SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	AB 1253	**Hearing Date:**	July 11, 2023
Author:	Maienschein		
Version:	May 4, 2023		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Hearsay: exceptions***

HISTORY

Source: Crime Victims United

Prior Legislation: Not applicable

Support: Ventura County District Attorney

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association (unless amended)

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to allow hearsay statements from a victim, eyewitness, or medical examiner in a SVP probable cause hearing.

Existing law provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be an SVP after the person has served their prison commitment. This is known as the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code § 6600, et seq.)

Existing law defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against at least one victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code § 6600, (a)(1).) 3)

Existing law requires a judge of the superior court to review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.

a) The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing.

b) Upon the commencement of the probable cause hearing, the person shall remain in custody pending the completion of the probable cause hearing.

c) Provides that if the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections and Rehabilitation or other secure facility. (Welf. & Inst. Code, § 6602 (a).)

Existing law allows, at the probable cause hearing for the existence of any prior convictions to be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals. (Welf. & Inst. Code, § 6600 (a)(3).)

Existing law provides that upon a showing of probable cause that a person is subject to the SVPA, the person is entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on the person's behalf, and to have access to all relevant medical and psychological records and reports. (Welf. & Inst. Code § 6603 (a).)

Existing law provides that the court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility designated by the Director of State Hospitals. (Welf. & Inst. Code § 6604.)

Existing law permits a person committed as an SVP to be held for an indeterminate term upon commitment. (Welf. & Inst. Code §§ 6604 & 6604.1.)

Existing law requires that a person found to have been an SVP and committed to the Department of State Hospitals (DSH) have a current examination on their mental condition made at least yearly. The report shall include consideration of whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and also what conditions can be imposed to adequately protect the community. (Welf. & Inst. Code, § 6604.9, (a) & (b).)

Existing law provides that when DSH determines that the person's condition has so changed that he or she is not likely to commit acts of predatory sexual violence while under community treatment and supervision, then the DSH Director shall forward a report and recommendation for conditional release to the court, the prosecuting agency, and the attorney of record for the committed person. (Welf. & Inst. Code, § 6607.)

Existing law establishes a process whereby a person committed as an SVP can petition for conditional release or an unconditional discharge any time after one year of commitment, notwithstanding the lack of recommendation or concurrence by the Director of DSH. (Welf. & Inst. Code, § 6608, (a), (f) & (m).)

Existing law requires the court to place the committed person in a forensic conditional release program operated by the state for one year if it finds that the person is not a danger to others due to their mental disorder diagnosis while under treatment and supervision in the community. Specifies that the program must include outpatient care. (Welf. & Inst. Code, § 6608, (g).)

Existing law provides that before actually placing a person on conditional release, the community program director designated by DSH must recommend the program most appropriate for supervising and treating the person. (Welf. & Inst. Code, § 6608, (h).)

Existing law provides that the Evidence Code applies in all actions, "[e]xcept as otherwise provided by statute." (Evidence Code § 300.)

Existing law states that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evidence Code §§ 350, 351.)

Existing law defines “hearsay evidence” as a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Provides that hearsay evidence is inadmissible, except as provided by law. (Evidence Code § 1200.)

Existing law authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evidence Code § 352.)

Existing law specifies that circumstances that are relevant to the issue of trustworthiness include, but are not limited to, the following:

a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

c) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this provision of law. (Evidence Code § 1370 (b).)

This bill creates a hearsay exception applicable only at a hearing to determine whether a person shall be held as an SVP.

This bill provides specifically that within an official written report or record of a law enforcement officer regarding a sexual offense in a person’s conviction, for the purposes of an SVP hearing the following are not inadmissible when offered to prove the truth of the matter stated:

a) A statement from a victim of the sexual offense.
b) A statement from an eyewitness to the sexual offense.
c) A statement from a sexual assault medical examiner who examined a victim of the sexual offense.

COMMENTS

1. Need for This Bill

According to the author:

> Survivors of sexual assault have endured unspeakable trauma. Many struggle for years to heal and move past the crimes that were committed against them. The civil hearing process to designate a sexual offender as a Sexually Violent Predator can begin years or decades after the resolution of criminal cases. As part of this process, victims are asked to return to court and relive the details of what happened to them. Because of the quick timeframe of SVP hearings, victims can find themselves being contacted out of the blue, years after their crime and asked to quickly come to court and relive their trauma. While having the victim testify in person during the SVP trial phase is important for due process, AB 1253 gives the victims the benefit of time and consideration by allowing specified statements previously made to law enforcement to be used in lieu of testimony for the purposes of the SVP probable cause hearing. It is important that sexual assault survivors are treated with dignity and respect when they are asked to share their stories. AB 1253 provides that.

2. Sexually Violence Predator Act

The Sexually Violent Predator Act (SVPA) establishes an extended civil commitment scheme for sex offenders who are about to be released from prison, but are referred to the DSH for treatment in a state hospital, because they have suffered from a mental illness which causes them to be a danger to the safety of others.

The DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. Under existing law, a person may be deemed a SVP if: (a) the defendant has committed specified sex offenses against two or more victims; (b) the defendant has a diagnosable mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually-violent criminal behavior; and, (3) two licensed psychiatrists or psychologists concur in the diagnosis. If both clinical evaluators find that the person meets the criteria, the case is referred to the county district attorney who may file a petition for civil commitment.

Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause if found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim[] and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (*Cooley v. Superior Court (Martinez)* (2002) 29 Cal.4th 228, 246.) If the prosecutor meets this burden, the person then can be civilly committed to a DSH facility for treatment.

The DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. **(**Welf. & Inst. Code, § 6604.9.) In addition, DSH has an obligation to seek judicial review any time it

believes a person committed as a SVP no longer meets the criteria, not just annually. **(**Welf. & Inst. Code, § 6607.)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law"), which became operative on November 7, 2006. Originally, a SVP commitment was for two years; but now, under Jessica's Law, a person committed as a SVP may be held for an indeterminate term upon commitment or until it is shown that the defendant no longer poses a danger to others. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1185-87.) Jessica's Law also amended the SVPA to make it more difficult for SVPs to petition for less restrictive alternatives to commitment. These changes have survived due process, ex post facto, and, more recently, equal protection challenges. (See *People v. McKee*, *supra*, 47 Cal.4th 1172 and *People v. McKee* (2012) 207 Cal.App.4th 1325.)

3. Evidence at SVP commitment hearings.

To meet the criteria of being an SVP, a person must have been convicted of at least one "sexually violent offense" against one or more victims and be diagnosed with a mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. The SVPA lists the offenses—including rape and child molestation—that qualify as a "sexually violent offense" when they are "committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person" (Id. at (b).) While conviction of one or more of the enumerated crimes—also called "predicate" offenses —is required, the fact of the conviction for that predicate crime or crimes cannot be the sole basis for the SVP determination.

Hearsay is an out-of-court statement offered for the truth of the matter asserted, and is generally inadmissible. (Evidence Code Section 1200.) Hearsay evidence deprives the factfinder of the ability to personally evaluate a witness' perception, memory, and demeanor in the courtroom. The admission of hearsay evidence denies parties the opportunity to confront and cross-examine the real witness – the declarant of the statement – to expose any weaknesses in their statement, including distortions of the truth, contradictions, or incomplete or ambiguous statements. There may be inadvertent errors in relaying the witness' out-of-court statements to the factfinder that cannot be questioned or even brought to light.

While the rules of evidence apply at both probable cause hearings and civil commitment trials (See In re Kirk, supra, 74 Cal.App.4th at p. 1073), the SVPA allows for the admission of some hearsay evidence at probable cause hearings. The existence of any prior conviction for a predicate offense and the "details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim," are explicitly authorized to be shown at a probable cause hearing with "documentary evidence."

Documentary evidence includes, but is not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the DSH. In addition, the Court of Appeal of California, Fourth Appellate District, concluded that "the prosecutor may present the opinions of the experts through the hearsay reports of such persons" at least as long as the prospective SVP has "the ability to challenge the accuracy of such reports by calling such experts for cross-examination." (*In re Parker* (1998) 60 Cal.App.4th 1453, 1469-1470.)

These explicit and implied hearsay exceptions, however, are limited. They do not allow for the admission of all hearsay statements within admissible documentary evidence at probable cause hearings. While Welfare and Institutions Code section 6600(a)(3) allows for the introduction of documentary evidence about predicate offenses, and some multiple-level-hearsay statements contained within the documents to prove the details of a prior qualifying conviction, this "hearsay exception is limited in scope and does not allow for the introduction of hearsay evidence to prove the details of either nonpredicate offenses that led to a conviction, or alleged offenses that did not result in conviction." (*Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, 879.) While Section 6600 (a)(3) relieves some victims of the burden of having to testify in SVP proceedings by permitting the admission of documentary evidence to prove the existence and details concerning predicate offenses under the SVP Act (*People v. Otto* (2001) 26 Cal.4th 200, 206.), it does not permit documentary evidence about convictions for non-predicate offenses or allegations to be admitted. For example, the California Supreme Court has concluded that while it is reasonable to determine that the Legislature intended for a psychological evaluation to be admissible in a probable cause hearing, it was not reasonable to conclude that hearsay within such evaluations – specifically statements about prior allegations of sexual assault-- also were intended to be admissible (absent a hearsay exception). (*Walke*r, supra, 12 Cal.5th at p. 194.) According to the Court, "neither the Legislature nor our case law has created a hearsay exception allowing admission of hearsay accounts involving prior, nonpredicate allegations or convictions at SVPA probable cause hearings." (Ibid.)

4. New Hearsay exception

This bill creates a new hearsay exemption in the Evidence Code that makes certain statements within an official written report or record of a law enforcement officer regarding a sexual offense that resulted in a person's conviction, admissible in a SVP probable cause hearing. Specifically, the following statements are not made inadmissible hearsay at the probable cause hearing described above: (1) a statement from a victim of the sexual offense; (2) a statement from an eyewitness to the sexual offense; or (3) a statement from a sexual assault medical examiner who examined a victim of the sexual offense. While the bill does not explicitly make a distinction between predicate and non-predicate offenses, given that existing law allows convictions for predicate offenses to be proven with documentary evidence, the bill's substantive change to the law is in regards to nonpredicate convictions. Under the bill, certain statements within these official written reports are not inadmissible hearsay. Therefore, if those statements are contained within other documentary evidence that is admissible in a probable cause hearing (i.e. a psychological evaluation by the DSH or a probation report) that cited a police report, quoting an eyewitness, the bill would also establish a multi-level hearsay exception to allow for the admission of such statements within those evaluations or reports.

The bill does not establish a hearsay exemption for allegations of sexual assault—whether about a "sexually violent offense" or not--that do not lead to a conviction (i.e. the fact pattern in *Walker*). In order for the bill's hearsay exemption to apply, there must be an underlying conviction for a non-predicate offense. If there has been a conviction for either a predicate or non-predicate offense, the bill allows specified statements within an official written report or record of a law enforcement officer—from a victim, eyewitness, or sexual assault examiner—to be admitted into evidence in a probable cause hearing to prove the truth of the matter stated. The bill adds these new provisions to a new standalone section of the Evidence Code, rather than amending Welfare & Institutions Code section 6602 (a)(3) , which the California Supreme Court has describe as having very "spare language" to guide trial court decisions regarding the

evidence the Legislature intends to be admitted in probable cause hearings. (*Walker*, supra, 12 Cal.5th at p. 195.) Therefore, while the language of the bill allows statements regarding nonpredicate offenses to be admitted into evidence notwithstanding that they are multi-level hearsay, it does not allow the convictions themselves to be admitted into evidence and proven with documentary evidence.

Is the hearsay proposed to be allowed by this bill reliable enough to be admissible at a probable cause hearing for an SVP? As raised by the Public Defenders in their oppose unless amended letter, would this bill allow in hearsay that had otherwise been rejected by a trial court as reliable or not enough to hold a person for that particular offense?

5. Argument in Support

The Ventura County District Attorney supports this bill stating:

> AB 1253 would allow prosecutors to present details of the alleged SVP's non predicate sexual offenses without requiring live testimony from survivors at the probable cause hearing, though live testimony would still be required at trial. At SVP probable cause hearings, your bill will permit introduction of official law enforcement reports containing statements from a victim of a sexual offense, from an eyewitness to a sexual offense, or from a sexual assault medical examiner, if the alleged SVP was convicted of the sexual offense to which the statements relate. This new hearsay exception would spare survivors the trauma of repeatedly facing and confronting their abuser.
>
> This change in the law is needed because, as the recent Supreme Court case of *Walker v. Superior Court* (2021) 12 Cal. 5th 177, recognized, the body of SVP law currently contains no express provision that allows hearsay evidence about non predicate offenses at a probable cause hearing. Concurring in that opinion, former California Supreme Court Chief Justice Tani Cantil-Sakauye urged the Legislature to address this problem by creating the necessary hearsay exception. (*Id*. at p.212)
>
> AB 1253's hearsay exception is narrowly targeted to address the Chief Justice's urging, permitting only hearsay contained in the official records and related to a sexual offense for which the alleged SVP was convicted, and permitting that hearsay only at the probable cause hearing, not the trial. Enacting AB 1253 permits judges to know thte full scope of the alleged SVP's prior sexual offenses without "converting the probable cause haring into a proceeding barely distinguishable from a subsequent trial on the merits. " (Walker, supra, 12 Cal. 5th at p212)

6. Argument in Opposition

The California Attorneys for Criminal Justice oppose this bill stating:

> In *Walker v. Superior Court* (2021) 12 C.5th 177, a unanimous California Supreme Court ruled that the hearsay rule applies at Sexually Violent Predator Act (SVPA) (WIC 6602) probable cause hearings. The Court further held that nothing in the language of the SVPA created an explicit exception for hearsay to be admitted at probable cause hearings. (*Walker* at p. 195)

The *Walker* Court goes on to say that: "The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree. Courts exercise this power [referring to hearsay exceptions] only 'for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence.'" (*Walker* at p. 205)

AB 1253 proposes to allow hearsay statements in police and probation reports regarding the defendant's past sexual offense to be admitted through, for example, mental health evaluators who testify at these SVP probable cause hearings regarding whether the defendant should remain in custody or be released having served his sentence for his criminal conviction. As noted in *Walker,* there is no reason to believe that "the mental health evaluators bring any professional judgment to bear in assessing the veracity of these hearsay statements….The experts readily admitted that they simply *assumed* these documents [police and probation reports] had accurate information….Given these reliability concerns, we think it implausible that it was within the ambit of the legislative purpose to allow the admission of this information as evidence merely because experts chose to include it in their evaluation reports." (*Walker* at p. 203. Emphasis added.)

AB 1253 seeks to transform the probable cause hearing under WIC 6602(a) from an adversarial hearing into a mere ministerial function. This is not what the Legislature originally intended nor should it do so now by passing AB 1253.

-- END –