MICHAEL P. WHALEN
The Law Office of Michael P. Whalen
333 E. English, Suite 215
Wichita, KS 67202
(316) 265-2598 Fax: (316) 264-3067
Email: mwhalen@kansasappellateattorney.com

To: Senate Judiciary Committee

From: Michael P. Whalen

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Subject: S.B. 149 - The Kansas Sexually Violent Predator Act (KSVPA)

Chairman King and Members of the Committee:

I am proud to be able to address this Committee and to explain why nearly every proposed amendment to the KSVPA is constitutionally unsound.

I have been fighting sexually violent predator (SVP) cases for over a decade. I won the *Ontiberos* case. I had *In re Chubb* remanded to the district court for a new hearing. The last two SVP cases I defended have been dismissed before they ever went to trial. I currently have another case on a habeas corpus review in the Kansas Supreme Court that I believe will result in another dismissal. I also currently have four other SVP cases on appeal. Nearly every proposed procedural amendment is in direct response to motions I have created or in response to appellate cases I have won.

The KSVPA is poorly developed legislation with numerous constitutional violations. And the proposed amendments make it even worse. .

First, several proposed amendments are already the law in Kansas but have been produced by the Attorney General to cover mistakes they have consistently made in the past. K.S.A. 59-29a03(c) deals with giving notice of the lack of confidentiality to SVP candidates prior to their evaluations. K.S.A. 59-29a03(d) deals with the disclosure of private medical and mental health information. These two statutes are codifications, and deficient ones, at that, of the requirements of the Health Information Portability and Accountability Act. The Attorney General and SRS/KDADS/KDOC have for years been in violation of the Act. It is an issue that has not been addressed by our appellate courts because the cases in which I have filed the objection have either been overturned on appeal or have been dismissed on other grounds. This amendment does not fix the shortfalls and requirements of the handling of private medical records as required by federal law, which supercedes state law. The Attorney General should follow the law as it currently exists and not ask this august body to make shortcuts that only assists in the prosecution and convictions of SVP candidates.

Second, K.S.A. 59-29a03(f), the addition of the mental health examiner to being a member of the multidisciplinary team creates a conflict of interest for the mental health examiner based upon the ethical code of mental health professionals. It also strips the validity of a "multidisciplinary team" making an independent decision based upon impartial data.

Third, K.S.A. 59-29a04(b) is invalid as written. This amendment allows the State to prosecute an SVP from another state or from a federal prison in the county of their residence or where they were charged or convicted. The problem is that the State can only prosecute an SVP case against someone that has been held and is pending release from a State facility. No out of State or federal convict would qualify under K.S.A. 59-29a02 as the statute is currently written.

Fourth, K.S.A. 59-29a04(c) is a pointless amendment. The Kansas Code of Civil Procedure already has very clear rules for service of process. To allow service of process on an SVP's attorney means that the State is having uncharged people illegally detained until such time that counsel might be appointed to represent them. This violates the constitutional basis for notice of an action. Further, the only reason this amendment was proposed by the Attorney General is because of their failure in a case of mine to effect proper service. Again, the Legislature does not exist to make things easier for the prosecution of SVP candidates and for the Attorney General because of their failure to aptly follow the law as it currently exists.

Fifth, K.S.A. 59-29a04(f) is strictly punitive. You can't make people pay for "treatment" that has been imposed upon them by the State. Especially when there has been a court finding beyond a reasonable doubt that they are being interred because of a mental disorder by which they cannot control their actions. This is treating mental health patients worse than convicted killers. Actually, please retain this amendment because it creates a great constitutional argument for invalidating the KSVPA.

Sixth, K.S.A. 59-29a05(a)(1) is unconstitutional on its face. Two federal circuit courts have held that holding civil commitment candidates in jail is a violation of their rights and that they must be held in a facility commensurate with the facilities to which they might be committed. To hold them in jail, when they are merely awaiting a mental health determination, is punishment, plain and simple. Further, the State would be liable for any injuries incurred by persons with severe mental health issues who were not receiving the required treatment that cannot be provided by a rural, county jail. I would further submit that the State of Kansas could well be liable for the wrongful incarceration of a person not found to be a sexually violent predator.

Seventh, K.S.A. 59-29a05(a)(2) is another deficient codification of law to which the State of Kansas is already subject: HIPAA.

Eighth, K.S.A. 59-29a06(b) takes away the right of SVP candidates to be examined by "a qualified expert or professional person of such person's own choosing" and replaces it with an "examiner." This is a distinct and knowing downgrade of the right to a qualified professional and is an obviously punitive measure, which was provided for by the original legislation.

Ninth, K.S.A. 59-29a06(f) strips SVP's of all rights of representation and due process in

proceedings under K.S.A. 59-29a08.

Tenth, K.S.A. 59-29a08 is a travesty. It denies access to counsel and access to the courts to SVP's. Please do not forget that every person in the program has a severe mental illness and the complicated requirements for access to a "hearing officer" as well as the specific non-appealable issues is a violation of the Due Process clause of the Constitution. Again, this is a punitive action and does not serve a legitimate, governmental interest other than expediency. Because every person, to my knowledge, being held under the KSVPA is indigent, they will never have access to outside or independent examiners that would be able to contradict the findings of the Larned staff.

Eleventh, K.S.A. 59-29a22, as amended, is a constitutionally unsound. It removes patient rights and privileges that were previously in place at the SVP program and again singles out SVP's as a group being treated differently than any other medical or mental health patients in the State of Kansas. There is a real sense here that the fact that this is supposed to be a "treatment facility" for mentally ill people is completely lost and that a singular class has been created for the withdrawal of rights and due process afforded all others in the State of Kansas. Again, there is no legitimate governmental interest that would validate the removal of simple patient rights afforded all other Americans. This point is repeatedly made by the simple change in language through out the act changing the word "patient" to "person." They ARE mental health patients, like it or not. And as such, they have a right to copies of their medical files; they have a right to refuse medication; they have a right to send and receive sealed mail.

Twelfth, K.S.A. 59-29a23 violates the Constitution of the State of Kansas by limiting access to the courts and the ability to pursue the remedy of a writ of habeas corpus by requiring the mandatory payment of fees, even if the person has been found to be indigent. The Bill of Rights of the Kansas Constitution, Amendment Eight states: "The right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Every amendment in this act is designed to prevent "persons" from having access to the courts by way of habeas corpus and creates penalties if the government doesn't think the issues being pursued are "valid." No other person, including convicted criminals, have similar restrictions on their ability to file actions in the courts of this state.

Two points that should be acknowledged by this Committee and the rest of the Legislature:
1. The Sexually Violent Predator Program at Larned is ineffective and has scored poorly on every State performance audit for the last four years. There is a lack of qualified staff and facilities. I would encourage this group to review the latest audit before enacting any new legislation.
2. Of the approximate 230 patients that have entered the SVP program, three have completed the program and 22 have died, according to the 2013 Audit. The program will likely be subject to a class action suit as is currently occurring in Minnesota. For the program to continue to exist, actual funding needs to be provided and qualified personnel need to be retained. None of the current amendments address these issues. The minute the treatment aspect of the program falters or fails, the entire Act becomes constitutionally invalid.

Please consider the issues presented herein. You might not like them, but the patients in the Sexually Violent Predator program are people, or "persons," with hearts and minds and souls. And with certain inalienable rights granted them by the Constitution of the State of Kansas and the United States of America. The KSVPA, and especially with the amendments proposed, reflects a lawless overreach by the government at the expense of the rights of its citizens.

If you enact the proposed amendments, I will continue to get cases dismissed and overturned by the Kansas Supreme Court. And the entire Act overturned much sooner than you might expect.