

TWENTY YEARS AFTER KANSAS V. HENDRICKS:
REFORMING THE KANSAS SEXUAL PREDATOR
TREATMENT PROGRAM IS CRUCIAL TO THE FUTURE OF
THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

*By Justine T. Koehle**

INTRODUCTION

In July 1993, Stephanie Schmidt, a student at Pittsburgh State University, was abducted, raped, and strangled to death by Donald Ray Gideon.¹ Gideon was a convicted rapist who had recently been released from prison.² This horrific and highly publicized crime created a public demand for more severe punishments for sex offenders.³

Likely motivated by Ms. Schmidt's murder, the Kansas Legislature enacted the Kansas Sexually Violent Predator Act (KSVPA) in 1994.⁴ The KSVPA allows for the potentially indefinite civil commitment of sexually violent predators with a mental abnormality or personality disorder that makes them likely to engage in repeat acts of sexual violence and renders them extremely dangerous to society.⁵ As a means to achieve its desired end of "no new victims," the KSVPA subjects any person found to be a sexually violent predator to potentially long-term commitment for control, care, and treatment in the Kansas Sexual Predator Treatment Program (SPTP).⁶ Leroy Hendricks, the first person civilly committed under the KSVPA, challenged its constitutionality in 1997.⁷ However, the Supreme Court found the KSVPA was

*J.D. Candidate 2017, University of Kansas School of Law; B.A. (Anthropology), University of California, Davis. I would like to thank my mom, Tammy Duggan, and Thomas Anderson for their endless love and support. I would also like to thank Professor Richard Levy and Professor Pamela Keller for their insightful comments and guidance.

1. Steve Fry, *Friend's Death Led Prosecutor to Field*, CJONLINE.COM (Mar. 18, 2005), http://cjonline.com/stories/031805/kan_wilson.shtml#.Vg21IXv6SRs; see *State v. Gideon*, 257 Kan. 591, 595–96 (1995).

2. Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 419 (1997).

3. *Id.*; David J. Gottlieb, *Preventive Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031, 1047 (2002).

4. KAN. STAT. ANN. § 59-29a01(a) (Supp. 2015).

5. *Id.*

6. *Id.*

7. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

constitutional because it was not punitive in nature and its statutory requirements for civil commitment satisfied substantive due process.⁸

Flash forward 22 years: only three out of the 287 residents committed to the SPTP have ever been fully treated and discharged, and the KSVPA has once again been challenged on constitutional grounds with a class action lawsuit brought by SPTP residents.⁹ Unsurprisingly, the program is fast approaching capacity and its annual expenditures are increasing.¹⁰ Given the influx of residents and expenses, the SPTP should attempt to curb the resident population by any means possible. However, the SPTP appears unequipped to provide residents adequate treatment, as the program does not conform to current best treatment practices.¹¹ With the release rate of three residents over 22 years,¹² Kansas can claim the KSVPA has been successful in promoting public safety because so few sexually violent predators have been released. However, this public safety comes at the expense of essentially indefinite civil confinement of residents. Considering its current state, is the KSVPA, as applied through the SPTP, still constitutional under *Kansas v. Hendricks*? Recent court decisions concerning the sexually violent predator treatment programs in Minnesota and Missouri suggest not.

Minnesota and Missouri's statutory regimes for civil commitment of sexually violent predators are nearly identical to the KSVPA and are similarly applied through a civil commitment treatment program.¹³ In 2015, district courts in Minnesota and Missouri found the respective civil commitment programs punitive in nature, and thus unconstitutional under *Kansas v. Hendricks*, because both programs applied the incorrect legal standard when determining whether a resident could be released.¹⁴ The similarities the KSVPA's statutory provisions, treatment practices, and standards for releasing residents share with Minnesota's and Missouri's likely render the KSVPA punitive in nature and unconstitutional under *Kansas v. Hendricks*.¹⁵ This potential unconstitutionality renders the State of Kansas vulnerable to additional class action litigation and endangers not only the future of the

8. *Id.* at 369–71.

9. LEGIS. DIV. OF POST AUDIT COMM., PERFORMANCE AUDIT REPORT: LARNED STATE HOSPITAL: REVIEWING THE OPERATIONS OF THE SEXUAL PREDATOR TREATMENT PROGRAM, PART 2, p. 6 (Apr. 2015), <http://www.kslpa.org/assets/files/reports/r-15-006.pdf>. [hereinafter 2015 PERFORMANCE AUDIT REPORT] (calculating total number of residents since 1994 by adding the number of residents currently in the SPTP (243), with the number of residents who have completed the program (3), the number of residents who have died while committed (28), and the number of residents released for legal technicalities (13)); Complaint-Class Action at 1–7, *Baker v. DesLauriers*, No. 6:14-cv-01356-JTM-KGG (D. Kan. Oct. 27, 2014), <http://www.clearinghouse.net/chDocs/public/MH-KS-0001-0001.pdf>.

10. *Id.* at 6–9.

11. See *infra* Part IV.

12. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6.

13. Compare KAN. STAT. ANN. § 59-29a01–07 (2015), with MINN. STAT. § 253D.01–07 (2015) and MO. REV. STAT. § 632.480–632.525 (2015). See *infra* Part III.

14. See *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1170–73 (D. Minn. 2015); *Van Orden v. Schaefer*, 129 F. Supp. 3d 839, 865–70 (E.D. Mo. 2015).

15. See *infra* Parts II–III.

KSVPA and SPTP, but also the public.¹⁶

Even if the KSVPA was ruled constitutional under *Kansas v. Hendricks* in the current class action lawsuit, SPTP operations should be reformed because they are inefficient and unsustainable in their current state. As of December 2014, the SPTP housed 243 residents and is projected to reach capacity sometime between 2017 and 2020.¹⁷ With a release rate of three residents in 22 years, it is clear the SPTP cannot curb the growing resident population while utilizing its current treatment program and operations.¹⁸ The SPTP recognizes the need for reform and has been working on a new treatment program.¹⁹ However, it remains unclear what this new program will entail as it was not yet released at the time of this article's publication.²⁰

Nonetheless, the SPTP operations and treatment should be reformed to meet current best practices and the SPTP should release residents that no longer meet the criteria for commitment. Reforming the SPTP treatment practices will promote the rights of residents by providing them with proven treatment methods and the opportunity to address their mental abnormalities or disorders. Additionally, reforming the SPTP will further promote public safety because those residents who are released will receive treatment that has yielded low recidivism rates in other states.²¹

Part I of this article gives a brief overview of the KSVPA's statutory provisions and its constitutionality as ruled in *Kansas v. Hendricks*. Part II describes the current state of the KSVPA by providing a synopsis of the KSVPA's pertinent legislative history. It also describes the current state of the SPTP. Part III discusses how the KSVPA, because of its similarities to the Minnesota and Missouri statutory provisions and treatment programs, is likely now unconstitutional under *Kansas v. Hendricks*. Part IV discusses the problems the KSVPA's potential unconstitutionality and the SPTP's current operations and treatment practices causes for the State of Kansas. Part V proposes solutions to remedy the KSVPA's potential unconstitutionality and the SPTP's inefficient and unstable operations. Part VI discusses the benefits and risks of the proposed solutions to the KSVPA and SPTP. Part VII concludes by emphasizing the importance of reforming the KSVPA and SPTP to promote the rights of residents, curb the SPTP's encroaching population capacity, and ensure public safety.

16. See *infra* Part IV.

17. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6.

18. *Id.*

19. John Hanna, *Kansas overhauling post-prison treatment of sex offenders*, LJWORLD.COM (Oct. 3, 2016), <http://www2.ljworld.com/news/2016/oct/03/kansas-overhauling-post-prison-treatment-sex-offen/>.

20. *Id.*

21. See *infra* Part VI.

PART I: OVERVIEW OF KANSAS SEXUALLY VIOLENT PREDATOR ACT

To address the extreme danger sexually violent predators pose to citizens, the Kansas Legislature drafted the KSVPA, which created a separate civil commitment regime for the “potentially long-term control, care, and treatment of sexually violent predators.”²² The KSVPA has been ruled constitutional twice by the Supreme Court and has been operating through the SPTP for the past 22 years.²³

A. The KSVPA’s Statutory Provisions

Before a person can be civilly committed under the KSVPA, they must first be convicted of a sexually violent offense. Rape, indecent liberties with a child, and eleven other crimes are considered sexually violent offenses.²⁴ A person becomes automatically eligible for civil commitment if they are convicted,²⁵ charged but incompetent to stand trial,²⁶ found not guilty by reason of insanity,²⁷ or found not guilty but the jury who decided the verdict found the “defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent.”²⁸ If convicted, the person first serves their prison sentence before civil commitment.²⁹ Prior to their release from custody they must go through the KSVPA’s commitment procedures to determine whether they meet the criteria for civil commitment.³⁰ If a person is civilly committed, they remain in custody until granted transitional release.³¹

1. Commitment Procedure

The KSVPA commitment procedure is triggered 90 days before a person’s release from custody while awaiting trial, or if convicted, 90 days before their scheduled prison release date.³² Notice of such person’s release is provided to the Attorney General and an established multidisciplinary team.³³ The multidisciplinary team consists of persons from the agency of confinement and the mental health professional who prepared or conducted any evaluations or reports of the person.³⁴ This team is the first to assess whether the person is

22. KAN. STAT. ANN. § 59-29a01(a) (2016).

23. *Kansas v. Hendricks*, 521 U.S. 346, 370–71 (1997); *Kansas v. Crane*, 534 U.S. 407, 415 (2002); 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 1.

24. *See* KAN. STAT. ANN. § 59-29a02(e)(1)–(13) (2016).

25. KAN. STAT. ANN. § 59-29a03(a)(1) (2016).

26. KAN. STAT. ANN. § 59-29a03(a)(2) (2016).

27. KAN. STAT. ANN. § 59-29a03(a)(3) (2016).

28. KAN. STAT. ANN. § 59-29a03(a)(4) (2016); KAN. STAT. ANN. § 22-3221 (1995).

29. KAN. STAT. ANN. §§ 59-29a03–29a07 (2016).

30. *Id.*

31. KAN. STAT. ANN. § 59-29a02(i) (2016); KAN. STAT. ANN. § 59-29a08 (2016).

32. KAN. STAT. ANN. § 59-29a03(a)(1)–(4) (2016).

33. KAN. STAT. ANN. § 59-29a03(a) (2016).

34. KAN. STAT. ANN. § 59-29a03(f) (2016).

a sexually violent predator.³⁵ A person is considered a sexually violent predator if they “have been convicted of or charged with a sexually violent offense and suffer from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”³⁶ “‘Mental abnormality’ is a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”³⁷ “‘Likely to engage in repeat acts of sexual violence’ means the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to health and safety of others.”³⁸ If the multidisciplinary team finds that the person meets the definition of a sexually violent predator, the team notifies the Attorney General of the assessment and the Attorney General refers the case to a prosecutor’s review committee.³⁹

A prosecutor’s review committee then conducts a second assessment of whether the person meets the definition of a sexually violent predator.⁴⁰ If the review committee determines the person is a sexually violent predator, the Attorney General files a petition alleging, with supporting facts, that the person is a sexually violent predator.⁴¹ The Attorney General must file this petition within 75 days of receiving notice of the prosecutor’s review committee’s finding.⁴²

A judge then reviews the petition and determines whether probable cause exists for a jury to find the person is a sexually violent predator.⁴³ If the judge determines probable cause exists, the person is detained and may appeal the judge’s finding at an opposition hearing.⁴⁴ If the judge’s finding is upheld at the opposition hearing, the matter goes on to trial.⁴⁵ At trial either the court or a jury, by unanimous verdict, must find beyond a reasonable doubt the person is a sexually violent predator to commit them.⁴⁶

2. Release Procedure

Every person committed under the KSVPA remains committed until their mental abnormality or personality disorder has so changed that they are safe to be released back into the community.⁴⁷ To assess each person’s progress within the program, the KSVPA requires an annual examination for each committed person’s mental condition.⁴⁸ Each person’s annual examination is

35. *Id.*

36. KAN. STAT. ANN. § 59-29a02(a) (2016).

37. KAN. STAT. ANN. § 59-29a02(b) (2016).

38. KAN. STAT. ANN. § 59-29a02(c) (2016).

39. KAN. STAT. ANN. § 59-29a03(f)–(g) (2016).

40. KAN. STAT. ANN. § 59-29a03(g) (2016).

41. KAN. STAT. ANN. § 59-29a04(a) (2016).

42. *Id.*

43. KAN. STAT. ANN. § 59-29a05(a) (2016).

44. KAN. STAT. ANN. § 59-29a05(a)(1) (2016); KAN. STAT. ANN. § 59-29a05(b) (2016).

45. KAN. STAT. ANN. § 59-29a06(a) (2016).

46. KAN. STAT. ANN. § 59-29a07(a) (2016).

47. *Id.*

48. KAN. STAT. ANN. § 59-29a08(a) (2016).

then submitted to the court that issued the commitment to review his or her current mental condition.⁴⁹ Upon review, if the court finds probable cause to conclude the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional or conditional release, the court sets a hearing on the issue.⁵⁰ At the hearing, the state bears the burden of proof to prove the resident's mental abnormality or personality disorder has not changed such that the resident is safe to be released.⁵¹ The resident will only be placed in transitional or conditional release if either the court or the jury is convinced beyond a reasonable doubt that it is appropriate to do so.⁵² Currently, the KSVPA does not provide statutory proceedings for final or complete discharge from the SPTP.⁵³

When a resident is granted transitional release, they are still civilly committed. Transitional release is actually a phase of the SPTP treatment program and the focus is on assisting residents in their reintegration back into the community post commitment.⁵⁴ This phase of treatment can occur at a halfway house, a SPTP treatment facility, or on work release.⁵⁵ Although not defined by the KSVPA, conditional release is analogous to probation.⁵⁶ If granted conditional release, a resident must complete a minimum of five years free from violating their conditional treatment plan before they can petition for final discharge.⁵⁷ In addition to the lack of proceedings for final discharge, the KSVPA also fails to define what final discharge is.⁵⁸ It is assumed that if a resident is granted final discharge, they are no longer subject to the treatment plan rules or conditions associated with transitional and conditional release.

B. The KSVPA's Constitutional Challenges

In spite of its procedurally safeguarded commitment proceedings, the KSVPA has twice been challenged and upheld by the Supreme Court.⁵⁹ The KSVPA was first constitutionally challenged in 1997 with *Kansas v. Hendricks*, and a second time in 2002 with *Kansas v. Crane*.⁶⁰ The scope of this article is limited to discussing why the KSVPA likely violates the constitution under *Kansas v. Hendricks*.⁶¹ Accordingly, only *Kansas v.*

49. *Id.*

50. KAN. STAT. ANN. § 59-29a08(c) (2016); KAN. STAT. ANN. § 59-29a18(a) (2016).

51. KAN. STAT. ANN. § 59-29a08(c)(3) (2016).

52. KAN. STAT. ANN. § 59-29a08(d) (2016).

53. *See* KAN. STAT. ANN. §§ 59-29a01–24a (2016). *But see infra* Part II. A.

54. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6; KAN. STAT. ANN. § 59-29a02(j) (2016).

55. KAN. STAT. ANN. § 59-29a02(i) (2016).

56. *See* KAN. STAT. ANN. § 59-29a19(a) (2016).

57. KAN. STAT. ANN. § 59-29a19(b) (2016).

58. *See* KAN. STAT. ANN. §§ 59-29a01–24a (2016).

59. *See* *Kansas v. Hendricks*, 521 U.S. 346 (1997); *see also* *Kansas v. Crane*, 534 U.S. 407 (2002).

60. *Id.*

61. *See infra* Part III.

Hendricks will be discussed.⁶²

Leroy Hendricks, who had an extensive history of sexually molesting children,⁶³ was the first person ever committed under the KSVPA and the first to challenge its constitutionality.⁶⁴ Hendricks argued that his commitment under the KSVPA was unconstitutional “on ‘substantive’ due process, double jeopardy, and *ex post facto* grounds.”⁶⁵ The Kansas Supreme Court invalidated the KSVPA on substantive due process grounds and in response, the State of Kansas petitioned for and was granted certiorari to the Supreme Court.⁶⁶ Hendricks also cross-petitioned for and was granted certiorari to “reassert his federal double jeopardy and *ex post facto* claims.”⁶⁷ The Court was ultimately not persuaded by any of Hendricks’ arguments, and by a 5-4 majority reversed the Kansas Supreme Court’s decision and ruled the KSVPA constitutional.⁶⁸

Hendricks first argued that civil commitment under the KSVPA violated his substantive due process rights because it infringed on his freedom from physical restraint.⁶⁹ Freedom from physical restraint is not an absolute liberty interest and states may require civil commitment for “people who are unable to control their behavior and who thereby pose a danger to the public health and safety.”⁷⁰ However, a finding of “dangerousness, standing alone, is ordinarily not a sufficient ground to justify indefinite involuntary commitment.”⁷¹ The Court found the KSVPA clearly required more than a finding of dangerousness because the person must be suffering from a personality disorder or mental abnormality that renders them dangerous to themselves or others.⁷² “Evidence of past sexually violent behavior and a present mental condition that creates a likelihood”⁷³ of reoffending if not incapacitated was ruled sufficient to require civil commitment and did not violate substantive due process rights.⁷⁴ Because Hendricks’ pedophilia diagnosis qualified as a mental abnormality that rendered him a danger to others, his civil commitment under the KSVPA did

62. See *Kansas v. Crane*, 534 U.S. 407 (2002), for discussion of the KSVPA’s second constitutional challenge; Sarah E. Miller, *Out of Control: An Ambiguous Decision Raises the Question of Exactly Who Has Control [Kansas v. Crane, 534 U.S. 407 (2002)]*, 42 WASHBURN L.J. 353 (2003).

63. See *Kansas v. Hendricks*, 521 U.S. 346, 353–54 (1997) (Hendricks was convicted of indecent liberties with two thirteen year old boys, indecent exposure, lewdness, and molestation/sexual assault of six other children over almost a thirty year period.).

64. *Id.* at 350.

65. *Id.*

66. *Id.*

67. *Id.* (explaining that because the Kansas Supreme Court invalidated the KSVPA on substantive due process grounds, the Court did not address Hendricks’ double jeopardy or *ex post facto* claims).

68. *Id.*

69. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

70. *Id.* at 356–57.

71. *Id.* at 358.

72. *Id.* at 357–58.

73. *Id.* at 357.

74. *Id.* (emphasizing that a finding of dangerousness alone was insufficient to justify commitment).

not violate substantive due process requirements and was constitutional.⁷⁵

The Court next considered, and ultimately rejected, Hendricks' double jeopardy and *ex post facto* claims. Hendricks argued the KSVPA established criminal rather than civil proceedings because commitment constituted as additional punishment for his past crimes, and thus violated double jeopardy and *ex post facto* clauses.⁷⁶ The Court rejected these arguments after finding the KSVPA was a civil procedure and not punitive in nature.⁷⁷

Statutory construction and legislative intent first established the KSVPA as a civil proceeding because the statute describes commitment as a civil proceeding and was intentionally placed in Kansas' probate code rather than criminal code.⁷⁸ Legislative intent will only be rejected by "clearest proof" that the statute is "so punitive either in purpose or effect as to negate intention to deem it civil."⁷⁹ For the majority, Hendricks did not meet the high burden of "clearest proof."⁸⁰

The Court also determined the KSVPA was not punitive because it did not "affix culpability for prior criminal conduct," was not "seeking retribution for a past misdeed,"⁸¹ and did not act as a deterrent.⁸² Even though a prior criminal act is a requirement for commitment, the Court found that the requirement only served as evidentiary purposes for the commitment proceedings and did not affix culpability nor seek retribution for the prior criminal conduct.⁸³ Additionally, the KSVPA did not serve as a deterrent because "by definition . . . persons with a 'mental abnormality' . . . that prevents them from exercising adequate control over their behavior" are unlikely to be deterred by the KSVPA.⁸⁴

The Court also ruled that a resident's potentially indefinite confinement under the KSVPA did not prove punitive intent.⁸⁵ This is because a resident's duration of confinement is connected to the KSVPA's purpose: "holding a person until their mental abnormality no longer causes them to be a threat to others."⁸⁶ Accordingly, the Court found that a resident is not confined for a potentially indefinite period as punishment, but as a necessity to achieve the

75. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). Hendricks also argued his pedophilia diagnosis was not a "mental illness" as defined in the medical profession and therefore could not be considered a "mental abnormality" to commit him under the KSVPA. *Id.* at 357–58. The Court rejected this argument on the basis that his pedophilia was still an abnormality that rendered him dangerous to others regardless of whether the diagnosis was a "mental illness" as defined in the medical profession.

76. *Id.* at 360–61.

77. *Id.* at 361.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

82. *Id.*

83. *Id.*

84. *Id.* at 362–63.

85. *Id.* at 363.

86. *Id.*

KSVPA's purpose.⁸⁷ Additionally, potentially indefinite confinement did not prove punitive intent because "if at any time the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release."⁸⁸ For the Court, this proved "that Kansas does not intend an individual committed pursuant to the [KSVPA] to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness."⁸⁹

Hendricks' final argument struck down by the Court was that the KSVPA was punitive because it "fail[ed] to offer legitimate 'treatment'" and thus, "confinement amounted to little more than disguised punishment."⁹⁰ The Court found that providing treatment to residents was at least an "ancillary purpose of the [KSVPA],"⁹¹ which meant the State was obligated to provide treatment if any was available for a certain disorder.⁹² However, Hendricks' lack of treatment in the SPTP did not alarm the Court because Hendricks was the first person committed under the KSVPA and it was understandable that the SPTP did not yet have all of "its treatment procedures in place."⁹³ The fact that residents of the SPTP were receiving roughly "31.5 hours of treatment per week" by the time the action was argued before the Court was considered as further evidence that the treatment offered under the KSVPA was not disguised punishment.⁹⁴ Without proof of the KSVPA's punitive intent or effect, Hendricks' *ex post facto* and double jeopardy claims failed.⁹⁵

After the Court's ruling, Hendricks remained in the SPTP at Larned State Hospital until he successfully completed all treatment phases and was conditionally released in 2005.⁹⁶ Although Hendricks was released from Larned, he was far from a free man.⁹⁷ Despite being a 70-year-old stroke victim with limited use of his hands, Hendricks was placed in a "supervised home setting" where he had "an escort with him around the clock, seven days a week, at an estimated cost of \$278,000 for the first 15 months."⁹⁸

87. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997).

88. *Id.* at 363–64.

89. *Id.* at 364.

90. *Id.* at 365.

91. *Id.* at 367.

92. *Id.* at 366–67.

93. *Kansas v. Hendricks*, 521 U.S. 346, 367–68 (1997).

94. *Id.* at 368.

95. *Id.* at 369.

96. Eric Weslander, *Notorious Sex offender is Moving to Lawrence*, LJWORLD.COM (Apr. 1, 2005), http://www2.ljworld.com/news/2005/apr/01/notorious_sex_offender/.

97. *Id.*

98. *Id.*; Alexander Blenkinsopp, *Continued Questions about civil commitment of sex offenders*, THE CIVIL-CRIMINAL DISTINCTION BLOG (June 3, 2013), <https://civilcriminal.wordpress.com/2013/06/03/continued-questions-about-civil-commitment-of-sex-offenders/>.

PART II: THE KSVPA AND SPTP TODAY

A. The KSVPA's Legislative History to Date

Possibly due to its success in the Supreme Court, the KSVPA has not experienced a substantial amount of legislative amendments. Likely the most notable of the few legislative changes to the KSVPA are the 2003 amendments to the commitment proceedings.⁹⁹ In 2003, the Kansas Legislature passed amendments to the KSVPA that stated all time limits within the act were “intended to be directory and not mandatory and serve as guidelines for conducting proceedings under K.S.A. 59-29a01 et seq., and amendments thereto.”¹⁰⁰ This amendment was likely prompted by the release of 13 residents from the SPTP due to various procedural time limit violations that deprived the court of jurisdiction over residents’ commitment proceedings.¹⁰¹ After this amendment, residents were no longer able to claim a court lacks jurisdiction over them due to untimely commitment procedures.¹⁰²

Recently enacted KSVPA amendments are perhaps the most radical to date. The most significant is the addition of final discharge procedures for SPTP residents.¹⁰³ This new section creates a procedure for residents placed on transitional or conditional release to petition for final discharge.¹⁰⁴ The process is similar to the procedure when petitioning for transitional release.¹⁰⁵ Although not explicit, it appears residents are still required to complete all phases of SPTP treatment before they can be finally discharged because only those on transitional or conditional release are eligible for final discharge.¹⁰⁶ Despite being enacted in February 2015, these amendments have yet to be published or take full effect.¹⁰⁷

B. The Current State of the SPTP

Since 1994, the SPTP has had 287 residents in total.¹⁰⁸ Of those 287

99. Act of Oct. 29, 2003, ch. 152, 2003 House Substitute for Senate Bill 27 (providing civil commitment of sexually violent predators).

100. KAN. STAT. ANN. § 59-29a01(b) (2016); Act of Oct. 29, 2003, ch. 152, 2003 House Substitute for Senate Bill 27 (providing civil commitment of sexually violent predators).

101. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6; see *In re Care & Treatment of Hunt*, 82 P.3d 861 (Kan. Ct. App. 2004); *In re Care & Treatment of Brown*, 978 P.2d 300 (Kan. Ct. App. 1999); *In re Care & Treatment of Goracke*, 9 P.3d 595 (Kan. Ct. App. 2000); *In re Care & Treatment of Blackmore*, 39 P.3d 89 (Kan. Ct. App. 2002).

102. KAN. STAT. ANN. § 59-29a01 (2016); *Hunt*, 82 P.3d at 872–74.

103. S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (enacted).

104. *Id.*

105. *Compare* KAN. STAT. ANN. § 59-29a08 (transitional release procedure) with S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (final discharge procedure) (enacted).

106. S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (enacted).

107. S.B. 149, 2015 Leg., 86th Sess. § 59-29a21 (Ks. 2015) (enacted).

108. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6. The total number of residents since 1996 was calculated by adding the number of residents currently in the SPTP (243), with the number of residents who have completed the program (3), the number of residents who have

residents, 13 were released for legal technicalities,¹⁰⁹ 28 died while committed, and only three have ever completed the program in its entirety to achieve final discharge.¹¹⁰ As of December 2014, the SPTP housed 243 residents total, with 227 at Larned State Hospital, eight at Osawatomie State Hospital, and eight at Parsons State Hospital.¹¹¹ To date, all SPTP residents have been adult males and the current population has residents with ages ranging from 20 to more than 70 years old.¹¹² Of the current population, 63 residents have been in the SPTP for less than five years, 70 for five to nine years, 88 for 10 to 14 years, and 22 for 15 or more years.¹¹³ In 2013, the most common diagnosis among residents was pedophilia, and other common diagnoses were schizophrenia, bipolar disorder, and depression.¹¹⁴ Given the few number of releases, the SPTP is expected to exceed capacity between 2017 and 2020.¹¹⁵

The SPTP's stated goal is to ensure "no new victims" by "prevent[ing] sexual predators from reoffending after their release."¹¹⁶ To achieve this goal, persons committed under the KSVPA first become residents at Larned State Hospital and begin the SPTP's seven-phase treatment program.¹¹⁷ Residents must complete all seven phases of SPTP before they can be released.¹¹⁸ Phases one through five are considered inpatient phases and are conducted at Larned. Phases six and seven are reintegration phases, though phase seven is considered transitional release, and are conducted as outpatient phases at either Osawatomie or Parsons State Hospitals.¹¹⁹ Although the seven-phase program is intended to prevent residents from reoffending, the treatment program has zero tools with which to assess each resident's risk of reoffending.¹²⁰

Each SPTP phase has specific participation, attendance, and task requirements, but none of the phases are specifically tailored to each individual resident's needs.¹²¹ Every resident, regardless of intellectual or developmental abilities or diagnosis is required to complete the same requirements for each phase in order to progress through the treatment program.¹²² As a result, every

died while committed (28), and the number of residents released for legal technicalities (13).

109. *Id.*

110. *Id.*

111. *Id.* at 1.

112. *Id.* at 6–7.

113. *Id.* at 7.

114. LEGIS. DIV. OF POST AUDIT COMM., PERFORMANCE AUDIT REPORT: LARNED STATE HOSPITAL: REVIEWING THE OPERATIONS OF THE SEXUAL PREDATOR TREATMENT PROGRAM 5 (Sept. 2013), <http://media.khi.org/news/documents/2013/09/11/R-13-011.pdf> [hereinafter 2013 PERFORMANCE AUDIT REPORT].

115. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6.

116. *Id.* at 5.

117. *Id.*

118. LEGIS. DIV. OF POST AUDIT COMM., PERFORMANCE AUDIT REPORT: LARNED STATE HOSPITAL: REVIEWING THE GROWTH IN THE SEXUAL PREDATOR TREATMENT PROGRAM 4 (Apr. 2005), <http://www.kslpa.org/assets/files/reports/05pa10a.pdf> [hereinafter 2005 PERFORMANCE AUDIT REPORT].

119. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6.

120. *Id.* at 12.

121. *Id.*

122. *Id.*

resident receives “essentially the same treatment.”¹²³

The SPTP’s phases have a disproportionately higher amount of non-clinical requirements than clinical requirements for phase completion.¹²⁴ Although varied depending on the phase, non-clinical requirements include a weekly eight-hour minimum of recreational or leisure classes, while weekly clinical requirements only include one to four hours of behavioral classes and zero to four hours of individual or group therapy.¹²⁵ Recreational and leisure classes include activities like arts and crafts or exercise.¹²⁶ Behavioral classes include anger management and relationship skills.¹²⁷ If a resident fails to satisfy both a phase’s clinical and non-clinical requirements, they are denied permission to advance to the next stage.¹²⁸ Additionally, the resident must endure a waiting period of at least three months before they can reapply for phase advancement.¹²⁹

The KSVPA requires the SPTP to perform annual exams and evaluations of each resident to determine whether they still meet the criteria for commitment.¹³⁰ Although the KSVPA does not define the requirements of the exam, the exam should assess whether a resident’s mental abnormality or personality disorder has so changed that they would be safe at large, as this is the criteria for commitment.¹³¹ However, per the SPTP’s 2015 audit, annual exams were essentially phase progress reports rather than comprehensive exams to assess whether the residents still met the criteria for commitment.¹³² Additionally, the auditors found that no true risk assessment tools were being utilized to periodically check residents’ progress, treatment needs, and potential risk for reoffending.¹³³

PART III: THE KSVPA, AS APPLIED THROUGH THE SPTP, IS LIKELY UNCONSTITUTIONAL

Although the KSVPA passed constitutional scrutiny in 1997, recent rulings in Minnesota and Missouri concerning each state’s civil commitment laws as applied through sex offender treatment programs suggest that the KSVPA, as applied through the SPTP, would be found unconstitutional today. Specifically, the SPTP’s failure to apply the correct legal standard to the KSVPA’s required annual exams likely renders the KSVPA punitive in nature and consequently unconstitutional under *Kansas v. Hendricks*.

123. *Id.*

124. *See Id.* at 15.

125. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 15.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. KAN. STAT. ANN. § 59-29a08(a) (2016); 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 17.

131. KAN. STAT. ANN. § 59-29a07(a) (2016); KAN. STAT. ANN. § 59-29a08(c) (2016).

132. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 17.

133. *Id.* at 8.

In summer of 2015, district courts in Minnesota and Missouri ruled that certain aspects of the states' respective sexual predator civil commitment statutes were unconstitutional as applied through the states' treatment programs.¹³⁴ The KSVPA's statutory criteria for civil commitment is nearly identical to that of Minnesota and Missouri's respective acts,¹³⁵ and the SPTP shares similarities with both Minnesota's Sex Offender Program (MSOP) and Missouri's Sexual Offender Rehabilitation and Treatment Services (SORTS).¹³⁶ These similarities between Minnesota, Missouri, and Kansas likely render the KSVPA, as applied through the SPTP, unconstitutional as well.

Both Minnesota and Missouri's sexual predator civil commitment laws were ruled punitive in nature, and thus unconstitutional under *Kansas v. Hendricks*, because the programs applied the incorrect legal standard when conducting resident risk assessments for release.¹³⁷ To be civilly committed, a person must meet the legal criteria for commitment. The legal criteria for civil commitment are: (1) a person must have mental disorder or abnormality; and (2) must pose a danger to society.¹³⁸ Accordingly, once a resident of a sexual predator treatment program either no longer has a mental abnormality *or* is no longer dangerous, they no longer meet the criteria for commitment.¹³⁹ If a resident no longer meets the criteria for civil commitment, but continues to be confined, the program is punitive because the resident "remains confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness."¹⁴⁰

When conducting resident risk assessments, MSOP and SORTS examiners only considered releasing residents who no longer had a mental abnormality *and* no longer posed a danger to society.¹⁴¹ This rendered both the MSOP and SORTS punitive in nature because the risk assessments had the potential to subject residents to continued confinement who no longer met the criteria for commitment.¹⁴² Although there was no evidence that the MSOP and SORTS risk assessments actually subjected residents to continued confinement when they no longer met the criteria for commitment, the mere potential of this occurring was enough evidence for each court to find the programs punitive and thus unconstitutional under *Kansas v. Hendricks*.¹⁴³

134. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1173–74 (D. Minn. 2015); *Van Orden v. Schaefer*, 129 F. Supp. 3d 839, 844 (E.D. Mo. 2015).

135. Compare KAN. STAT. ANN. § 59-29a01–07 (2015), with MINN. STAT. § 253D.01–07 (2015) and MO. REV. STAT. § 632.480–632.525 (2015).

136. See *infra* Part III.A.

137. *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

138. KAN. STAT. ANN. § 59-29a01–07; MINN. STAT. § 253D.01–07; MO. REV. STAT. § 632.480–632.525; *Kansas v. Hendricks*, 521 U.S. 346, 357–60 (1997).

139. *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

140. *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997); *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

141. *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

142. *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

143. *Karsjens*, 109 F. Supp. 3d at 1171–74; *Van Orden*, 129 F. Supp. 3d at 864, 867.

Given the Minnesota and Missouri rulings, the SPTP's practice for conducting annual resident risk assessment exams likely renders the KSVPA punitive in nature and thus unconstitutional under *Kansas v. Hendricks*. The KSVPA requires the SPTP to perform annual resident risk assessment exams, but auditors of the 2015 Performance Audit Report, *Larned State Hospital: Reviewing the Operations of the Sexual Predator Treatment Program*, discovered the SPTP has not performed these exams as statutorily required.¹⁴⁴ The KSVPA does not define the requirements of the exam, but it should assess whether a resident's "mental abnormality or personality disorder has so changed that they would be safe at large,"¹⁴⁵ as this is the criteria for release.¹⁴⁶ However, the SPTP auditors discovered the annual exams were essentially phase progress reports rather than comprehensive exams to assess whether the residents still met the criteria for commitment.¹⁴⁷ Applying Minnesota and Missouri's rulings, the KSVPA is likely punitive in nature because SPTP examiners are failing to perform any substantive risk assessments on residents which potentially subjects residents who no longer meet the criteria for commitment to continued confinement.¹⁴⁸ Because SPTP examiners are currently failing to perform annual resident risk assessment exams with the proper legal standard for commitment, the KSVPA is likely punitive in nature and unconstitutional under *Kansas v. Hendricks*.¹⁴⁹

PART IV. PROBLEMS A KSVPA CONSTITUTIONAL VIOLATION AND THE CURRENT STATE OF THE SPTP CREATE

The potential unconstitutionality of the KSVPA for failure to perform resident risk assessment exams with the proper legal standard and the SPTP's current operations and treatment practices threaten the State of Kansas, the rights of SPTP residents, and public safety.

A. The KSVPA's Potential Constitutional Violation

The KSVPA's potential unconstitutionality threatens the State of Kansas because it creates a large financial burden on the state. First, the KSVPA's unconstitutionality leaves Kansas vulnerable to class action lawsuits brought by the SPTP residents.¹⁵⁰ In fact, SPTP residents recently filed a class action lawsuit claiming a number of constitutional violations by the KSVPA and

144. See 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 17 (2015).

145. S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (enacted).

146. *Id.*

147. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 17.

148. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1171-74 (D. Minn. 2015) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)); *Van Orden v. Schaefer*, 129 F. Supp. 3d 839, 867 (E.D. Mo. 2015).

149. *Karsjens*, 109 F. Supp. 3d at 1171-74 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)); *Van Orden*, 129 F. Supp. 3d at 864, 867.

150. See *Karsjens*, 109 F. Supp. 3d at 1171-74 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)); *Van Orden*, 129 F. Supp. 3d at 864, 867.

SPTP operations.¹⁵¹ Even more concerning is that this case was “put on hold until the Minnesota and Missouri rulings came through, and . . . is set to proceed as soon as attorneys are appointed.”¹⁵² Given the similarities between the cases and analysis provided in the previous section, the KSVPA is in real danger of being ruled unconstitutional in this class action suit.¹⁵³ This class action is a financial strain on the State of Kansas as it will require time and resources to investigate, defend, and litigate. Kansas could save money, time, and other resources if the SPTP’s deficient annual risk assessment exams were preemptively remedied, especially considering the Minnesota and Missouri rulings.

The KSVPA’s potential unconstitutionality also threatens the rights of the SPTP residents. The residents have a constitutional right to avoid undue confinement and should only be civilly committed so long as they meet the commitment criteria.¹⁵⁴ Although sex offenders can easily be one of the most unanimously hated groups in society,¹⁵⁵ they still have protected liberty interests under the United States Constitution.¹⁵⁶ Kansas should strive to defend the liberty interests of all citizens, even unpopular sex offenders. The Constitution guarantees rights for all citizens, even unpopular ones, and Kansas should remedy the SPTP’s deficient annual risk assessment exams to protect the SPTP residents’ Constitutional rights.

The final threat posed by the KSVPA’s potential unconstitutionality is to public safety. A failure to remedy the SPTP’s deficient annual risk assessment exams could result in the SPTP being shut down and residents being released. In Minnesota’s First Interim Relief Order, Judge Donovan W. Frank threatened to demand the release of all MSOP’s committed individuals or to shut down the MSOP operations entirely if Minnesota did not comply with the remedial order.¹⁵⁷ Shutting down the SPTP would be contrary to the KSVPA’s goal of protecting the public because it would release even those residents who still met the criteria for commitment into the community.¹⁵⁸ While this action is the worst-case scenario and likely a judge’s last resort, it is nevertheless a risk to Kansas’s citizens if the state legislature does not correct the KSVPA’s likely constitutional deficiencies.

151. See Complaint-Class Action, *Baker v. DesLauriers*, No. 6:14-cv-01356-JTM-KGG (D. Kan. Oct. 27, 2014), <http://www.clearinghouse.net/chDocs/public/MH-KS-0001-0001.pdf>.

152. Mike Hendricks, *The Most Common Way to Leave Kansas’ Sexual Predator Program Is to Die*, KAN. CITY STAR (Jan. 16, 2016, 5:03 PM), <http://www.kansascity.com/news/local/crime/article55098475.html>.

153. See *supra* Part III.

154. *Van Orden v. Schaefer*, 129 F. Supp 3d 839, 867 (E.D. Mo. Sept. 11, 2015).

155. See generally Robert M. Weetstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 598–601 (1992).

156. Gottlieb, *supra* note 3, at 1049–50.

157. First Interim Relief Order at 37, *Van Orden v. Schaefer*, No. 4:09-cv-00971-AGF (E.D. Mo. Sept. 11, 2015), <http://www.clearinghouse.net/chDocs/public/CJ-MN-0002-0036.pdf> (demanding MSOP to immediately conduct risk assessment evaluations of all residents according to the proper legal standard and to petition for the release of individuals who no longer meet the criteria for commitment).

158. KAN. STAT. ANN. § 59-29a01(a) (2016).

B. The SPTP's Current Operations and Treatment Practices

Even if the KSVPA were to survive another round of constitutional scrutiny, efforts should be made to reform the SPTP's operations and treatment practices. As is, the SPTP's operations and treatment practices create a financial burden on the State of Kansas because they have rendered the SPTP inefficient and unsustainable. Its inefficiency is evidenced by the fact that only three residents ever have been fully released in the 22 years of its existence.¹⁵⁹ The SPTP is unsustainable because under the current model few to no residents are ever released and the population continues to grow.¹⁶⁰ As previously stated, the SPTP is predicted to reach population capacity sometime between 2017 and 2020.¹⁶¹ Unless the SPTP is reformed, Kansas will have to spend more money to accommodate the program's rapid growth.¹⁶²

PART V: PROPOSED SOLUTIONS

A. Proposed Solutions for the KSVPA's Likely Constitutional Violation

The obvious and simple solution to remedy the KSVPA's likely constitutional violation is to order the SPTP examiners to conduct proper risk assessment exams. The SPTP should begin conducting risk assessment exams that are more than the phase progress reports that are currently in use.¹⁶³ Instead, the exam should fulfill the KSVPA's purpose and thoroughly examine whether a resident still meets the criteria for commitment. To ensure the examiners are applying the proper legal standard, the SPTP should provide examiners with training on the legal standard for commitment. Both the Minnesota and Missouri courts identified that a lack of legal training for examiners resulted in the improper legal standard being applied.¹⁶⁴ Although this would be an additional cost to the SPTP, the money saved from releasing residents could recover this cost.

Another viable solution is to amend the KSVPA provisions on annual risk assessment exams to include the legal standard for commitment. Since these exams are used to determine whether a resident is eligible for release, the statute should direct SPTP examiners to apply the legal standard for commitment when conducting these exams. The current provision on annual risk assessment exams reads as follows: "Each person committed under the Kansas sexually violent predator act shall have a current examination of the person's mental condition made once every year."¹⁶⁵ As is, the statute does not

159. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 6.

160. *See supra* Part II. B.

161. *Id.*

162. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 24–47 (suggesting six options to curb resident population from reaching capacity, one of which was expanding SPTP facilities).

163. *See supra* Part II. B.

164. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1161, 1177 (D. Minn. 2015); *Van Orden v. Schaefer*, 129 F. Supp. 3d 839, 852–54, 868 (E.D. Mo. 2015).

165. KAN. STAT. ANN. § 59-29a08(a) (2016).

direct SPTP examiners to apply the legal standard for commitment when conducting the annual risk assessment exams. The provision could be amended to one similar to the following:

“Each person committed under the Kansas sexually violent predator act shall have a current examination of the person’s mental condition made once every year. Each examination shall analyze if each person committed under the Kansas sexually violent predator act still meets the criteria for commitment under the Kansas sexually violent predator act. A person still meets the criteria for commitment under the Kansas sexually violent predator act if the person has a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence. If a person no longer has a mental abnormality or personality disorder or if a person has a mental abnormality or personality disorder but such abnormality or disorder does not make that person likely to engage in repeat acts of sexual violence, that person no longer meets the criteria for commitment.”¹⁶⁶

Although lengthy, this amended provision would have three extremely beneficial effects. First, it would direct the SPTP to apply the legal standard for commitment when conducting annual risk assessment exams. Second, it avoids vagueness because it provides the legal standard. Third, the amended provision also clearly identifies when a person is no longer qualified for commitment under the KSVPA. This will avoid continued confinement for those residents who no longer meet the criteria for commitment, regardless of what phase of treatment they are in. This amendment, or a similar version, could remedy the KSVPA’s potential violation by providing clarity to SPTP examiners to better facilitate annual risk assessments that adhere to the legal standard for civil commitment and are no longer punitive in nature.

An additional solution is to eliminate the proposed eligibility requirements for final discharge.¹⁶⁷ The current statutory provisions do not provide residents with a procedure for final discharge,¹⁶⁸ however, under the recently enacted provisions, residents are not eligible for final discharge unless they are on transitional release.¹⁶⁹ This is contrary to *Kansas v. Hendricks* because a resident should be eligible for final discharge once they no longer meet the criteria for commitment *regardless* of the SPTP phases they have progressed through.¹⁷⁰ Eliminating the transitional release prerequisite for final discharge will ensure residents are eligible for release once they no longer meet the criteria for commitment and will lower the risk of the KSVPA being punitive in nature.

166. This statute combines language from KAN. STAT. ANN. § 59-29a08(a) and KAN. STAT. ANN. § 59-29a02(a).

167. See S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (enacted).

168. See KAN. STAT. ANN. §§ 59-29a01–24a (2016).

169. S.B. 149, 2015 Leg., 86th Sess. § 59-28a09 (Ks. 2015) (enacted).

170. See *supra* Part I. B.

B. Proposed Solution to the SPTP's Inefficient and Unsustainable Operations

Currently, the SPTP's operations and treatment practices do not meet current best practices recommended by the Association for the Treatment of Sexual Abusers (ATSA).¹⁷¹ The ATSA is an "international, multi-disciplinary organization dedicated to preventing sexual abuse" by researching and promoting evidence based practices and strategies that create "effective assessment, treatment, and management" of sex offenders.¹⁷² One of ATSA's major concerns is whether state civil commitment programs for sexually violent persons provide residents with legitimate and effective treatment.¹⁷³ Although the ATSA does not have a firm stance in favor of or in opposition to civil commitment of sexual offenders, it does encourage states that choose to implement such programs to conduct treatment "in a careful manner consistent with relevant research and best practices in assessing, treating, and managing sexual offenders."¹⁷⁴ The ATSA further advises that if a state is unable to meet the recommendations, the state should not implement a civil commitment program for sexual offenders.¹⁷⁵

The SPTP should reform its current operations and treatment practices to meet the ATSA's recommendations because it could reduce the resident population. States that follow the ATSA's recommendations, like Wisconsin and Washington, have significantly higher release rates than the SPTP.¹⁷⁶ The 2015 performance audit identified the SPTP's failure to meet the ATSA's recommended best practices as a major systemic failure that is likely contributing to the SPTP's inefficiency and unsustainability.¹⁷⁷ If the SPTP complied with the ATSA's current best practices, the program could increase release rates, lower the resident population, and reduce the program's financial burden on the state.¹⁷⁸

1. The ATSA's Recommended Best Practices

For sexual offender civil commitment treatment programs in the United States, the ATSA recommends the following list of treatment practices: (1) "sexual predator assessments should be conducted using empirically validated risk assessment instruments, measures, and methods;" (2) treatment should be "consistent with current research and professional standards. . . reflect each individual's qualifying mental disorder(s), relative risk, and criminogenic needs;" (3) treatment plans should be individualized to best measure a sex

171. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 11–21.

172. ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, FIRST ANNUAL REPORT 2012-2013 2 (2013), https://www.atsa.com/pdfs/ATSA_2013_Annual_Report.pdf.

173. ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, *Civil Commitment of Sexually Violent Predators* (Aug. 17, 2010), <http://www.atsa.com/civil-commitment-sexually-violent-predators> [hereinafter *Civil Commitment*].

174. *Id.*

175. *Id.*

176. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 15–16.

177. *Id.* at 11–21.

178. *Id.* at 24–47.

offender's treatment progress; (4) civil commitment treatment programs should be supplemented with a prison treatment program that is also consistent with current research and professional standards; and (5) "sex offenders should be reassessed once per year to evaluate progress towards treatment goals."¹⁷⁹ As discussed below, the SPTP's current operations and treatment practices fail to meet four of ATSA's five recommended treatment practices.

First, SPTP operations should change to provide individualized treatment plans for residents. Each SPTP phase has specific participation, attendance, and task requirements, but none of the phases are specifically tailored to each individual resident's needs.¹⁸⁰ Every resident, regardless of intellectual or developmental abilities or diagnosis is required to complete the same requirements for each phase to advance through the treatment program.¹⁸¹ As a result, every resident receives "essentially the same treatment" and no treatment is individualized.¹⁸²

Second, the SPTP's clinical and non-clinical phase requirements should be reformed to better provide meaningful treatment to residents. SPTP phases have a disproportionately higher amount of non-clinical requirements than clinical requirements for phase completion.¹⁸³ As highlighted earlier, residents are required to meet a minimum of eight non-clinical hours and anywhere from one to seven clinical hours a week.¹⁸⁴ Residents must satisfy both the clinical and non-clinical requirements of a phase before petitioning to advance to a new phase; if not, they are denied advancement and must wait a period of at least three months before they can reapply.¹⁸⁵ The SPTP's equal emphasis on clinical and non-clinical requirements highlights the SPTP's deficiencies in providing meaningful treatment to residents. For example, if a resident completes their clinical requirements, but not their arts and crafts requirement, they cannot advance to the next phase.¹⁸⁶ This unnecessarily stymies phase progression and reduces the chances of residents being released. With a more meaningful treatment program, residents will likely move through phases more quickly, eventually curbing the resident population.

The SPTP should adopt the proposed solutions for conducting risk assessments discussed in Part V. B.¹⁸⁷ Additionally, the SPTP should also utilize empirically validated risk assessment tools when evaluating residents' risk of reoffending and each resident's individual treatment needs.¹⁸⁸ This will ensure that: (1) the proper legal standard is being applied and those residents who no longer meet the commitment criteria are released; and (2) each resident

179. Civil Commitment, *supra* note 173.

180. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 5–8, 12; *see supra* Part II. B.

181. *Id.* at 12.

182. *Id.*

183. *Id.* at 15.

184. *Id.*

185. *Id.*

186. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 15.

187. *See supra* Part V. B.

188. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 12.

will receive targeted treatment which could move residents through the program at a more timely pace.

Finally, the Kansas Department of Corrections should develop and offer a prison based sexual predator treatment program to those convicted of a sexually violent offense.¹⁸⁹ This could help alleviate the growing resident population at Larned because offenders could complete the earlier phases of treatment while incarcerated and be placed in later phases at either Osawatomie or Parsons State Hospital upon their release from prison rather than Larned.¹⁹⁰ This could also help reduce costs of the SPTP, as the Kansas Department of Corrections would facilitate the prison treatment program. This solution would require substantial planning and funding, but could ultimately reduce resident population at Larned and help the SPTP avoid reaching capacity.

Overall, reforming the SPTP to conform to the ATSA's recommended best practices will likely remedy the program's inefficiency and unsustainability because it will increase the number of released residents. For example, Wisconsin's sexual predator treatment program follows ATSA standards and also began in 1994.¹⁹¹ Of the 484 total residents,¹⁹² Wisconsin has conditionally released 122 residents and unconditionally discharged 118 other residents.¹⁹³ Washington's program, which began in 1990, also follows ATSA standards and has conditionally released 70 residents and unconditionally released 40 others.¹⁹⁴ It is unclear what the total resident population at Washington's program is since 1990, but the total population as of 2014 was 258 residents.¹⁹⁵ Although Washington's total release rate is unclear, Wisconsin's release rate of roughly 50% and Washington's release of 110 residents is significantly more successful than Kansas' total release of 5 residents since 1994.¹⁹⁶ This evidence supports the conclusion that should Kansas reform the SPTP to conform to ATSA's recommend best practices, the resident population will likely be reduced and the SPTP population will be curbed.

PART VI: BENEFITS & RISKS OF PROPOSED SOLUTIONS

The solutions proposed in this article have both benefits and risks. One benefit is that by conducting resident risk assessments using the proper legal standard, residents who no longer meet the criteria for civil commitment will

189. *Id.* at 25.

190. *See supra* Part II. B.

191. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 16.

192. ST. OF WIS. DEP'T OF HEALTH SERVICES, LEGISLATIVE AUDIT BUREAU, R. 13-12 SUPERVISED RELEASE PLACEMENTS AND EXPENDITURES 13 (2013), <http://legis.wisconsin.gov/lab/reports/13-12full.pdf>.

193. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 16.

194. *Id.*

195. *Id.*

196. *See id.*

be released.¹⁹⁷ This protects the liberty interests of the residents because they will not be confined after they no longer meet the criteria for commitment.

Releasing residents could also improve the morale of the resident population and motivate more residents to participate in treatment.¹⁹⁸ As of 2014, about 40% of SPTP residents were not actively participating in treatment.¹⁹⁹ With the cost of the SPTP per resident in 2014 at roughly \$61,000, this left Kansas with a bill of approximately \$5,900,000 to house residents who will likely never be released because they are neither participating in nor progressing through the SPTP phases.²⁰⁰ A limiting factor on treatment participation is slow phase progression, which is exasperated by a lack of risk assessment.²⁰¹ If non-participatory residents witnessed residents being released and progressing through phases, this could motivate them to participate in treatment. Increasing participation in treatment could reduce the resident population because more residents would eventually be qualified for release after receiving treatment. Additionally, this could eventually save money as more residents are released.

Amending the statutory provisions on conducting annual risk assessment exams also poses a benefit because it could better prove or demonstrate that the KSVPA is not punitive in nature. The proposed statutory amendments clearly direct SPTP examiners to apply the proper legal standard and clearly defines when a resident no longer meets the commitment for criteria.²⁰² Without the amendment, a court could find the KSVPA punitive in nature, as the courts did in Minnesota and Missouri, and would likely order the legislature to amend the statute anyway. Additionally, adopting the proposed statutory provisions instead of the enacted amendments will better protect the KSVPA because it will ensure all residents are eligible for release regardless of what SPTP phase they are in.²⁰³ Without these statutory provisions, it is very likely a court would find the KSVPA punitive in nature because, as is, the statute could subject residents to indefinite confinement.²⁰⁴ Kansas could save time and money by preemptively amending the statutory provisions with the amendments proposed in this article.

Kansas can also save money by reforming the SPTP to conform to the ATSA's recommended best practices because the number of released residents will likely increase. Increasing the number of released residents will eventually curb the encroaching capacity of the SPTP. Fewer residents would mean lower operating costs for the SPTP and lowering the resident population would

197. See *supra* Parts III, V. A.

198. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 8.

199. *Id.*

200. See 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 8, 9, 16. The cost per resident was calculated by dividing the total expenditures (\$14.8 million) by the total number of residents (243). The cost for residents not participating in the treatment program was calculated by taking 40% of total residents (97) and multiplying it by \$61,000.

201. See 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 18–20.

202. See *supra* Parts III, V. A.

203. *Id.*

204. *Id.*

eliminate the need to expand the SPTP facilities.²⁰⁵

The major risk of the proposed solutions is that residents will be released into the community. This would likely spark considerable public outrage and be seen as risk to the public's safety. However, if the SPTP conducts annual risk assessment exams using the proper legal standard, only those residents who actually meet criteria for release will be released while ensuring that those residents who continue to meet the criteria for commitment remain confined. This means only those residents who no longer have a mental abnormality or disorder or are no longer dangerous, and therefore no longer qualify for civil commitment, will be released. Not every sex offender in Kansas is civilly committed, and those who no longer meet the criteria for civil commitment should not be subjected to prolonged confinement simply because they met the criteria at one time. Residents who no longer meet the criteria for commitment should not be subjected to prolonged confinement out of fear of public outrage.

Additionally, if the SPTP is reformed to conform to the ATSA's recommended treatment practices, residents who are released using the proper legal standard will have received adequate and meaningful treatment that has the potential to yield low recidivism rates.²⁰⁶ For example, Wisconsin follows ATSA's recommended treatment practices and has only has a three percent to five percent rate of recidivism.²⁰⁷ The KSVPA's goal of "no new victims"²⁰⁸ is only truly obtainable if no residents were released from the SPTP because eliminating the risk of reoffending and predicting an individual's risk of reoffending cannot be done with 100% certainty.²⁰⁹ However, never releasing any residents could violate the constitutional rights of some of the committed individuals.²¹⁰ Kansas will never know what treatment program effectively reduces recidivism unless residents are actually released and their progress is tracked. Although residents would be released, adopting the ATSA's recommended practices would still promote public safety because released residents will have received meaningful treatment that has produced low recidivism rates.

PART VII: CONCLUSION

In conclusion, the KSVPA is likely unconstitutional and SPTP examiners must apply the correct legal standard for commitment when conducting annual risk assessment exams to remedy this likely violation. Even if the KSVPA was once again ruled constitutional, the SPTP's current operations and treatment practices are inefficient and unsustainable. The SPTP should be reformed to conform to the ATSA's recommended treatment practices to protect the financial interests of Kansas, the future of the SPTP, the SPTP residents, and

205. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 25.

206. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 16.

207. *Id.*

208. 2015 PERFORMANCE AUDIT REPORT, *supra* note 9, at 5.

209. *See Weetstein supra* note 155, at 608.

210. *See supra* Part III.

public safety. The proposed solutions will not only remedy the KSVPA's likely constitutional deficiencies and make the SPTP more efficient and sustainable, but they will also protect the rights of residents in a manner that promotes public safety.