KAISERDILLON PLLC

1401 K ST. NW
SUITE 600
WASHINGTON, DC 20005
(202) 640-2850
WWW.KAISERDILLON.COM

May 8, 2018

Attorney General Mark Herring
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219

Dear Attorney General Herring:

We respectfully write to you with regard to our client, Mr. Galen Michael Baughman. Mr. Baughman is the respondent in *Commonwealth v. Baughman*, Case No. CL 17-3009, a case currently pending in the Circuit Court for Arlington County, Virginia, in which the Office of the Attorney General ("OAG" or "your office") is seeking the civil commitment of Mr. Baughman under Virginia's Sexually Violent Predator Act ("SVPA" or "the Act"). We represent Mr. Baughman *pro bono*, in conjunction with the Washington Lawyers' Committee for Civil Rights ("WLC"). WLC requested that our law firm represent Mr. Baughman in this case because of the distressing nature of this prosecution, which represents the second attempt by your office to obtain a finding that our client is a "sexually violent predator" under the Act. A jury ruled unanimously for Mr. Baughman in 2012 when OAG attempted to commit him under the SVPA the first time.

We ask that your office dismiss the petition against Mr. Baughman at this time, prior to the trial, which is currently scheduled for August 20, 2018. Respectfully, as set forth below, there are at least four reasons suggesting both why this case is not worthy of your office's attention and resources and why Mr. Baughman should finally be released from jail so that he can safely return to his loved ones.

First—and most disturbingly—we see no possibility that OAG would be proceeding against Mr. Baughman were he not a gay man. As set forth in the attached Statement of Facts, Mr. Baughman's convictions are aged, from when he was very young, and involved consensual conduct.[1] They involved no violence. In addition, Mr. Baughman was in the community for

[1] It should be noted that Virginia uses the Static-99, a highly criticized risk assessment instrument, as a screening tool to determine eligibility for further assessment of whether an individual will be pursued under the SVPA. Mr. Baughman would not have met the cut-off

four years between his 2012 SVP trial and his probation revocation with no violations of any kind. When he was violated after four years, it was on technical grounds, and not for any kind of new criminal conduct. Based on the foregoing factors, as well as others, it is overwhelmingly clear to us that this case is an unfortunate product of lingering but persistent homophobia. The reality is that if Mr. Baughman's background offenses involved similar heterosexual—as opposed to homosexual—conduct, there would be no interest from your office (or anywhere else) in civilly committing Mr. Baughman as a "sexually dangerous predator." As an Attorney General dedicated to supporting LGBT equality and ending discrimination, we respectfully submit that you should dismiss this case immediately for that reason alone.

Second, this case involves blatant doctor-shopping by OAG. Under the SVPA, the expert psychologist who evaluates potential civil committees such as Mr. Baughman—and who testifies at the probable cause hearing and at trial—must be "designated by the Commissioner" of the Department of Behavioral Health and Developmental Services. VA Code § 37.2-904(B); *see also id.* § 37.2-906(E) (setting forth required qualifications for expert psychologist at probable cause hearing); § 37.2-908(C) (same, for trial). In this case, the expert psychologist designated by the Commissioner to evaluate Mr. Baughman, Dr. Ilona Gravers, concluded in September 2017 that Mr. Baughman *is not* a sexually violent predator under the Act. Instead of leading OAG to take no action with respect to Mr. Baughman, however, this negative recommendation led OAG to retain a second expert illegally and *ultra vires*, and to use *that* expert's opinion to justify a petition. While the Virginia courts have not yet addressed the statutory and due process issues arising when OAG expert-shops in this manner, other courts have directly rejected OAG's actions in this regard. *See, e.g., In re Wilputte S.*, 100 P.3d 929, 932 (Ariz. Cr. App. 2004) (holding that "fundamental fairness and reason dictate that the legislature . . . could not have intended to subject a person to multiple examinations until the State is able to obtain a favorable opinion to support an SVP petition"). The continued prosecution of Mr. Baughman under these circumstances is tremendously unfair, and will, if permitted to continue, undermine the public's confidence in your office's administration of equal justice.

Third, this prosecution is barred by the equitable doctrine of res judicata. As noted, just five years ago your office tried and failed to have Mr. Baughman civilly committed under the SVPA, when a unanimous jury found Mr. Baughman to not be SVP. As a matter of legal principle and ethics, your office should respect that verdict of Virginia citizens. While Virginia law does not categorically prohibit a successive petition, it permits such a petition only when there has been some change in the respondent's mental condition that now renders the individual SVP whereas he or she previously was not. *See Rhoten v. Commonwealth*, 286 Va. 262 (2013) (permitting successive petition as "the Act assumes the *mental health of a sexually violent offender may change over time* " (emphasis added)). In this case, OAG has not even attempted to allege that Mr. Baughman's mental condition has changed since 2012. To the contrary, even OAG's own hand-picked expert has testified that Mr. Baughman's mental condition *has not*

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score were it not for his conviction for an offense committed when Mr. Baughman was only 14 years old. Additionally, the Static-99 is only used to assess the risk of men and gives an extra risk point if the victim is male; it is thus an inherently discriminatory tool when used with homosexual men. Virginia is one of only a few states to use the Static-99 cutoff to screen SVPA eligibility.

changed since 2012. As the Kansas Supreme Court held in *In re Care & Treatment of Sporn*, 215 P.3d 615, 620 (Kan. 2009), the new evidence in this case—the text messages underlying Mr. Baughman's probation violation case—"appear to be offered simply to shore up or corroborate the previous diagnosis and risk assessment, with the hope that a second jury would reach a different result on the same underlying evidence. *That is precisely what the principle of res judicata is designed to prevent.*" *Id.* (emphasis added). Respectfully, your office cannot simultaneously show respect for the jury's verdict in the 2012 case while also pushing ahead with a prosecution that is nothing more than a second bite at the apple.

Fourth, this prosecution (and Mr. Baughman's continued detention) is pointless given the already extremely onerous probationary conditions Mr. Baughman will be living under if is he released today, with no further prosecution under the SVPA. At Mr. Baughman's sentencing on his probation case in Case No. CR 03-576-01, Judge Fiore imposed every manner of restriction on Mr. Baughman as part of *lifetime* supervision. Mr. Baughman is prohibited from accessing the internet for personal use, he must consent to having his computer loaded with monitoring software, his treating psychiatrist must waive any confidentiality privilege, and his probation officer is stripped of any discretion to modify any of his probation conditions. These conditions are far more stringent than necessary to ensure that Mr. Baughman poses no threat whatsoever to the community. Given those conditions of probation—and regardless of what OAG may believe regarding the remainder of Mr. Baughman's arguments against this case—this case is a complete waste of taxpayer and your office's resources.

* * *

OAG is dedicating a tremendous quantity of taxpayer resources to this successive effort to commit Mr. Baughman. Your office has chosen to expend these resources despite a finding by a jury of Virginia citizens that Mr. Baughman *is not an SVP* at his 2012 trial and despite the 2017 opinion of the expert psychologist appointed in the statutorily-prescribed manner that Mr. Baughman *is not an SVP even now*. This prosecution is indefensible from both a legal and policy standpoint and it is impossible, frankly, to imagine such vigorous and expensive pursuit of a heterosexual man with a similar record. We respectfully request that your office dismiss the petition, thereby permitting Mr. Baughman's release to probation and his return home to his loved ones.

Thank you for your review of this matter. We are available to discuss Mr. Baughman's case at your convenience.

Sincerely yours,

Jonathan S. Jeffress

Emily A. Voshell

Counsel for Galen Baughman

STATEMENT OF FACTS

Mr. Baughman is a 34-year-old man raised in Arlington, Virginia. Between 2003, and 2012, Mr. Baughman served nine years of incarceration on two offenses, both of which occurred before Mr. Baughman's 20th birthday, when Mr. Baughman was a teenager himself. Neither offense involved conduct that would even remotely be considered "sexually violent" to the average person.

In July, 2004, Mr. Baughman was sentenced by the Circuit Court for Arlington County, Virginia, on two separate offenses for which he had plead guilty: 1) Carnal Knowledge (18.2-63); and, 2) Aggravated Sexual Battery (18.2-67.3). Mr. Baughman received concurrent sentences of 10 years with 3 years suspended on the Carnal Knowledge charge, and 20 years with 13 years suspended on the Aggravated Sexual Battery charge.

The Carnal Knowledge conviction arose out of a sexual relationship Mr. Baughman had with a 14-year-old when Mr. Baughman was 19 years old. Aside from the age difference, there was no allegation the relationship was non-consensual (the 14-year-old refused to cooperate with authorities, but the incriminating information came from a chat log on Mr. Baughman's computer).

The offense date for the second charge was 10/25/1997, which was 10 days after Mr. Baughman turned *14 years old* (as you know, individuals cannot be charged as an adult in Virginia unless they are at least 14 years old). The basis of the second charge was the claim Mr. Baughman had instructed a 9-year-old how to masturbate. The Commonwealth had previously declined to press charges in Juvenile Court but, after the Carnal Knowledge charge was lodged, prosecutors also sought indictment on the 1997 incident. Mr. Baughman, as part of his plea deal, agreed to not contest being sentenced as an adult on the 1997 charge.

Mr. Baughman completed service of his 6.5-year prison term on November 5, 2009 but, shortly before his scheduled release date, OAG filed a petition seeking to civilly commit Mr. Baughman as a sexually violent predator ("SVP"). Mr. Baughman ultimately won a jury trial where he was unanimously deemed not to be an SVP, but after he spent more than **2.5 years** of additional time (much of it in solitary confinement) in prison beyond his scheduled release date throughout this process. Mr. Baughman was detained for so long that the Virginia Supreme Court scheduled a habeas corpus hearing in 2011, but Mr. Baughman was found not to be a SVP before the case was argued.

After his release, against all odds and challenges facing a convicted sex offender, Mr. Baughman started a successful career in policy reform. He spent the next 4 years advocating for reform of the civil commitment process. Civil commitment typically results in the individual being remanded to the Department of Behavioral Health and Developmental Services ("DBHDS") for "intensive in-patient treatment." Mr. Baughman learned, however, that few individuals committed to DBHDS are ever been released back to the community. Essentially, civil commitment as an SVP is a life sentence in Virginia and in many other jurisdictions.

Mr. Baughman's advocacy efforts took place on several fronts. He became a Soros Fellowship award winner, he worked with Jenner Block on litigation challenging the civil commitment process, and gave speeches throughout the country and internationally, including at Harvard and Yale. He published numerous articles on the topic of sex offender laws and prosecutions, received well-deserved accolades for his work, and even gave a TEDx talk on civil commitment and treatment of sex offenders. He learned that SVP labels are affixed disproportionately on gay men, and that the assessment tool utilized by law enforcement automatically deems an individual a SVP if the alleged "victim" is a male and the alleged perpetrator is under 34 years old.

Mr. Baughman meticulously complied with the terms of his probation and sought permission each time he left the Commonwealth or gave presentations at a location where individuals under the age of 18 might attend. In August, Mr. Baughman travelled to Minnesota for a funeral, with the prior consent of his probation officer. In December, Mr. Baughman was informed by his probation officer that the mother of a 16-year-old in attendance at the funeral reported that her son was having email and text communication with Mr. Baughman. Mr. Baughman's probation officer did not arrest Mr. Baughman or file for Mr. Baughman's probation to be revoked.

In February 2016, Mr. Baughman was summoned to his probation officer, where he was met by two detectives. At their request, Mr. Baughman turned over his telephone and computer which were thoroughly scrubbed, but found to find no objectionable material.

Nevertheless, Mr. Baughman was charged with a violation of his probation charges for having communications with a 16-year-old. There was nothing sexual in the messaging and the teenager was above the age of consent in Minnesota. The Commonwealth argued that Mr. Baughman, who is gay, was "grooming" the heterosexual teenager for sex in the future. The Court agreed that the communications were a technical violation of the terms of his probation, describing Mr. Baughman's actions as an "attempted misdemeanor," although no such criminal charge is available under the Virginia Code. This was a "technical" violation of the terms of his probation, not a new criminal charge.

Mr. Baughman was denied bond while awaiting the probation violation hearing, which was conducted more than 8 months after he was detained. Despite the fact that the conversations constituted what would normally be characterized as a first time technical violation, and typically would not merit any jail time, Mr. Baughman was given an additional one year to serve. He remained incarcerated at the Arlington, Virginia Detention Center, for more than 20 months, awaiting news of a new SVP hearing.

On November 6, 2017, the day before Mr. Baughman was to be released back onto lifetime probation, OAG filed a second petition to commit Mr. Baughman as an SVP. The petition alleged that Dr. Michelle Sjolinder, Psy. D., diagnosed Mr. Baughman with "Narcissistic Personality Disorder and Other Specific Paraphilic Disorder, Adolescent males."

Dr. Sjolinder alleged no change in Mr. Baughman's mental health such that he is now an SVP when the 2012 jury found he was not. Nor did the petition allege any change. The only

arguably "new" information—the non-sexual text messages that were the subject of the technical probation violation—did not establish that Mr. Baughman is now a sexually violent predator. If the texts were taken in the light most favorable to the government, the most the texts could possibly show was that Mr. Baughman could have led to consensual sex between Mr. Baughman and a 16-year-old, which would be a misdemeanor in Virginia and would not be a "sexually violent act." *See* VA Code § 37.2-900 (defining "sexually violent predator" as "any person who (i) has been convicted of a sexually violent offense…; and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, *which makes him likely to engage in sexually violent acts*"; and enumerating sexually violent offenses).

During a probable cause hearing conducted on January 17, 2018, it came to light that Dr. Michelle Sjolinder was, in fact, not the first psychologist to evaluate Mr. Baughman in connection with OAG's most recent effort to commit Mr. Baughman. Indeed, the psychologist appointed in conformity with the SVPA, Dr. Ilona Gravers, had already evaluated Mr. Baughman and concluded that Mr. Baughman is *not* a sexually violent predator. It was only after OAG went out and hired a second (and, frankly, significantly less qualified) psychologist, Dr. Michelle Sjolinder, with OAG's own funds, that any psychologist concluded in this go-round that Mr. Baughman met the criteria for an SVP.

OAG's doctor-shopping was a violation of the procedures set forth in the SVPA both because (1) the Act states that only a psychologist "designated by the Commissioner" of DBHDS can testify at the probable cause hearing and at trial, *see* VA Code § 37.2-904(B); *see also id.* § 37.2-906(E), § 37.2-908(C); (2) there is nothing that allows OAG to spend taxpayer funds for the expert psychologist testifying at an SVPA trial, as the Act require that the expert is supposed to have been selected (and paid for) by DBHDS.

If and when he is released, Mr. Baughman's probationary conditions are such that he will be on "lifetime" probation. He is prohibited from accessing the internet for personal use, he must consent to having his computer loaded with monitoring software, his treating psychiatrist must waive any confidentiality privilege, and his probation officer is stripped of any discretion to modify any of his probation conditions. These conditions are far more stringent than what is necessary to ensure that Mr. Baughman poses no threat whatsoever to the community.