes in that, as implemented, there is a lengthy period prior to trial during which the accused will be detained in a secure facility. This is an appropriate circumstance for bail. Regardless of civil or criminal labeling, the impact on liberty is the same, substantive rights must prevail over arguments based on legal nomenclature when personal freedom is at stake.

#### 6. Protection of the Public.

This is not to say that the state is defenseless against those Safekeepers who pose an imminent and serious threat to public safety. The necessity of providing bail can be avoided entirely by processing Chapter 229A commitment cases prior to a prisoner's release. Moreover, bail can be addressed on a case-by-case basis, set at levels high enough to protect the competing interests involved, granted only on conditions that protect public safety, subjected to the intrusive common law rights of supervision by a bondsman, policed by the state, and revoked for cause. Further, if traditional mental health issues are present, the state can seek an emergency commitment under Iowa Code Chapter 229.

## 7. Statutory Interpretation

The Respondents may say that as bail is not typically pursued under Chapter 229 mental health commitments there should be no bail under Chapter 229A. But, there are significant differences between Chapter 229 commitments and Chapter 229A proceedings: Chapter 229 mental health commitments are emergency actions for prompt medical intervention based on an imminent likelihood of harm. As such, there is no need for bail. Chapter 229 respondents are not required to be taken into pretrial custody (even if dangerous), and any detention imposed is strictly limited and controlled. Chapter 229 proceedings are typically over in 48 hours (the time that it might take to hold a bail hearing); and release may be ordered at any time on the advice of the presiding physician. By contrast, pretrial Chapter 229A proceedings may last months, even years, without professional oversight or resolution.

It may also be argued that there can be no bail under Chapter 229A, because the legislature never authorized it. That is a strange way to extinguish a constitutional right. One would presume that if the legislature thought it had the right to eliminate bail, it would have done so explicitly (e.g., “Bail shall not be allowed.”) Indeed, if survival of our constitutional rights depended on our legislature to restate them with each new piece of legislation, we should have no rights at all by now.

#### D. Applicability of the Americans with Disabilities Act

The Americans with Disabilities Act ["ADA"] prohibits the Respondents from discriminating against the Safekeepers in the provision of "services, programs and activities". Title 42 U.S.C. §12132; See Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 26, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) {Disabled prisoner could sue for equal access to rehabilitative placement}.

##### 1. No State Immunity from ADA

In order to avoid problems of sovereign immunity in the enforcement of claims under the ADA, Congress enacted Title 42 U.S.C. § 2000d-7 of the Rehabilitation Act which explicitly states, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." If a covered entity, such as the Iowa Department of Corrections, receives federal assistance it must agree to comply with the ADA and to waive its sovereign immunity with respect to ADA claims. See Clark v. State of California, 123 F.3d 1267, 1270 (9th Cir. 1997) {Inmates with developmental disabilities allowed to seek injunctive relief under ADA despite claim of immunity}. The Iowa Department of Corrections receives federal funds. [App. G].

## 2. Applicability of ADA to Safekeepers

In Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) the United States Supreme Court dispelled the developing illusion that alleged sexual predators could be held on dangerousness alone. In doing so it returned to principles previously announced in Foucha, supra. (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term). "Lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment," the Supreme Court noted, there must be proof of a "serious mental disorder" that results in "a special and serious lack of ability to control behavior." Crane 534 U.S. at 412-13, 122 S. Ct. at 870.

The Iowa Supreme court previously reached the same result:

The essential conclusion to be derived from Hendricks is that a state's sexually violent predator statute does not violate substantive due process if it requires proof of a "mental abnormality" that results in an inability to control sexually dangerous behavior. Iowa Code section 229A.2 requires such proof....

In re Ewoldt, 634 N.W.2d 622, 623 (Iowa 2001)

A “serious mental disorder” that results in a “lack of ability” is surely a “disability.” The ADA defines “disability” broadly:

**12102. Definitions**

As used in this chapter:

(1) \* \* \*

(2) Disability

The term "disability" means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

**Title 42 USC § 12102.**

The Safekeepers meet each of the three independent grounds for finding a “disability” under the ADA. Their alleged (i.e., perceived), documented or actual loss of volitional control subjects them to major handicaps in social relationship, societal functioning, individual productivity and autonomous action. It has, in fact, wholly compromised their freedom of movement and personal choice as to their activities. Harsher consequences for a disability can seldom be imagined. It is their disability that has caused their detention and resulted in their discriminatory segregation within the institution in which they are held.

The Respondents in this case are surely estopped from denying that the Safekeepers have a serious “perceived disability” or a “record of disability” for they are attempting to prove that very same fact in order to commit each of Safekeepers’ under Iowa Code Chapter 229A. Clearly the ADA applies.

The ADA prohibits discrimination by covered entities against those with perceived disabilities; Title 42 U.S.C. §12132 provides:

...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Id. Because of their status as Safekeepers, the Petitioners are denied privileges, programming and services that are provided to other inmates of the institutions in which they have been or are being held.

[Answer to Complaint ¶154, App. B4; Test. of Dir. Reed, Warden Rogerson, App. E(35 et seq.) ; Affdvt of Rogerson, App. F; Generally, App. A-G, J]

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## E. Constitutional Conditions of Confinement.

### 1. Mandatory Solitary Confinement

Solitary confinement, or “administrative segregation” as it is euphemistically called in corrections jargon, has a long and unpleasant history. Practiced in the extreme, solitary confinement is one of the punishments historically recognized as “cruel and unusual.” Robinson v. California, 370 U.S. 660, 575 82 S.Ct. 1417, 1425, 8 L.Ed.2d 758 (1962). Early on, it was discovered that too much deprivation led to insanity, and it has always been understood to be an additional punishment beyond imprisonment. See generally, Ex Parte Medley, 134 U.S. 160, 167 et seq., 10 S. Ct. 384, 33 L. Ed. 835 (1890); 4 Blackstone Commentaries 300. Iowa follows this tradition by imposing administrative segregation selectively within the prison system only to temporarily address special problems or concerns such as prison discipline. See State of Iowa Dept. of Corrections, Division of Institutions Policy Number IN-V-05, effective date 4/82, revised 5/99. [“Policy # IN-V-05,” App. I].

When this litigation began, the Safekeepers were being kept in constant solitary confinement at the IMCC in Oakdale. [App. E] In what appears to be a tactical response to this lawsuit, they were returned to Newton where they benefit from only slightly more freedom

and a better physical facility. [App. E(9-11; App. J)] That simple maneuver, however, is not enough to remove this issue from contention in this lawsuit for two reasons: First, because a litigation driven temporary change in behavior solves nothing, and second, because the conditions now experienced by the Safekeepers are not materially better than they were.

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." City of Mesquite, 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" Id., at 289, n. 10, 102 S.Ct. 1070 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)).

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000).

Today, the conditions imposed on the Safekeepers still largely bear the incidents of solitary confinement. The Safekeepers are still confined to their cells for 20 to 23 hours per day; Their cells are not significantly larger, but they are now "double bunked;" Their access to recreation, the commissary and other privileges is still very limited in comparison to the norm in the institution in which they are being held. [App. E(9-11; App. J)].

Even Iowa prison inmates committed to administrative segregation have more rights than the Safekeepers have been afforded. A prisoner placed in Administrative segregation is protected against unnecessary or prolonged segregation. Policy # IN-V-05, provides Iowa prisoners with individualized due process concerning whether “ad seg” should be imposed and periodic reviews and processes by which the restrictive status can be removed. [App. I].

Administrative segregation of pretrial detainees is always deemed to be an unconstitutional punishment absent extenuating individual justification such as personal medical necessity<sup>14</sup> or controlling individual misconduct. See, Martinez v. Turner, 121 F.3d 712 (8th Cir. 1997) appeal from remand at 977 F.2d 421 (8th Cir. 1992) cert den. 507 U.S. 1009. and cases cited. In Lock v. Jenkins, the U.S. Court of Appeals for the 7th Circuit held that the arbitrary confinement of all pretrial detainees in prison cells for 22 hours per day without regard for the individual situations of each detainee, when the average length of confinement was about 60 days, amounted to punishment of the detainees and violated their right to due process.

We have no hesitancy in concluding that confinement of these detainees in a prison maintained primarily for the purpose of punishment of convicted

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<sup>14</sup> E.g., Davis v. Hall, 992 F.2d 151 (8th Cir. 1993)

persons, under conditions more burdensome than those imposed on the general population of convicted felons, amounts to punishment under *Bell v. Wolfish* . . . Granting that the state's interest in secure confinement of the safekeepers may justify confinement of particular detainees under restricted conditions because of their known characteristics, the additional severity of treatment in the absence of knowledge of their individual characteristics is clearly excessive and thus amounts to punishment under the *Wolfish* test. 441 U.S. at 538-39, 561, 99 S.Ct. at 1873-74

*Lock v. Jenkins*, 641 F.2d 488, 494 (7th Cir. 1981)

Where courts have confronted an institutional right to employ administrative segregation, they have also affirmed the right of segregated inmates to individualized due process and periodic review. E.g. *Ramsey v. Squires*, 879 F. Supp 270, 283 (W.D.N.Y 1995). {Striking regulations permitting administrative segregation of pretrial detainees without review}; *Conti v. Dyer*, 593 F.Supp. 696 (N.D. Calif. 1984); Cf., *Covino f. Vermont Dept. of Corr.*, 933 F.2d 128 (2nd Cir. 1991); Compare, *Hewitt v. Helms*, 459 U.S. 460, 477 n.9, 103 S.Ct. 864, 874, 74 L.Ed.2d 675 (U.S.,1983) {Addressing the same issue within a prison setting: “administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in ... periodic review of the confinement”} Iowa Code Ch. 229A does not command the use of prison facilities, overcrowding or lockup. The detention of the Safekeepers must conform to” constitutional standards”. *Id.*

## 2. Punitive Conditions.

### a. Freedom from Punishment

Petitioners have asked this Court to rule on the constitutional and legal standards governing the conditions of their pretrial detention, including whether they can constitutionally be kept in conditions harsher than those imposed by Iowa upon its general prison populations. The record on summary judgment is probably undisputed that conditions for the Safekeepers have been and continue to be worse than those experienced by the general prison populations in the penal institutions in which they have been held. [J. Paulsen, App. C; J.Walters: App. D(4 et. seq.); App. E-G & J].

[D]ue process requires that the conditions and duration of confinement under...[an act providing for the civil commitment of sexual predators] bear some reasonable relation to the purpose for which persons are committed .

Seling v. Young, 531 U.S. 250, 265, 121 S.Ct. 727, 148 L.Ed.2d 734

(2001) {citing, Foucha v. Louisiana, Youngberg v. Romeo, and Jackson v. Indiana, emphasis supplied}

As the United States Supreme Court has noted: “confinement of 'mentally unstable individuals who present a danger to the public' " has been cited as a classic example of nonpunitive detention.”

Kansas v. Hendricks, 521 U.S. 346, 363, 117 S.Ct. 2072, 2083, 138

L.Ed.2d 501, 516 (1997) (Characterizing a Sexual Offender commitment statute similar to Iowa's as treatment oriented civil commitment. Id., 521 U.S. at 368, 117 S. Ct. at 2084 et seq.) The Iowa Supreme Court has taken a similar view holding that commitment under Iowa Code Chapter 229A is for the purpose of treatment not punishment.<sup>15</sup> Detention of Garren, 620 N.W.2d 275, 280 (Iowa 2000). Thus, conditions that may be constitutionally imposed on civil detainees under Chapter 229A, cannot be equated to the lawful punishment meted out to convicted felons.

Nonetheless, prison cases do establish a basis for comparison. Conditions in the prison context are governed primarily by the Eighth Amendment to the United States Constitution which prohibits cruel and unusual punishment of prisoners Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) {Holding that the prohibition against cruel and unusual punishment applies to the conditions under which prisoners are held in addition to any intentional punishments

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<sup>15</sup> “The preamble to the statute also suggests that the purpose of the commitment is public safety and *treatment* of the committed individual rather than punishment. *See id.* (“existing involuntary commitment procedure[s] ... [are] inadequate to address the *risk* these sexually violent predators pose to society ... [and] the *treatment* needs of this population are very long-term and the treatment modalities ... are very different from the traditional *treatment* modalities available in a prison setting or for persons appropriate for commitment under chapter 229” (emphasis added)). The legislature’s intent to enact a civil statute is also implied from the placement of the law among code chapters dealing with the mentally ill; chapter 229 provides for the voluntary and involuntary hospitalization of persons with mental illness and chapter 230 concerns support of persons with mental illness.”

Garren, cited *supra*. {Italics are original}

inflicted}. Courts that have considered the matter have concluded that conditions of confinement of pretrial detainees are likewise protected—usually to an even greater extent—by the due process guarantees of state and federal constitutions.

It is ...a well established constitutional principle that the conditions of incarceration for pretrial detainees “must not only be equal to but superior to, those permitted for prisoners serving sentences (following convictions).” The Eighth Amendment is not appropriate to judge the conditions with respect to pretrial detainees, as those who are incarcerated awaiting trial are presumed innocent and “should not have to suffer any ‘punishment’ as such, whether ‘cruel or unusual’ or not.

Hamilton v. Covington, 445 F. Supp. 195 ( W.D. Arkansas 1978)

[citation omitted]; In accord, Moore v. Hosier, 43 F. Supp. 2d 978 (N.D. Ind. 1998) [“Unconstitutional, punitive pretrial detention results from restrictions which are not reasonably related to... ensuring... presence at trial,... or which are not reasonably related to... facility management.”

If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all — in unsafe conditions.

Youngberg v. Romeo, 457 U.S. 307, 315-16, 102 S. Ct. 2452, 73

L. Ed. 2d 28, 37 (1982) {emphasis added}.

Pretrial detainees are entitled to at least as much protection as a convicted inmate. See generally Thomas v. Booker, 784 F.2d 299 (8th Cir.) (en banc), cert. denied, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986)

Perkins v. Grimes, 161 F.3d 1127, 1129 (8th Cir. 1998). Accord, City of Revere v. Massachusetts General Hospital 463 U.S. 239, 245, 103 S. Ct. 2979 (1983) {right to adequate medical care}.

The distinction between the conditions that may be imposed on pretrial detainees and convicted prisoners has grown to the point of analytical divorce. In Sandin v. Conner,<sup>16</sup> the United States Supreme Court firmly announced a formal break— holding that while pretrial detainees may retain a liberty interest in not being punished through the use of administrative segregation, the same is not true of convicted prisoners who may expect such conditions as an incident of their original punishment. Id., 515 U.S. at 485, 115 S. Ct. at 2301.

Moreover, as the Sandin court noted, even convicted prisoners have a right to avoid placement decisions that impose conditions qualitatively different from normal punishment. Id., 115 S. Ct. at 2297 n.4 {Citing Vitek v. Jones, 445 U.S. 480 (1980) [transfer of prisoner to hospital for involuntary treatment] }. Thus, while conditions for the

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<sup>16</sup> Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed.2d 418 (1995).

confinement of the Safekeepers must excel those established for prison facilities, they must also avoid hardships unrelated to objects pursued.

In this regard it must even be noted that not even all pretrial detainees are to be treated alike. In *Bell v. Wolfish*<sup>17</sup> the United States Supreme Court directly addressed the rights of pretrial criminal court detainees . Unlike detainees awaiting civil treatment, criminal court detainees do not benefit from their presumed innocence. Rather, as the Bell Court noted, for purposes of detention the presumption is just the opposite, i.e., following a probable cause hearing, criminal court detainees are considered to have committed a crime for which traditional jail house restrictions are appropriate. *Id.*, 441 U.S. at 536. Even so, gratuitously harsh conditions may not be imposed on criminal court detainees, because—despite a considerable forfeiture of their liberty—they retain a constitutional right to avoid punishment prior to conviction. *Id.*, 441 U.S. at 536-7. The Bell Court concluded, without providing specifics, that in addition to restrictions necessary to secure prisoners and guarantee their presence at trial, jailers could impose restraints reasonably related to facility management. *Id.*, 441 U.S., 540.

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<sup>17</sup> *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

Just how far jail officials may go in tying detention restrictions to legitimate managerial needs was tested in U.S. v. Gotti, 755 F. Supp. 1159 (E.D. N.Y. 1991). The Gotti case is instructive here, because like the Safekeepers, Gotti and his mob boss associates were objecting to the jail administration's decision to maintain them in solitary confinement. Despite the fact that the Gotti Respondents were charged with multiple murders, conspiracy to murder, and obstruction of justice, Judge Glasser held that these factors did not justify their placement in administrative detention. He noted that since the detainees had been in custody they committed no act or omission which posed a serious threat to inmates or to security of the institution and by consequence, the imposition of administrative segregation was an "exaggerated and 'excessive [restriction] in relation to the alternative purpose assigned to it.'" Id., 755 F. Supp at 1165 {quoting Bell v. Wolfish, 441 U.S.at 538}. Accord, Boudin v. Thomas. 533 F. Supp. 786 (S.D.N.Y. 1982) {Alleged member "Black Liberation Army" wrongfully detained in ad. seg.}

Just as it was impermissible to punish the Gotti criminal court Respondents with pretrial solitary confinement based upon their own alleged past, so too, is it impermissible to punish the civilly detained Safekeepers for theirs. The meting out of extra punishment assumes even graver constitutional dimensions in this case. Unlike the Mob

bosses in Gotti, the Safekeepers' crimes are in the distant past, and they have already endured the maximum punishments allowed for their acts.

Indeed, Chapter 229A is both presumed and argued to be a forward-looking statute aimed sincerely at prevention and treatment. Punitive measures have no place in such a scheme and draw its constitutionality into serious question. See, Seling, supra. 531 U.S.250 {deferring question whether punitive conditions of confinement may be used to prove that a confinement scheme is not civil}; Kansas v. Hendricks, supra., 521 U.S. at372, 117 S. Ct. at 2087 {J. Kennedy concurring, and warning that offender commitment schemes cannot be allowed to substitute for criminal justice.

Because, the conditions of confinement of the Safekeepers including isolation and solitary confinement are far more oppressive than those imposed on Iowa's general prison population as punishment, the Safekeepers are entitled to summary judgment and equitable relief prohibiting such treatment.

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b. Least Restrictive Reasonable Alternative.

Analysis should not end here, however, because it would be a disservice to justice to imply to this Court that the Safekeepers rights are determined solely by reference to the rights of the criminally accused. As noted previously, and by Iowa's Supreme Court, Chapter 229A is a civil scheme for the commitment of otherwise free individuals who are in need of treatment. The right to treatment attaches at the point at which an individual is deprived of his physical liberty and is no longer allowed to obtain such treatment for himself. D.W. by M.J. on Behalf of D.W. v. Rogers 113 F.3d 1214, 1218 (C.A.11 1997) <sup>18</sup>

As a civil commitment law, its closest legal analogue is the adjacent Iowa Code Chapter 229 providing for commitment of persons having recognized mental illness or disability. This is legal territory ruled by the U. S. Supreme Court's polestar decision in Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) cited by Seling, *supra*.

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<sup>18</sup> [T]he right to treatment "is triggered by the deprivation of physical liberty that generally results from commitment, ... This conclusion follows logically from the basis of the constitutional right to state services of those who are in state custody. The Supreme Court explained that basis in *DeShaney*: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs...it transgresses the substantive limits on state action set out by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. 489 U.S. at 199-200, 109 S.Ct. at 1005-06

Youngberg was handed down after the decision governing the rights of pretrial criminal court detainees in *Bell v. Wolfish*, and defines the impact of that decision in the area of civil commitment. The Youngberg Court acknowledged Bell's general proviso that punishment of detainees must be avoided and that only restrictions on liberty "reasonably related to legitimate government objectives should be allowed, but the court had specific ideas of how those concepts should be addressed in the context of civil mental health commitment.

First, the Court in Youngberg determined that the purpose of the commitment implied substantive duties upon the state with respect to the conditions imposed. Among the constitutional interests which the Youngberg Court identified were "interests in reasonable care and safety, reasonably nonrestrictive confinement conditions and... [rehabilitation ]." *Id.*, 457 U.S. at 324. {emphasis supplied}. These rights have been often referred to loosely as the right "to the least restrictive placement" and the "right to treatment."

In enforcing these rights, the inquiry which Courts are to make involves a balancing of each liberty interest involved with the relevant state interests. In determining the reasonableness of the state's actions, deference is given not to administrators but to the decisions of

“appropriate qualified professionals.” Id., 457 U.S. at 321 et seq. In this case, the absence of control by an appropriate mental health professional has been documented and admitted. [Eg., Op. Reitman, App. A(15); Testimony Williams, Dir. Reed, App. E(33 & 43)]

Simple administrative convenience or arguments concerning lack of resources are less likely to succeed when commitment is based, at least in part, on a treatment objective. Compare, Inmates of the Boy’s Training School v. Affleck, 346 F. Supp. 1345 (D. R.I. 1972) {Administrative decision to transfer delinquent and wayward boys to harsh facility involving solitary confinement overturned.}; Wyatt v. Stickney , 325 F.Supp. 781, 784 (D.C.Ala. 1971) {“The failure to provide suitable and adequate treatment to the mentally ill cannot be justified by lack of staff or facilities.”}; Eubanks v. Clark, 434 F. Supp. 1022 (E.D. Penn. 1977) {If state has a choice of facilities it violates the rights and liberties of patients to confine them in one unnecessarily restrictive}.

It must be conceded that much of the above authority predates the U.S. Supreme Court decisions in Bell and Youngblood, but the conclusions reached rest upon principles that have since been vindicated by those guidepost decisions. Any doubt was removed by the opinion of the U. S. Court of Appeals for the 11th Circuit in Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984) which was decided in light of both Bell and Youngblood.

In Lynch the court of appeals had to consider a statutorily authorized practice of housing civil commitment mental health detainees in county jails for pretrial periods of up to thirty days. The appeals court first looked to the purpose being pursued by involuntary mental health commitment and reasoned at page 1458:

Emergency detention, however, should not be inconsistent with treating the mentally ill individual or protecting society, to whom Petitioners belong.

Id., 744 F.2d at 1468.

The Lynch court observed, based on expert testimony that jail detention of the mental health detainees exacerbated their conditions and frustrated treatment in part by breeding unnecessary resentment in the detainees and stiffening their resistance to treatment.

Compare, Barker,<sup>19</sup> In this case the opinion of Dr. Reitman reaches a similar conclusion. [App. A(14);] C.f. Dr. Rogers [App. G(82)]

In determining whether to accord administrative deference or some other standard to determine minimally acceptable conditions for the mental health detainees the Lynch court rejected a proffered analogy with conditions tolerated for criminal court detainees. Id. at 1460. The proper standard according to the Eleventh Circuit court was

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<sup>19</sup> noting that “overcrowding of facilities and conditions” have a “destructive effect on human character and makes the rehabilitation of the offender much more difficult.”

“application of the least restrictive alternative analysis .” Id. at

1459. The Court went on to state:

If pretrial detainees cannot be punished because they have not yet been convicted, ...[citing Bell], then emergency detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment.

Id. at 1461. Accord, Doe by Roe v. Guagan, 617 F. Supp. 1477, 1485 (D. Mass. 1985) {noting that holding persons awaiting commitment proceedings “in worse conditions than they would have been subject to if committed...[is] an obvious violation of the Jackson<sup>20</sup> ‘rational relation’ standard and the Shelton<sup>21</sup> ‘least restrictive means’ requirement.” The Guagan court’s amplification of the principles stated in Lynch are important here, because conditions for persons committed under Iowa Code Chapter 229A are vastly superior to the punitive conditions of pretrial detention currently imposed on the Safekeepers, who are still awaiting their commitment trials. [App.A].

The Lynch court invalidated jailing of pretrial mental health commitment candidates both because jails were not the least restrictive alternative and because jailing of the detainees was punitive. This Court should rule similarly in regard to the plight of the Safekeepers.

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<sup>20</sup> Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972)

<sup>21</sup> Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)

What Iowa Code Chapter 229A affirmatively provides is pretrial placement in an “appropriate secure facility” for an evaluation by a person who is “professionally qualified to conduct such an evaluation,” and where the conditions of detention “conform to constitutional requirements for care and treatment .” Iowa Code §§ 229A.5(5) & 229A.9. [emphasis added]. Does it not appear that the Iowa legislature intended pretrial detention to conform to the requirements of Youngberg?—Surely so.<sup>22</sup> Recently, a magistrate judge of this court applied Youngberg’s standards to pretrial detention under Iowa Chapter 229A [J. Walters, App. D(10)].

This conclusion holds notwithstanding Iowa Code Section 229A.2(2) which defines an “appropriate secure facility” as “a state facility that is designed to confine but not necessarily to treat a sexually violent predator” In view of the more specific language concerning internal conditions quoted above, this provision should be read as an authorization for leeway in the physical facility chosen, and not as a limitation upon what must occur inside.<sup>23</sup>

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<sup>22</sup> Compare, Hince v. O’Keefe, 632 N.W.2d 577, 584 (Minn. 2001) {Under the Minnesota sex offender commitment statute “the plain language of the term ‘secure treatment facility’ suggests that in addition to being secure the facility is also a “treatment facility.”

<sup>23</sup> Courts have a duty to reconcile potentially conflicting statutory language. [Citizens' Aide/Ombudsman v. Miller, 543 N.W.2d 899 (Iowa,1996)] and to construe statutes in a manner that avoids constitutional doubt. Hernandez-Lopez, supra.; Iowa Supreme Court Comm’n on Unauthorized Practice of Law v. A-1 Associates, Ltd., 623 N.W.2d 803, 807 (Iowa,2001).

c. Professional Control

Youngberg governs decisions affecting overall conditions in custody, holding that they must be made by an “appropriate professional”  
Youngberg, 457 U.S. at 324 fn.30 {professionals should control the milieu and program when liberty is sacrificed to the state’s goal of treatment.}

[S]ince treatment is an essential justifying purpose of any civil commitment, a 'permissible \* \* \* decision' to confine a patient under maximal restrictions cannot be made without consideration of its therapeutic consequences. That the conditions of confinement may significantly enhance or retard a given patient's recovery is not open to doubt. The milieu of the hospital, if properly structured, is \* \* \* a constructive force for getting well; if improperly constructed it is a force for remaining sick.

Covington v. Harris, 419 F.2d 617, 625 (C.A.D.C. 1969).

It is a violation of due process rights described by Youngberg to permit administrators to supplant professional judgment on these issues. Consider the result in Buckley v. Rogerson,<sup>24</sup> where our own U.S. Court of Appeals for the Eighth Circuit concluded that repeated use of segregation and restraints at Iowa’s Oakdale prison medical facility without situation specific approvals by a supervising doctor violated a prisoner’s due process rights as recognized in Youngberg}.

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<sup>24</sup> Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998). Safekeepers note parenthetically that Mr. Rogerson is also a respondent in this proceeding.

[E]ven a prisoner has a constitutionally protected interest in "conditions of reasonable care and safety [and] reasonably nonrestrictive confinement conditions .... [which] comport fully with the purpose of ... [the] commitment." [citing Youngberg 457 U.S. at 324, 102 S.Ct. at 2462.]

Id., 33 F.3d at 1129. The Eighth Circuit went on to examine other cases concluding that this was clearly established law. If these protections are already firmly established for prisoners who are being punished, do they not also extend to pretrial detainees under Chapter 229A who are being detained for purposes of treatment, and who may not, consistent with double jeopardy and due process guarantees, be punished at all? In an analogous situation involving mental health detainees the Eleventh Circuit has already so held. Lynch, supra. {Noting and basing its decision upon the counterproductive anti-therapeutic effects of punitive pretrial detention.]

[T]hose awaiting commitment proceedings are entitled to confinement which is not inconsistent with being released or committed. Jail is a place of incarceration for those accused of crimes. ... Temporary jail detention of those awaiting civil commitment proceedings... violates substantive due process. \* \* \*

In order to cure the ...due process violations found we hold that ... [detention must occur] in the nearest hospital or mental health facility.

Lynch, supra. 744 F.2d at 1461-2.

In this case, it the Respondents chose to detain the Safekeepers in a penal institution. Iowa Code Chapter 229A only requires the use of an “appropriate secure facility.” That Chapter gives responsibility of treatment to the Iowa Department of Human Services and responsibility for the Safekeepers to no one. Under these circumstances, this Court is free to examine the choices that have been made.

#### C O N C L U S I O N

This Court should rule favorably on Respondents request for summary judgment and enter interlocutory, declaratory, and final injunctive relief as requested therein.

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**Respectfully Submitted:**  
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**CERTIFICATE OF SERVICE & FILING**

I certify that on October 3, 2003, I served each of the parties to this action in compliance with Fed. R. Civ. Pro. 5 by depositing true copies of this document in the United States Mail, first class postage prepaid, addressed to each of the parties or their attorneys of record as shown below or by electronic service. Contemporaneous therewith an original and sufficient copies were forwarded to the Clerk of this Court for filing or the document was filed electronically according to the rules of this Court.:



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