

**Senate Judiciary Committee
February 15, 2021**

**Senate Bill 102
Testimony in Opposition
Kansas Association of Criminal Defense Lawyers**

Dear Chairperson Warren and Members of the Committee:

SB 102 seeks to amend the Kansas Sexually Violent Predator Act (KSVPA). KSVPA permits the state to involuntarily and indefinitely incarcerate people (although the Act uses “control, care and treatment” to describe what it does) who a court determines beyond a reasonable doubt to be “sexually violent predators.” As you can see on pages 1-2 of the bill, the people subject to KSVPA include those 1) who have been convicted of a “sexually violent offense,” which includes offenses ranging from offgrid to severity level 10;¹ 2) who have been convicted of a non-sexually-violent offense that was determined to be sexually motivated; 3) who were charged with a sexually violent offense but determined incompetent to stand trial; and 4) who were found not guilty of a sexually violent offense by reason of mental disease or defect. See K.S.A. 59-29a03.

Unfortunately, there is no time for me to research and provide information about the history of the Act, how many people are currently subject to it, its efficacy of its stated goals, etc. At this point, we simply raise concerns that can be summed up as follows:

If there is no statutory “right to appear at a proceeding...absent a court order,” there can still be a constitutional due process violation.

If there is no statutory “right whatsoever in the amount of time the person is detained in the county jail to secure the person’s attendance at a proceeding,” there can still be a constitutional due process violation.

If the Legislature wants KSVPA to work as intended, then it should properly fund it at all levels, which will require all involved parties (the Attorney General’s Office, the county jails, the entities that pay for counsel, etc.) to come forward with fiscal impact information that encompasses what it needs to make the program work as intended.

¹ Definition includes some or all subsections of: rape, indecent liberties, aggravated indecent liberties, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a child, aggravated indecent solicitation of child, sexual exploitation of a child, aggravated sexual battery, aggravated incest, and any attempt, conspiracy, or criminal solicitation of the same (which is what makes the severity levels vary). See K.S.A. 59-29a02(e).

Constitutional due process concerns do not go away with SB 102

The proposed 59-29a05(g) reads: “(g) Nothing in this section shall be construed to give a person: (1) The right to appear at a proceeding under the Kansas sexually violent predator act absent a court order; or (2) any right whatsoever in the amount of time the person is detained in the county jail to secure the person’s attendance at a proceeding under the Kansas sexually violent predator act.”

First, this would take away a person’s right to appear at hearings absent a court order. Our concern is the AG’s Office may argue that certain hearings do not require the accused’s presence, and a court may agree. This is an infringement on the right to be present, which is generally afforded to people without a court order.

Also concerning is the provision that allows a person to be detained for any amount of time between the state filing the SVP petition and the court making a probable cause finding (current law is “72 hours or as soon as reasonably practicable or agreed upon by the parties”). This means people may be finished with their sentences, be transferred to county jails, and just sit there without any finding from the court that there is probable cause to believe they are SVPs. SB 102 appears to be a response to *In re Ellison*, 305 Kan. 519 (2016), where the Kansas Supreme Court unanimously found Mr. Ellison had a right to speedy disposition of his case. That decision was grounded in the constitutional due process right. That right does not go away if SB 102 passes.

Incidentally, Mr. Ellison was in jail awaiting his trial for more than four years, at a cost to Sedgwick County—1,705 days at the 2017 per day SG CO jail rate is \$59,675 in taxpayer money. Furthermore, when people are taken from KDOC to county jail, they are not receiving sex offender treatment. They just sit. If treatment is ostensibly one of the purpose of KSVPA—rather than locking people up indefinitely in county jail without any probable cause—then it seems that keeping people where they can receive treatment is the more appropriate course of action.

Properly funding KSVPA

I noticed that the fiscal note for SB 102 gives an explanation from DOC about what funds and positions they will need to handle the changes that SB 102 would bring.² But that information as it relates to the Attorney General’s Office and counties is missing.

² DOC’s estimate does not address space needs, but a 2016 legislative post-audit found the program was going to run out of space in 2017. I didn’t have time to look into it further.

The AG's Office mentions "some additional costs" and that SB 102 "could also have an increase in cases to litigate to determine the sexually violent predator status," but "a precise fiscal effect cannot be estimated because the number of additional cases is unknown." In talking with someone who works on these cases, I learned that, on average, SVP cases normally take about two years to process. This is due, in large part, to staffing constraints at the AG's Office. And SB 102 appears to pave the way for the AG's Office to prosecute more SVP cases without any incentive to do so in a timely manner.

As for the impact on counties, the Kansas Association of Counties acknowledges it "could increase expenditures," but "it is not possible to estimate the fiscal effect."

It is our position that this Committee should be concerned about the costs and resources that would result from SB 102, and inquire further—surely there is information based on current and past costs that could be helpful to know. Again, if the entities involved in SVP cases really want the KSVPA to function as intended, then they should come forward with estimated costs and ask this Legislature to fund the same.

In its current form, KACDL opposes SB 102, and we ask this Committee to not recommend it favorably for passage.

Sincerely,
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