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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 2661                      **Hearing Date:** June 26, 2018  
**Author:** Arambula  
**Version:** April 4, 2018  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** GC

**Subject:** *Mental Health: Sexually Violent Predators*

### HISTORY

Source: California District Attorneys Association

Prior Legislation: None known

Support: Unknown

Opposition: None known

Assembly Floor Vote: 71 - 0

### PURPOSE

*The purpose of this bill is to clarify that a person's subsequent conviction for an offense that is not a sexually violent offense committed while in the custody of the California Department of Corrections and Rehabilitation (CDCR) or the Department of State Hospitals (DSH) while awaiting the resolution of a petition to have the person committed to the DSH as a Sexually Violent Predator (SVP) does not change the jurisdiction over the pending SVP petition, which is the county in which the person was convicted of the sexually violent offense that resulted in commitment to CDCR.*

*Existing law* provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a SVP after the person has served his or her prison commitment. (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, subd. (a)(1).)

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

*Existing law* requires that a person found to have been a SVP and committed to the Department of State Hospitals (DSH) have a current examination on his or her mental condition made at least yearly. The report shall include consideration of 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.)

*Existing law* allows a SVP to seek conditional release with the authorization of the DSH Director when DSH determines that the person's condition has so changed that he or she no longer meets the SVP criteria, or when conditional release is in the person's best interest and conditions to adequately protect the public can be imposed. (Welf. & Inst. Code, § 6607.)

*Existing law* allows a person committed as a SVP to 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, subd. (a).)

*Existing law* provides that, if the court deems the conditional release petition not frivolous, the court is to give notice of the hearing date to the attorney designated to represent the county of commitment, the retained or appointed attorney for the committed person, and the Director of State Hospitals at least 30 court days before the hearing date. (Welf. & Inst. Code, § 6608, subd. (b).)

*Existing law* requires the court to first obtain the written recommendation of the director of the treatment facility before taking any action on the petition for conditional release if the petition filed is made without the consent of the director of the treatment facility. (Welf. & Inst. Code, § 6608, subd. (c).)

*Existing law* provides that the court shall hold a hearing to determine whether the person committed would be 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 due to his or her diagnosed mental disorder if under supervision and treatment in the community. Provides that the attorney designated in the county of commitment shall represent the state and have the committed person evaluated by experts chosen by the state and that the committed person shall have the right to the appointment of experts, if he or she so requests. (Welf. & Inst. Code, § 6608, subd. (e).)

*Existing law* requires the court to order the committed person placed with an appropriate forensic conditional release program operated by the state for one year if the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community. Requires a substantial portion of the state-operated forensic conditional release program to include outpatient supervision and treatment. Provides that the court retains jurisdiction of the person throughout the course of the program. (Welf. & Inst. Code, § 6608, subd. (e).)

*Existing law* provides that if the court denies the petition to place the person in an appropriate forensic conditional release program, the person may not file a new application until one year has elapsed from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h).)

*Existing law* allows, after a minimum of one year on conditional release, the committed person, with or without the recommendation or concurrence of the Director of State Hospitals, to petition the court for unconditional discharge, as specified. (Welf. & Inst. Code, § 6608, subd. (k).)

*This bill* provides that if the person who is the subject of the petition for commitment is convicted of an offense that is not a sexually violent offense while in the custody of the Department of Corrections and Rehabilitation or the State Department of State Hospitals prior to resolution of the commitment petition, the jurisdiction for the petition for commitment would remain with the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the department.

*This bill* provides that if the person who is the subject of the petition for commitment is convicted of a subsequent sexually violent offense while in the custody of the Department of Corrections and Rehabilitation or the State Department of State Hospitals prior to the resolution of the first commitment petition, the jurisdiction for the subsequent petition for commitment would be the county in which the subsequent sexually violent offense occurred.

## COMMENTS

### 1. Need for This Bill

According to the author:

AB 2661 ensures that the jurisdiction for a petition for commitment of a Sexually Violent Predator is in the county most appropriately suited to handle such a petition.

Under Welfare & Institutions Code section 6601, when a person has been evaluated and determined to be an SVP, the jurisdiction for a petition for commitment is in the county in which the person was last convicted. If the SVP is convicted of a new offense while in a state prison or a state hospital, the county of the most recent conviction will be the county in which the prison or state hospital is located. In most cases, this will not be the county from which the SVP came, which is most familiar with the person's history and possesses the relevant records.

As an example, if an SVP from Los Angeles County was convicted of a new offense for conduct that occurred while in Coalinga State Hospital, the jurisdiction for purposes of an SVP commitment petition would be Fresno County, where Coalinga is located.

Coalinga State Hospital is currently dealing with a rash of child pornography cases. Since September 2016, the Fresno County District Attorney's Office has filed child pornography charges against 18 patients, with more cases currently being investigated. Under current law, Fresno County would be inundated with these inmates' petitions for commitment, rather than the counties from which the patients came.

AB 2661 clarifies that jurisdiction remains in the county from which the SVP was committed to the Department of Corrections and Rehabilitation (CDCR) or the State Department of State Hospitals (DSH).

The bill contains one exception to this rule, if the SVP is convicted of a subsequent sexually violent offense while in CDCR or DSH. In that case, it would be appropriate for jurisdiction to shift to the new county.

## 2. SVP Law Generally

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 is 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. Obtaining Release From Commitment

A person committed as a SVP may petition the court for conditional release or unconditional discharge after one year of commitment. (Welf. & Inst. Code, § 6608, subd. (a).) The petition can be filed with, or without, the concurrence of the Director of State Hospitals. The Director's

concurrence or lack thereof makes a difference in the process used.

A SVP can, with the concurrence of the Director of State Hospitals, petition for unconditional discharge if the patient "no longer meets the definition of a SVP," or for conditional release. (Welf. & Inst. Code, § 6604.9, subd. (d).) If an evaluator determines that the person no longer qualifies as a SVP or that conditional release is in the person's best interest and conditions can be imposed to adequately protect the community, but the Director of State Hospitals disagrees with the recommendation, the Director must nevertheless authorize the petition. (*People v. Landau* (2011) 199 Cal.App.4th 31, 37-39.) When the petition is filed with the concurrence of the DSH, the court orders a show-cause hearing. (Welf. & Inst. Code, § 6604.9, subd. (f).) If probable cause is found, the patient thereafter has a right to a jury trial and is entitled to relief unless the district attorney proves "beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent behavior if discharged." (Welf. & Inst. Code, § 6605.)

A committed person may also petition for conditional release or unconditional discharge notwithstanding the lack of recommendation or concurrence by the Director of State Hospitals. (Welf. & Inst. Code, § 6608, subd. (a).) Upon receipt of this type of petition, the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (Welf. & Inst. Code, § 6608, subd. (a).)<sup>1</sup> If the petition is not found to be frivolous, the court is required to hold a hearing. (*People v. Smith* (2013) 216 Cal.App.4th 947.)

The SVPA does not define the term "frivolous." The courts have applied the definition of "frivolous" found in Code of Civil Procedure section 128.5, subdivision (b)(2): "totally and completely without merit" or "for the sole purpose of harassing an opposing party." (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1411; see also *People v. McKee, supra*, 47 Cal.4th 1172; *People v. Collins* (2003) 110 Cal.App.4th 340, 349.) Additionally, in *Reynolds, supra*, 181 Cal.App.4th at p. 1407, the court interpreted Welfare and Institutions Code section 6608 to require the petitioner to allege facts in the petition that will show he or she is not likely to engage in sexually-violent criminal behavior due to a diagnosed mental disorder, without supervision and treatment in the community, since that is the relief requested.

Once the court sets the hearing on the petition, then the petitioner is entitled to both the assistance of counsel, and the appointment of an expert. (*People v. McKee, supra*, 47 Cal.4th 1172, 1193.) At the hearing, the person petitioning for release has the burden of proof by a preponderance of the evidence. (Welf. & Inst. Code, § 6608, subd. (i); *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1503.) If the petition is denied, the SVP may not file a subsequent petition until one year from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h).)

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<sup>1</sup> Recently, in *People v. McCloud* (2013) 213 Cal.App.4th 1076, the Court of Appeal recognized that the provision in Welfare and Institutions Code section 6608, subdivision (a) allowing for dismissal of a frivolous petition for release without a hearing, may violate the equal protection clause. The petitioner's equal protection claim was based on the fact that "[n]o other commitment scheme allows the judge to deem the petition 'frivolous' and thereby deny the petitioner a hearing." (*Id.* at p. 1087.) The court found there might well be actual disparate treatment of similarly situated persons—and if there was disparate treatment, the State might or might not be justified in so distinguishing between persons. The court remanded the case for further proceedings on the equal protection claim. (*Id.* at p. 1088.)