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Senate Judiciary Committee
SB 280
Assistant Attorney General Christine Ladner
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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 Senate Bill 280. I am one of the Assistant Attorneys General responsible for prosecution of sexually violent predators. SB 280 would assist prosecutors in two ways: (1) the bill clarifies that there is only limited confidentiality in SVP evaluations and (2) the bill expands the admissibility of expert testimony to apply to all proceedings and hearings under the act, not just the initial trial.

I. Limits on Confidentiality

The Kansas Sexual Predator Act (KSVPA) contains a very limited waiver of confidential or privileged information. K.S.A. 29-29a16 provides:

> **59-29a16. Same; confidential or privileged information and records.** ***In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator.*** The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

K.S.A. 59-29a17 contemplates that psychological reports and treatment records may be admitted into evidence, but provides some protection for respondents, providing that they shall be sealed and opened only after court order.

The limits in confidentiality need to be further clarified. Currently, when inmates are sent to Larned State Hospital for a sexual predator evaluation, the lack of confidentiality in their clinical interviews is discussed with them, but several issues have been raised in recent litigation as to whether such notification adequately waives confidentiality. Respondents have claimed that the state cannot proceed under the SVPA because of potential confidentiality under HIPPA. They have also claimed that the information may only be released to the attorney general and the agency with jurisdiction and no one else. It should not be the intent of the legislature that the information should be so limited. The court, the jury or whomever the trier of fact is at any hearing within the KSVPA should also have access to the relevant information they need in determining whether or not someone is a sexually violent predator. The legislative proposal is needed to firmly remove these confidentiality issues in litigating SVP cases.

The legislative intent behind the KSVPA is recognition that "there exists an extremely group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated." K.S.A. 59-29a01. This group of persons should not be able to hide behind physician/patient or psychologist patient confidentiality in order to avoid commitment to the SVP program. Relevant information and records which would otherwise be

confidential or privileged should be disclosed as needed at all stages within the SVP process. This proposal will remove a potential issue for SVP's to litigate: that they have not waived confidentiality of their records for trial purposes, only treatment purposes. For reasons of public safety, SVP evaluations should not be confidential.

II. Hearsay Issues and Expert Testimony – Admissible at any "Proceeding"

K.S.A. 59-29a06 was modified in 2011 by HB 2071 to make the rule regarding admissibility of hearsay in SVP cases the same as in Federal Rule of Evidence 703. The 2011 law only applies to trials. K.S.A. 59-29a06(c) provides:

> Notwithstanding K.S.A. 60-456, and amendments thereto, ***at any trial*** conducted under K.S.A. 59-29a01 et seq., and amendments thereto, the parties shall be permitted to call expert witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts and data need not be admissible in evidence in order for the opinion or inference to be admitted.

The language, "at any trial" should be changed to ***"at any proceeding."***

The new provision was successfully used at a bench trial in November in Lawrence. District Court Judge Robert Fairchild found the new statute helpful. In determining the admissibility of expert testimony that relied upon hearsay of prior sexual offenses, Judge Fairchild cited the new law. He wrote:

> "The court has struggled with determining the degree to which testimony about these incidents should be allowed and considered by the court. ... ***The 2011 Kansas Legislature attempted to assist with this problem by enacting*** (HB 2071). ***The court finds that reports relating a respondent's additional sexual offenses are of a type reasonably relied upon by experts in the psychology field in making diagnoses of pedophilia and in assessing the likelihood that a sexual offender is likely to reoffend."***

This rule of evidence needs to apply to all proceedings under the KSVPA, not just "trials." There are numerous places within the act where additional hearings occur before and after the trial to determine SVP status. There are probable cause hearing, annual reviews, petitions for transitional release, conditional release and final discharge. All of these hearings rely upon expert opinion testimony.

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. The proposal passed in 2011 is a service to victims so that they do not have to potentially testify twice. The 2012 proposal extends the rule to all proceedings under the act potentially saving victims from having to testify multiple times.