STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

**Senate Judiciary Committee**
HB 2196
Assistant Attorney General Christine Ladner
March 10, 2011

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony on behalf of Attorney General Derek Schmidt in support of House Bill 2196. I am one of the Assistant Attorneys General responsible for prosecution of sexually violent predators (SVPs).

HGB 2196 would save costs and streamline presentation of evidence cases by amending the rules of evidence for expert testimony only in SVP cases to mirror the Federal Rules of Evidence (FRE).

SVP cases are based upon criminal records of sexually violent offenses and expert testimony by forensic psychologists. In litigating SVP cases, the State relies heavily upon psychological experts. Before an inmate is released from custody for a sexually violent offense, the inmate is interviewed and evaluated by a psychologist employed by the Department of Corrections (DOC). The psychologist prepares a Clinical Services Report (CSR). The CSR includes the diagnosis, progress in Sex Offender Treatment while in DOC and risk assessment. These psychologists rely on DOC records and other treatment records of the inmate in making their assessments.

Next, if the State files a Petition pursuant to the KSVPA and a court finds probable cause that the inmate meets the criteria for a Sexually Violent Predator, the inmate is further evaluated by psychologists at Larned State Hospital (LSH). If the LSH evaluation determines that the respondent meets the criteria for SVP status, we proceed to trial. These psychologists rely on volumes of prior treatment records.

At trial, if the Respondent objects to a psychologist's testimony on the basis that his opinion is based upon hearsay, presentation of the expert's opinion soon becomes unwieldy depending upon the source of the information in the prior records. In Kansas, "experts' opinions based upon hearsay are not admissible in any court proceedings." *In re Care & Treatment of Foster*, 280 Kan. 845, Syl. ¶ 9 (2006).

K.S.A. 60-456(b) currently controls the admission of testimony of expert opinion in SVP cases. The testimony must be: (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of special knowledge, skill, experience or training possessed by the witness. Reliance upon information from someone else or data obtained from someplace else is an opinion based on hearsay, and absent an agreement of the parties, inadmissible.

Therefore, existing law regarding the admissibility of expert opinion in SVP cases is a problem because a hearsay objection makes foundation requirements for the opinion extraordinary foundation.

Cost, travel and efficiency become issues where the records are from the Department of Corrections, Larned State Hospital and each individual treatment provider that previously provided sex offender treatment or counseling. Even more problematic, if we have to subpoena prior victims (particularly those who were children at the time of the prior molestations) or law enforcement officials who may no longer be available, the burden of having these declarants available is enormous. It seems a disservice to victims of

Senate Judiciary
3-10-11
Attachment 11

violent sexual assaults, whose cases were long ago disposed of, to have to testify about the same facts again to establish SVP status on the same perpetrator. For those predators who have lengthy criminal histories, it surely is not the legislative intent behind the SVPA for predators to avoid commitment because they have outlived their victims.

This proposal does not change K.S.A. 60-456(b), but amends the rule only in SVP cases to conform with the Federal Rules of Evidence on the admission of expert opinion. Evidence of the report is not admitted as substantive proof of the report's truth but for the limited purpose of showing the basis of the expert's opinion. FRE 703 is more in line with the "real life" practice of experts. If it is the customary practice in the expert's specialty to consider reports from nontestifying third parties in formulating an opinion, the expert's testimony may be based on such reports. The rationale of the Federal Rule is that judicial practice should be brought in line with the practice of experts themselves when not in court, who, in the case of physicians, may make life and death decisions on the basis of hearsay statements.

The Kansas Sexually Violent Predator Act is ready for this amendment. Recent appellate treatment of SVP cases indicates that codifying FRE 703 would help trial judges and practitioners avoid trial error.

Twenty states and the federal system have sexually violent predator laws. Fourteen of them: Alabama, Arizona, Florida, Iowa, Illinois, Massachusetts, North Dakota, New Jersey, Pennsylvania, South Carolina, Texas, Virginia, Wisconsin and of course, the federal system apply a form of the proposed rule of evidence within their sexually violent predator laws. Kansas should join this list of states. This proposal would be a service to victims so that they would not have to potentially testify twice. The proposal would also cut costs in the presentation of evidence by both sides.