

IN THE SUPREME COURT OF IOWA

No. 05-0485

Wayne Atwood, Arthur Jennings, Daniel Bellman and John Carmody, on behalf of themselves and all present and future Iowa Code Chapter 229A pretrial detainees,

Petitioners/APPELLANTS

v.

The Hon. Thomas J. Vilsack, Governor of the State of Iowa; Gary Maynard, Director Iowa Department of Corrections; Kevin W. Concannon, Director Iowa Department of Human Services; and Rusty Rogerson, Warden of the Iowa Medical and Classification Center at Oakdale, Iowa, in both their official and personal capacities,

and

The State of Iowa; The Iowa Department of Corrections; The Multidisciplinary Team established pursuant to Iowa Code Chapter 229A, and The Prosecutors' Review Committee established pursuant to Iowa Code Chapter 229A,

Respondents/APPELLEES

CERTIFIED QUESTION
FROM THE U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
Docket No. 4:02-cv-90358
THE HON. ROBERT W. PRATT U.S. DISTRICT JUDGE PRESIDING

**REPLY BRIEF
OF APPELLANTS**

RANDALL C. WILSON, Esq. PK 0007857
IOWA CIVIL LIBERTIES UNION FOUNDATION
901 Insurance Exchange Bldg.
505 Fifth Avenue
Des Moines, IA. 50309-2316
Tel.: (515) 243 4032
Fax: (515) 243 8506 (call first)

JON M. KINNAMON, Esq.
KINNAMON, KINNAMON, RUSSO, MEYER
& KEEGAN
330 First St. S. E.
Cedar Rapids, IA 52401
Tel.: (319) 351 2650
Fax: (319) 351 1452

PROOF OF SERVICE

I certify that on July 5, 2005, I served each of the parties to this action in compliance with Ia. Rule App. Pro.6.13, by depositing two true copies of this Reply Brief 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 hand delivery of true copies:

For Appellees-Respondents

Mark Hunacek, Esq.
General Counsel Division
Iowa Attorney General's Office
c/o Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Courtesy Copy to:

Patrick Ingram, Esq.
Counsel for damage claimants in
Atwood v. Vilsack, U. S. D. Ct.
S.D. Iowa, No. 4-02-cv-90359
(Not participating in this appeal)

CERTIFICATE OF FILING

I certify that on July 5, 2005, I will accomplish filing of this Reply Brief in accordance with Ia. Rule of App. Pro. 6.13 by depositing **eighteen** copies of the same in the United States Mail, first class postage prepaid, addressed to the Clerk of the Iowa Supreme Court with a request that said document be placed on file or by physically filing said document at the Clerk's office on or before said date.

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ERRATA

At page 41 of Appellants' previously filed Brief, DeChamplain v. Lovelace, 510 F.2d 419 (8th Cir. 1975) is cited as an example of a case requiring individualized due process bail procedures addressing the necessity of pretrial detention in a situation where no bail was authorized by statute. Although that case continues to be cited, Appellants' briefing failed to timely discover and note that the 8th Circuit's decision was vacated as moot by the U.S. Supreme Court. *sub nom.* Lovelace v. DeChamplain, 421 U.S. 996, 95 S.Ct. 2392, 44 L.Ed.2d 664 (1975).

ARGUMENT

I. Bail is a presumed right that must be preserved.

For centuries, bail has served a critical function within Anglo-American jurisprudence; it protects nothing less than fundamental right of freedom from personal restraint. Attempts to dispense with bail should be met not only with "strict scrutiny," but with the high degree of historical skepticism necessary to prevent erosion of our core body of rights. {"...the history of the world teaches us the absolute necessity of guarding well the rights of the people: for power is always receding from the many to the few." Debates of the Constitutional Conventions of the State of Iowa, Vol. 1, pp. 100-101, January 20, 1857)

The Appellees suggest that the supposed novelty of confining someone because they are perceived to be dangerous renders the common law obsolete. [Appellees' Brief, 11 *et seq.*] Further, they contend that civil reasons for denying bail can "trump" the constitutionally protected availability of bail even in a criminal action [*Id. discussing* Iowa Code § 229A.5C]. Correct or not, these assertions if upheld would establish the principle that the Iowa General Assembly may eliminate bail, and incarcerate whole classes of people prior to trial, by merely advancing a novel public safety reason for their "civil" detention.

However, in view of the critical function that bail plays within our system for protecting against premature punishment, protection due process, and loss of liberty¹, we should not be asking: "Since when did new kinds of people like "SVPs"² become entitled to bail?," but rather: "When was the right of bail extending to 'all persons' lost?". The Appellees' claim—that there has been a statutory abrogation of the common law *vis a vis* alleged SVP's—deserves critical examination—for this case stands at the threshold of a new system of bail which would allow that right to be rescinded for disfavored groups according to the popular political sentiments that so often command legislative decision making.

The only jurisprudential event that the Appellees point to in their brief for this supposed abrogation of the common law is the adoption of Iowa Code Chapter 229A, which, Appellees contend, eliminated the right of bail for alleged SVP's. [Appellees' Brf., 7] That the Iowa legislature may usually abrogate the common law is not subject to question, but that it may, as easily as the stroke of a pen, also eliminate core common law rights that secure fundamental personal liberties and have constitutional protection is another matter altogether to behold.

¹ "From the passage of the Judiciary Act of 1789...to present, federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Stack v. Boyle, 342 U.S. 1, 4, 72 S. Ct. 1, 96 l.Ed. 3, 6 (1951).

² In this Brief the term "SVP" refers to the term "Sexually Violent Predator" as used in Iowa's civil commitment statute for SVP's, Iowa Code Chapter 229A.

If the right of bail has been abrogated here, it has been extinguished without any express mention of the right that was being eliminated. Neither abrogation of common law nor impairment of important fundamental rights should occur so easily. Nonetheless, turning this observation toward their own ends, Appellees contend, that the very failure of the statute to address the subject of bail is itself evidence that the right of bail has been legislatively rescinded. [Appellees' Brf.,11] This argument only works if the starting assumption is that there is a general presumption against bail, but the presumption in Iowa, as in other jurisdictions, favors the provision of bail or pretrial release. U.S. v. Salerno, 481 U.S. 739, 755, 107 S. Ct. 2095, 2105, 95 L. Ed. 2d 697 (1987) {"liberty is the norm, and detention prior to trial is the carefully limited exception."}; See Simpson v. Owens, 207 Ariz. 261, 270 fn. 15, 85 P.3rd 478, 487 fn.15 (2004) *citing* this Courts' decision in *Dilley* and other jurisdictions and holding that it is the state's burden to show that an exception to bail exists.

It is of no meaningful consequence that Iowa's SVP statute is silent on the provision of bail. If preservation of core constitutional rights required their full reiteration every time a legislative body enacted a law impinging upon personal liberties, we should by this day have no rights left at all. *Compare cases finding power to grant bail even in absence of statutory authority: e.g., Wright v. Henkel*, 190 U.S. 40, 63, 23 S. Ct. 781, 47 L. Ed. 948, 956 (1903); State v. Jensen, 203 Neb. 441, 447, 279 N.W. 2d 120, 123 (1979).

II. There Has Been No Abrogation of Bail by Implication

This is a very appropriate instance in which to enforce, with some rigor, this Courts' insistence that when the Iowa legislature intends to abrogate the common law it must do so in a clear unmistakable fashion. ICLU v. Critelli, 244 N.W. 2d 564, 569 (Iowa 1976). In this case there is no clear evidence of an intent to abrogate the common law right to bail. Even the Appellees concede the SVP

"...statute's own specific terms do not answer the question of whether bail is entitled, [*and that*] the statute is, to that extent at least, arguably **ambiguous**."

[Appellee's Brf., 8 *emphasis supplied*.] Without statutory language to support their argument, the Appellees are left to argue what was in the legislators' minds.

Has there been a clear legislative recision of the right of bail by "implication?" Four reasons may be advanced why this is not the case. ¹⁾the **specific** language of the operative statute is incongruous with the claimed abrogation; ²⁾the motives imputed to the legislature by the Appellees do not capture the full legislative intent which was to adopt a fair and constitutionally sensitive approach to sex offender commitment; ³⁾construing the SVP statute to require "preventative pretrial detention" would render those parts of it unconstitutional, and ⁴⁾such a construction would also fail the required strict scrutiny.

A. Statutory language does not support abrogation.

Appellees cite no affirmative statutory language in their brief showing that Iowa Legislators specifically decided to proscribe bail. Their analogy with an Arizona case, Martin v. Reinstein, 195 Ariz. 293, 308, 987 P.2d 779, 795 (1999), is neither controlling nor apposite to our own statute. While most SVP statutes bear similarity to the statute upheld against a challenge in *Kansas v. Hendricks*,³ ours is sufficiently dissimilar to Arizona's to permit any lock step conclusions. Arizona's statute, for example, contains no provision acknowledging the possibility of pretrial release. *Compare* Iowa Code 229A.5B(1). Moreover, the parties in *Reinstein* were not arguing over statutory interpretation, both sides assumed that no bail was available under the Arizona statute. *Id.* And finally, Arizona is not a state where the common law right to bail has survived a Constitutional revision. Arizona limits the right of bail to criminal cases.

The only substantive Iowa provisions that Appellees cite in support of their claim that no bail is allowed in SVP proceedings are Iowa Code Sections 229A.5C(1) and 229A.5B (discussed previously in Appellants' initial brief at p. 7). As noted in Appellants' prior brief, Section 229A.5C(1) (proscribing bail in criminal proceedings) would be unnecessary if the legislature already thought it had completely abrogated the right of bail for accused SVP's.

³ Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)

Nevertheless, Appellees contend that § 229A.5C(1) establishes a "no bail" policy that sweeps more broadly than the section itself. [Appellees' Brf., 11]. All that § 229A.5C(1) really does is provide for coordination between the SVP court and the criminal courts on the granting of bail— *i.e.*, a criminal court bail determination may not be used to override the release of "a person **who is detained** pursuant to 229A.5." Note, however, that if a person were released on pretrial bail by a court in an SVP proceeding they would **not meet the criteria** for denial of release in a criminal proceeding under the literal terms of § 229A.5C(1). This section does not establish a global bar to release in SVP proceedings.

It is hard to see how the other section, 229A.5B(1) fits into the Appellees' argument that the terms of the statute command continued confinement of pretrial SVP detainees once their evaluations have been completed. Section 229A.5B(1) states:

1. A person who is detained pursuant to section 229A.5 [*the probable cause hearing*] or is subject to an order of civil commitment under this chapter shall remain in custody **unless released by court order or** discharged under Section 229A.8 or 229A.10.

Id. {*emphasis added*}. In order to be discharged under sections 229A.8 or 229A.10 a person must already "be subject to an order of civil commitment." Iowa Code § 229A.8 (1&2); Iowa Code § 229A.10(2). "Discharge" is not an option under Chapter 229A for its pretrial detainees. Therefore, the reference in

Iowa Code Section 229A.5B(1) to release of pretrial detainees by a "court order", is **not** simply a reference to "discharge" from treatment as argued by the Appellees at page 11 of their brief.

Indeed, if "discharge" were the only avenue of release from pretrial detention contemplated by our legislature there would have been no reason to disjunctively single out "court order" as a separate option in the same sentence. Surely this express reference to the possibility of pretrial release, is enough, in and of itself, to obscure any argument that the common law right to bail has been abrogated by clear "implication."

B. Imputed legislative "motives" do not support abrogation.

The Appellees arguments do not end with analysis of the operative statute. They also point to the statutory preamble, Iowa Code Section 229A.1, to reach their conclusion that the common law right of bail has been abrogated.

[Appellee's Brf., 8] Appellants argue far too much here. They claim the common law right of bail has been repealed because it is "inconsistent" with what they interpret to be the legislative intent as set forth in the statutory preamble.

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.**

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

If this Court were to adopt Appellees' process of statutory enlargement, it would lead to a total breakdown of role distinctions between the legislature and the judiciary. Judges would be permitted to abrogate any existing common law right, or statute based only upon their subjective conclusions about the legislative mind set as evidenced by generalized statements of statutory purpose. Legislatures are not empowered to merely state broad goals and then set courts loose upon a mission to choose what laws, rights and legal traditions will be kept or repealed in the effort to get there.

Normally, in construing the effect of a statute, the preamble is not even consulted unless the operative clauses of the statute are sufficiently ambiguous {Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 563, 12 S. Ct. 689, 692 (1892); U.S. v. Fisher, 6 U.S. 358, 368 (1805)}—and then it is only one of many factors, **including the pre-existing common law**, that a Court may look to for aid in interpretation. Iowa Code Section 4.6 (construction of "ambiguous statutes.")

The prefatory language to Chapter 229A contained in Section 1 does not contain any wording suggesting that the legislature wanted to repeal any statutes, rights, or the common law on any subject. This language doesn't even

rise to meet the semblance of a "general repeal clause." which though ineffective in and of itself to repeal prior law, would at least evidence some recognition by the legislature that its enactment may be in conflict with pre-existing law.⁴ If a "general repeal clause" does not satisfy this Court's requirement that the legislature's must be specifically clear before a prior law may be deemed repealed by implication, then the prefatory language of Iowa Code Chapter 229A falls even further afield from the mark.

Nor can Appellants agree with Appellees that the prefatory language of Iowa Code Chapter 229A somehow addresses the issue of pretrial freedom of accused SVP's. The language of Section 1, which need not be reproduced in full here, simply talks about the need for a commitment statute providing for "long term care and treatment" and "procedures that reflect" both "legitimate public safety concerns" and the need for effective beneficial treatment of offenders. The focus of this section, with its even handed tone, is upon providing a scheme for commitment, and for meaningful participatory treatment after commitment—the need for establishment of long term solutions is described, but the need for emergency pretrial detention measures is not.

⁴ See, Kruse v. Gaines, 258 Iowa 983, 986-7 139 N.W.2d 535, 537 (1966) {"Ordinarily, a general repealing clause of inconsistent acts does not,...operate to repeal a local or special act."}; Peters v. Iowa Employment Sec. Comm'n, 235 N.W.2d 306, 310 (Iowa 1975) {"Although an express general repealing clause like s 19A.22 is ineffective as a repealing device, it does constitute an express recognition by the legislature that there are statutory provisions inconsistent with the act in which the clause is included and signifies a legislative intent to repeal such inconsistent provisions" citing *Kruse*}

It is more relevant to this analysis to refer to the substantive provisions of Chapter 229A, and they likewise, demonstrate no evidence that the legislature was willing to cut corners on the pretrial rights of civil commitment detainees in order to achieve greater public safety. To the contrary, examples of the caution taken by the legislature to preserve fundamental rights are strung throughout sections 5—9 of the SVP commitment statute and have been previously briefed.

"Inconsistency" between rights protecting individuals from overreaching by the state, and the end goals of law enforcement are not grounds for concluding that the former must be sacrificed whenever a new law enforcement statute is passed. It may be easily presumed from a general review of Iowa Code Chapter 229A, that the Iowa legislature was aware of the importance of the tension between rights of those accused and the state's goals of identifying and detaining dangerous persons, and that the true legislative intent was not to eliminate fundamental liberty interests, but to strike the traditional balance between the needs of public safety and the rights of individuals in the crafting of a new civil commitment statute. *See generally, Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2646, 159 L.Ed.2d 578 (2004){preventative detention case discussing the "tension" between private rights of individuals and government measures undertaken for security and the careful balancing of opposing interests that are constitutionally required in such a context}. If this view presents at least

one reasonable interpretation to draw from the statute, then the imputed intent of the legislature to rescind the common law can neither be clear nor certain.

C. Constitutional Infirmity Must be Avoided

1. *Standards for "preventative detention" cannot be satisfied.*

Iowa Code Chapter 229A cannot be interpreted as an implied abrogation of bail, unless it is characterized as a scheme for preventative pretrial detention. However, that interpretation would subject the statute to grave constitutional doubt. The Iowa legislature can be presumed to have intended to draft a constitutionally viable statute. It been the practice of this Court and others to avoid statutory constructions which introduce serious constitutional questions or which could invalidate the statute on constitutional grounds. *See, Appellants' Brf* at p. 11 *citing*⁵ Scheetz {constitutionality of an Iowa sex offender commitment statute} and Zadvydas {U.S. S. Ct. decision rejecting interpretation of statute providing for the unlimited detention of dangerous deportable aliens in order to avoid constitutional infirmity that unlimited detention would pose.}

⁵ State ex rel. Fulton v. Scheetz, 166 N.W.2d 874, 877 (Iowa 1969); Zadvydas v Davis, 553 U.S. 678, 689-690, 121 S. Ct. 2491, 2498, 150 L. Ed. 2d 653 (2001).

We may set aside for the moment the consideration that the Article I, Section 12 of the Iowa Constitution bars the practice of preventative pretrial detention because that provision is still in issue here, but the due process requirements of preventative pretrial detention of dangerous individuals under the federal constitution are better settled. Measured against the parameters of federal case law, Iowa Code Chapter 229A falls well short of providing minimally required due process when posited as a scheme for preventative detention.

Before determining whether Iowa Code Chapter 229A satisfies the criteria for a preventative pretrial detention statute, however, it is worth noting that the language of the statute itself fails to articulate preventative pretrial detention as its specific goal. Under section 5 of the Chapter, the sole immediate consequence of a probable cause hearing is identified not as "preventative detention" but, rather, performance of an "evaluation." {This case speaks to the substantial period of pretrial detention **after** the evaluation has been completed.}⁶

5. If the court determines that probable cause does exist, the court shall direct that the respondent be transferred to an appropriate secure facility **for an evaluation** as to whether the respondent is a sexually violent predator.

⁶ Appellees do not challenge their right to be held for an "evaluation" but contend in the underlying federal action, that their pretrial detentions last an average of seven month; that "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."; and that they are entitled to bail once the evaluation has been completed or abandoned. Atwood v. Vilsack, 338 F. Supp. 2d 985, 996-7 (S.D. Iowa 2004).

Iowa Code Section 229A.5 {*emphasis supplied*}. Thus, Appellees are building alleged implications upon implications. They decide first that the legislature meant not just what it said, but something more altogether amounting to preventative detention, and then, that the implied goal of preventative detention implies a further clear intent to rescind the preexisting common law.

Be that as it may, the United States Supreme Court first confronted the issue of preventative pretrial detention when it considered the facial validity of the "Bail Reform Act of 1984" which ended a centuries long tradition of extending bail in all federal cases. U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). There it made note of the substantive and procedural safeguards written into the bail reform statute that permitted a limited departure in special cases from the usual practice of granting bail. *Id.* at 481 U.S. 742 *et seq.* In Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) the U.S. Supreme Court made clear that a "sharply focused scheme" like that reviewed in *Salerno*, was essential whenever the government attempts to civilly detain a person on grounds of dangerousness. *Id.*, 504 U.S. at 81-2.

Used correctly, preventative detention can only follow upon "clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Salerno, 481 U.S. at 750. Thus, unlike proceedings under Iowa Code Section 229A.5(5) "less restrictive alternatives"

must be considered, litigated, and ruled out in a constitutionally sound preventative pretrial detention scheme. In contrast, there is no less restrictive alternative inquiry under Chapter 229A probable cause hearings. *C.f.*, In re Detention of Garren, 620 N.W.2d 275, 284- 85 (Iowa 2000){rejecting consideration of "less restrictive alternatives" as an option following SVP commitment}.

Under the federal Bail Reform Act reviewed in *Salerno* an **individualized** dangerousness determination was made based on factors that include the personal characteristics and history of the offender. The U.S. Supreme Court expressly refused to hold that whole classifications of persons could be preventively detained based only on alleged membership in a defined class. *See, Salerno* 481 U.S. at 754.; *Cf.*, Demore v. Hyung Joon Kim, 538 U.S. 510, 551-2, 123 S. Ct. 1708, 1733, 155 L.Ed. 2d 724 (2003) (concurring & dissenting op. by Souter, Stevens & Ginsburg). {Interpreting cases to prohibit detention based on presumed group membership without individualized detention determinations.⁷}

⁷ "These cases [*cited infra*] yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away. ...In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause ... by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away. The cases, of course, would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand. Without any "full-blown adversary hearing" before detention, *Salerno*, ..., or heightened burden of proof, *Addington, supra*, or other procedures to show the government's interest in committing an individual, *Foucha, supra*; *Jackson, supra*, procedural rights would amount to nothing but mechanisms for testing group membership. *Cf. Foucha, supra*, at 88, 112 S.Ct. 1780 (opinion of O'CONNOR, J.)... We held as much just two Terms ago in *Zadvydas v Davis*, [*citation omitted*]which stands for the proposition that detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself."

The analysis of dangerousness under the Bail Reform Act approved in *Salerno* is appropriately focused only with the time period between arrest and trial. Thus, there is an issue of imminent dangerousness under the procedures authorized by *Salerno*, that is lacking in the probable cause determinations made under Iowa Code Section 229A.5. A commitment determination under Chapter 229A, does not depend on a showing that the person will immediately or even inevitably re-offend—a determination of long term dangerousness alone suffices to support commitment. In re Ewoldt, 634 N.W.2d 622 (Iowa 2001) [no need to show likelihood of re-offense within 1 year];⁸ *Cf.* In Re Detention of Barnes 658 N.W.2d 98, 101 (Iowa 2003) *citing* Kansas v. Crane, 534 U.S. 407, 411 (2002) [total loss of volitional control is not required]. If the ultimate determination to be made under Iowa's SVP statute does not speak to the immediacy of danger posed by a detainee, then even less so, does a mere probable cause determination made under that statute speak to the likelihood of recidivism pending trial. There is a mismatch between the risks to be demonstrated and the period of concern.

The scheme approved in *Salerno* pertained only to the most serious of crimes. By contrast, some of the "sexually violent offenses" that permit an SVP

⁸ *Quoting Ewoldt*: "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. Iowa Code § 229A.2(3), (9) (Supp.1999). "As the State urges, the legislature has recognized that "the treatment needs of [sexually violent predators] are very long-term." Iowa Code § 229A.1. Hence, we are convinced that the legislature did not intend to impose a burden upon the State to prove that alleged sexual predators are expected to reoffend within a specific time period, particularly a relatively short, one-year time period." *Ewoldt* 634 N.W.2d at 624.

determination, though serious, do not usually rank at the top level of concern: *e.g.*, indecent exposure {Iowa Code § 709.9}, sexual contact with a client {Iowa Code § 709.15(f)(3)}, pandering involving a minor {a class C felony, Iowa Code §725.3(2)}, and permitting sexual abuse of a child {an aggravated misdemeanor, Iowa Code § 726.6(e)}. Incredibly, another definition of "Sexually Violent Offense" under Chapter 229A is "**Any act which**, either at the time of sentencing for the offense or subsequently during civil commitment proceedings..., **has been determined... to be sexually motivated.**" Iowa Code Section 229A.2(10)(g).

Last, but not least, under "Salerno" pretrial detention may only be ordered pursuant to a "clear and convincing" showing arising out of a "full blown adversary hearing." *Salerno*, 481 U.S. at 750. Yet, Iowa's Chapter 229A.5 determinations merely require a "probable cause" determination in a proceeding where "rules of evidence" do not apply. Documentary evidence, such as an expert's opinion, may be presented while the right of cross examination is reserved only for witnesses who actually testify.

At the Section 229A.5 hearing an SVP detainee can only challenge the sufficiency of the state's case to meet the low threshold of probable cause, a rebuttal on the merits of the state's contentions is not within the scope of the hearing. Under *Salerno*, the burden is on the state—and evidence from both sides is weighed on the merits of whether pretrial detention is necessary.

The Appellees suggest that Chapter 229A requires the pretrial detainee "to show that he is not dangerous." [Appellees' Brf, 9] Read this way the statute would require detainees to "prove a negative," an interpretation that would create an impossible evidentiary burden, and place it on the wrong party. *See, Foucha*, 504 U.S. at 86 {burden improperly placed on detainee to show he was not dangerous. "[S]tate must establish grounds of dangerousness by clear and convincing evidence."}; *People v. Purcell*, 201 Ill.2d 542, 551, 778 N.E.2d 695, 700 (2002) {Unconstitutionally unfair to force defendant to affirmatively prove negative proposition that he did not fall within exception for bail}.

Despite these differences, Appellees contend that the probable cause determination under Iowa Code 229A.5 serves to cure the omission of a preventative detention proceeding. [Appellees' Brf, p.9]. Early in the last century this Court rejected such a proposition when it held that a probable cause finding under a grand jury's indictment could not serve as a substitute for a legal and factual determination that a defendant was not entitled to pretrial bail under Iowa's constitutional exception ("capital offences where the proof is evident, or the presumption great"). Because the probable cause determination makes no inquiry into the relative weight of evidence as a whole, and because the factors affecting bail are not even in issue in a probable cause determination, probable cause must be ignored for the purpose of determining the availability of bail.

It seems evident that neither the nature of the hearing nor the degree of proof required of the successful party have any logical relation to giving to an indictment the attribute of being evidence [*required to overcome the constitutional presumption in favor of granting bail*]

Ford v. Dilley, 174 Iowa 243, 156 N.W. 513, 523 (1916). *Accord*, Stack v. Boyle, 342 U.S. 1, 9-10, 72 S. Ct. 1, 96 L. Ed. 3 (1951) {grand jury's indictment with bail recommendation has no more legal force than an accusation and "should be given no weight" on the issue of bail.} These precedents should be followed. The observations and reasoning of *Dilley* and *Stack* are as sound today as ever.

2. Appellees' Interpretation of the Statute Cannot Survive Strict Scrutiny

When interpreted as a scheme for preventative pretrial detention, Iowa's SVP statute must be subjected to strict scrutiny because it interferes with the fundamental right of freedom from bodily restraint. State v. Hernandez-Lopez, 639 N.W.2d 226, 238 (Iowa 2002) *citing* In re Garren, 620 N.W.2d at 284 and Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. ed 2d 437, 448 (1992). Under strict scrutiny the burden is on the state to show that less restrictive alternatives to accomplish its goals are not adequate. In *Hernandez-Lopez*, this Court upheld Iowa's material witness statute against that argument specifically because the statute provided for consideration of less restrictive alternatives on a case-by-case basis through a bail determination. *Id.*

Since the Appellees argue that the SVP statute should be interpreted to require class wide pretrial detention of all SVP proceeding respondents, strict scrutiny might be applied in the same broad fashion to their claim of right. This is not to suggest that class-wide categorical justifications will ever suffice to satisfy the requirements of due process or strict scrutiny in reviewing detention schemes—individualized determinations seem to always be required here.⁹ But the Appellees' statutory interpretations should not be permitted to escape the requirements of strict scrutiny simply because they have chosen to paint over a proposed problem with a broad brush.

In *Foucha*, the State of Louisiana attempted to civilly detain without a meaningful hearing an individual based on a determination that he had been acquitted of a crime by reason of prior insanity and was considered dangerous because he had an anti-social personality disorder that made it likely that he would re-offend. Applying an unspecified level of scrutiny under the Equal Protection Clause, Justice White, writing for the Court, noted that similarly dangerous persons who had not been acquitted by reason of insanity were effectively controlled by the criminal law and that it was the state's burden under these circumstances to put forward "a particularly convincing reason" for such

⁹ See, *Zadvydas v Davis*, 533 U.S. 678, 692, 121 S. Ct. 2491, 2500, 150 L. Ed. 2d 653 (2001) rejecting detention on the basis of alienage status alone and suggesting that due process demands as much individualized procedure in cases of personal detention as it does in property cases; *Accord*, *Augustus v. Roemer*, 771 F. Supp. 1458 (E.D. LA. 1991).

discrimination given that "freedom from physical restraint" is a "fundamental right." *Foucha* 504 U.S. at 86; 112 S. Ct. at 1788.

In this case there has been no argument showing that alternatives to preventative pretrial detention would be ineffective in controlling pretrial recidivism. Given that there are so few SVP pretrial detainees, and that so few of them are likely to have any financial resources to actually post bail, it might also be noted that the goal of protecting the public cannot be materially advanced by denying bail to just these select individuals while allowing those with similar propensities to remain at large. Under heightened scrutiny the government

...must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and **material** way.
[*Citations omitted*]

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 624, 114 S.Ct. 2445, 2450, 129 L.Ed.2d 497 (1994) {applying intermediate scrutiny to regulation impinging on 1st Amendment rights.} Here, despite its prior experience with a sex offender commitment statute that provided for bail, the Iowa General Assembly made no findings or even predictions that pretrial recidivism was or even could be expected to be a problem under the new statute if bail were permitted.

Indeed, the State of Iowa has many options besides the "no bail" scheme argued for by the Appellees to materially advance the asserted goal of protecting

the public from pretrial recidivism by alleged SVP's. In the first place, the danger of pretrial recidivism is largely a threat of the Appellees own making—stemming from their choice not to diligently prosecute SVP commitment proceedings while the candidates are still in prison. An examination of the statute, particularly Iowa Code Section 229A.5(1), shows that the Iowa legislature contemplated that these proceedings could progress while the candidate was still serving his or her prison sentence. (It may be that the legislature did not address the topic of bail because it assumed most commitment proceedings would be completed prior to discharge from prison.) In addition, the state can enforce its mental health and criminal statutes in the traditional way to detect and deter crime and incapacitate those who attempt crimes or have mental issues posing an immediate threat.

Nor should the traditional bail process itself be overlooked as a remedy for the very danger that the Appellees posit. Bail may be set at reasonably high levels in response to the seriousness of the cause, and a cash only bond may be required.¹⁰ Release on bail is subject to judicially imposed conditions that protect the safety of other persons. *See*, Iowa Code Section 811.2. These may include restrictions on travel and activities, return to custody after specified hours, curfews, and electronic monitoring, and any other conditions deemed "reasonably necessary." *Id.* Bailees may also be subjected to the extensive

¹⁰ *See*, State v. Briggs, 666 N.W.2d 573 (Iowa 2003).

common law rights of supervision by a bondsman, surveilled by police and required to report. Bail may be increased as needed and revoked for violation of the terms of release. The Appellees' brief makes no showing why any of these alternatives are inadequate to the task of controlling crimes committed by SVP detainees prior to trial, nor did the legislature speak upon the subject in the statute. Strict scrutiny requires such a showing.

Accordingly, Appellees' suggestion that this Court should interpret Iowa's SVP statute to be a preventative pretrial detention scheme preclusive of bail, would cause that statute to both fail strict scrutiny, and run afoul of the criteria specifically established for preventative pretrial detention by the United States Supreme Court under the U.S. Constitution. Constitutionally unsound interpretations should be avoided. In the absence of any other component to protect the pretrial liberty of SVP detainees, bail would appear to be essential to the validity of the statute. Because bail is necessary to the constitutional health of the SVP statute, there has been no implied recision of the common law.

III. State Constitutional Provisions.

A. Article I, Section 12, Iowa's bail guarantee provision.

When it adopted our present state constitutional bail guarantee, Iowa joined the constitutional bail reform movement which began in the United States in

the early 1800's in an effort by the states to protect the right of bail from erosion. [See Appellants' Brf, 32-3]. Contrary to the spirit of that movement, Appellees contend the intent was to limit the right of bail to criminal cases only, but Appellees supply no history of constitutional development to support that claim. They do cite the federal court certifying this issue to this Court for as authority answering the very question it certified. [Appellees' Brf, 16], but Judge Pratt only noted what he viewed as "support" for the appellee's argument that the Bail Guarantee clause is limited by its own language. Judge Pratt did not undertake an exhaustive analysis, however, finding that there was a "lack of clear Iowa law on the matter." Atwood v. Vilsack, 338 F. Supp. 985, 999 (S.D. Iowa 2004).

Appellants have since briefed the issue of the intent behind Article I, Section 12 in great detail to this more authoritative Court [Appellants' Brf., 28-36]. The arguments need not be repeated here. Appellees' only direct authority in response has been to cite this Court's decision in Allen v. Wild, 249 Iowa 255, 86 N.W. 2d 839 (1957). It is true that *Wild* stated that our state bail guarantee did not apply to persons detained under the Uniform Criminal Extradition Act for offenses committed outside the jurisdiction of the State of Iowa. Id. at 842.

A fair reading of *Wild* is that it subjects the operation of our own constitutional bail guarantee provision to the superior obligation of the federal constitution's interstate extradition provisions (U.S. Const., Art. IV, Sec. 2) which

requires states to comply with extradition requests from other states. The *Wild* decision does **not** state, as Appellees contend at p. 16 of their brief, that Iowa's constitutional bail guarantee "applies only to criminal cases." Even if it did, such a statement would be mere *dicta* which should be rejected by this Court now that the issue has been squarely presented and briefed.

B. Other State Constitutional Provisions

Appellees argue that Iowa's provision granting persons the inalienable right to defend liberty does not extend to pretrial detainees under Iowa's SVP statute because that clause only secures "pre-existing" common law rights according to this Court's decision in May's Drug Store v. State Tax Commissioner, 242 Iowa 219, 45 N.W.2d 245 (1950), and because at common law there is no right for accused SVP's to be released pending trial. [Appellees' Brf., 18]. No authority for this supposed common law exception is cited, and there is no merit in construing *Mays* as a limitation upon Article I, Section 1's purpose of guaranteeing all individual a meaningful opportunity to protect their personal liberty in Court.[*See* Appellants' Brf , 21]. Being allowed to present evidence that there is insufficient evidence to warrant a commitment trial is not as Appellees suggest at p. 18 of their brief, a meaningful opportunity to litigate all the factors pertaining to the necessity for pretrial detention.

The remainder of Appellees' brief as to the effect and applicability of Iowa's Bill of Rights provisions are largely argumentative appeals to sentiment and do not contain citations to authority. Appellants do cite this Court's decision in *Garren* however, for the sweeping proposition that 'these constitutional provisions' only apply to penal or criminal laws." *Garren*, 620 N.W.2d at 283. It is important to be more precise. *Garren* says nothing about limiting constitutional rights to criminal cases! The fact that a governmental action may be civil in nature does not exempt it from the requirements of due process, the right to defend liberty, freedom from personal restraint or a host of other personally held constitutional rights.

CONCLUSION

This case, simply because it touches upon the lightning rod of sexual offenses, should not be used to erode fundamental rights under the excuse of "civil" regulation. Protection of those liberties demands that this Court answer both parts of the question posed by the federal district court, in the affirmative. Pretrial detainees being held pursuant to Iowa Code Chapter 229A are entitled to bail under both the common law and the Iowa Constitution.

Respectfully Submitted:
For Petitioners.:



RANDALL C. WILSON, Esq. PK 0007857
IOWA CIVIL LIBERTIES UNION FOUNDATION

901 Insurance Exchange Bldg.
505 Fifth Avenue
Des Moines, IA. 50309-2316
Tel.: (515) 243 4032
Fax: (515) 243 8506 (call first)

JON M. KINNAMON, Esq.
KINNAMON, KINNAMON, RUSSO, MEYER
& KEEGAN

330 First St. S. E.
Cedar Rapids, IA 52401
Tel.: (319) 351 2650
Fax: (319) 351 1452

CERTIFICATE OF COSTS