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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

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**Bill No:** SB 1034                      **Hearing Date:** April 5, 2022  
**Author:** Atkins  
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**Urgency:** No                                      **Fiscal:** No  
**Consultant:** MK

**Subject:** *Sexually violent predators*

## HISTORY

**Source:** Author

**Prior Legislation:** SB 248 (Bates) Ch. 383, Stats. 2020  
SB 1023 (Bates) failed Senate Public Safety 2020  
AB 1983 (Gallagher) not heard Assembly Public Safety  
AB 303 (Cervantes) Ch. 606, Stats. 2019  
AB 2661 (Arambula) Ch. 821, Stats. 2018  
AB 1909 (Melendez) Ch. 878, Stats. 2016  
SB 507 (Pavley) Ch. 576, Stats. 2015  
AB 1607 (Fox) Ch. 877, Stats. 2014  
SB 295 (Emmerson) – Ch. 182, Stats. 2013  
SB 760 (Alquist) Ch. 790, Stats. 2012  
Proposition 83, November 2006 General Election  
SB 1128 (Alquist) Ch. 337, Stats. 2006  
AB 893 (Horton) Ch. 162, Stats. 2005  
AB 2450 (Canciamilla) Ch. 425, Stats. 2004  
AB 493 (Salinas) Ch. 222, Stats. 2004  
SB 659 (Correa) Ch. 248, Stats. 2001  
AB 1142 (Runner) Ch. 323, Stats. 2001  
SB 2018 (Schiff) Ch. 420, Stats. 2000  
SB 451 (Schiff) Ch. 41, Stats. 2000  
AB 2849 (Havice) Ch. 643, Stats. 2000  
SB 746 (Schiff) Ch. 995, Stats. 1999  
SB 11 (Schiff) Ch. 136, Stats. 1999  
SB 1976 (Mountjoy) Ch. 961, Stats. 1998  
AB 888 (Rogan) – Ch. 763, Stats. 1995  
SB 1143 (Mountjoy) Ch. 764, Stats. 1995  
AB 888 (Rogan) Ch. 763, Stats. of 1995  
SB 1143 (Mountjoy) Ch. 764, Stats. of 1995

**Support:** Unknown

**Opposition:** San Diego County District Attorney's Office

## PURPOSE

***The purpose of this bill is to establish a process for finding housing for a sexually violent predator who has been found to no longer be a danger and set forth what a court must do in order to determine extraordinary circumstances exist so that a sexually violent predator cannot be placed in the county of domicile.***

*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* 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, subds. (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* provides that if the petition is made without the consent of the director of the treatment facility, no action may be taken on the petition without first obtaining the written recommendation of the director of the treatment facility. (Welf. & Inst. Code, § 6608, (e).)

*Existing law* prohibits the court from holding a hearing on a petition for conditional release until the community program director designated by DHS submits a report to the court that makes a recommendation as to the appropriateness of placing the inmate in a state-operated forensic conditional release program. (Welf. & Inst. Code, § 6608, (f); Pen. Code, § 1605, (a).)

*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 a person who is conditionally released pursuant to this article shall be placed in the county of domicile of the person prior to the person's incarceration, unless both of the following conditions are satisfied:

- a) The court finds that extraordinary circumstances require placement outside the county of domicile.
- b) The designated county of placement was given prior notice and an opportunity to comment on the proposed placement of the committed person in the county. ((Welf. & Inst. Code, 6608.5, (a).)

*This bill* clarifies that a person is conditionally released after a judicial determination that a person would not be a danger to others due to a diagnosed mental disorder while under supervision and treatment in the community.

*Existing law* states that the county of domicile shall designate a county agency or program that will provide assistance and consultation in the process of locating and securing housing within the county for persons committed as SVPs who are about to be conditionally released. (Welf. & Inst. Code, § 6608.5, (d).)

*This bill* provides that the counsel for the committed individual, the sheriff or the chief of police of the locality for placement, and the county counsel and the district attorney of the county of domicile, or their designees, shall provide the assistance and consultation in securing housing.

*This bill* provides that DSH shall convene a committee with the listed participants for the purpose of obtaining relevant assistance and consultation information in order to secure suitable housing for the person to be conditionally released.

*This bill* provides that a court may order a status conference to evaluate the DSH's progress in locating and securing housing and in obtaining relevant assistance and consultation information from the participants. The court may sanction any of the participants for failure to appear at the status conference unless they show good cause for their failure to appear.

*Existing law* specifies that in recommending a specific placement for community outpatient treatment, DSH or its designee shall consider all of the following: a) The concerns and proximity of the victim or the victim's next of kin; and b) The age and profile of the victim or victims in the sexually violent offenses committed by the person subject to placement. The "profile" of a victim includes, but is not limited to, gender, physical appearance, economic background, profession, and other social or personal characteristics. (Welf. & Inst. Code, § 6608.5, (e)(1)-(2).)

*Existing law* states that if the court determines that placement of a person in the county of his or her domicile is not appropriate, the court shall consider the following circumstances in designating his or her placement in a county for conditional release: a) If and how long the person has previously resided or been employed in the county; and b) If the person has next of kin in the county. (Welf. & Inst. Code, § 6608.5, (g)(1)-(2))

*This bill* provides that a court may make a finding of extraordinary circumstances only after the committed person's county of domicile has petitioned the court to make this finding.

*This bill* provides that the court may grant the county of domicile's petition and make a finding of extraordinary circumstances only after all of the following has occurred:

- a) The county of domicile has demonstrated to the court that the county of domicile has engaged in an exhaustive search with meaningful and robust participation from the parties in both committee conferences and status conferences. The county of domicile shall provide the court with declarations from the county of domicile and all the participants attesting to the exhaustive housing search.
- b) The county of domicile has provided at least one alternative placement county for consideration and has noticed the district attorney, or district attorneys, of the alternative placement county, or counties, and the department regarding the county of domicile's intention to petition for a finding of extraordinary circumstances. And if applicable, the county of domicile shall indicate how the committee person has a community connection to a proposed placement county.
- c) The county of domicile has provided the declarations and community connection information to DSH and to the district attorney of the proposed alternate placement county.
- d) DSH and the district attorney of a proposed alternate placement county have had an opportunity to be heard and noticed at a hearing.

*This bill* provides that a court shall not order a search of alternative housing placements outside of the county of domicile until after the court has granted a petition finding that extraordinary circumstances exist.

*This bill* provides that the Judicial Counsel shall report to the Legislature on an annual bases the instances in which a court issues a finding of extraordinary circumstances and shall detail the court's findings and ground supporting the findings as stated by the court.

## COMMENTS

### 1. Need for This Bill

For individuals who have completed their criminal sentence for specified sexual offenses who are still in need of additional treatment and rehabilitation upon release from prison, these individuals may be committed as patients to the Department of State Hospitals for their care. Known as the sexually violent predator (SVP) program, these patients receive in-patient treatment and support for their mental health disorder. During this in-patient treatment, the SVP is set-up with a team of psychologists, psychiatrists, social workers, psychiatric technicians and nurses with the goal of treating the mental disorder in order to help address the risks associated with recidivism. The intensity of treatment is matched to the individual's risk level of reoffending, so that high-risk offenders receive more intensive and extensive treatment.

Current law requires the Department of State Hospitals to evaluate – on an annual basis – whether or not the SVP continues to suffer from a diagnosable mental disorder that would likely lead to further acts of sexual violence.

For some, in-patient treatment is not successful and those patients will continue their stay at the State Hospital until medical interventions are no longer needed.

For others, however, treatment and therapeutics have positive net effects so much so that maintaining civil confinement may amount to a constitutional deprivation. For example, it could be that a patient's conditions can be improved to such a state that a court may order for unconditional release. In some cases, a court could also decide—after a significant hearing with law enforcement stakeholders, state hospitals, and the patient's counsel—that placing the patient in a less restrictive alternative while imposing significant conditions is in the best interest of the patient. Known as conditional release (CONREP), a court determines that a patient can be safely placed in the community with strict conditions. Essentially, CONREP allows a patient to finish the final segments of their treatment via outpatient under exacting conditions and monitoring. Generally, these conditions include individual supervision, specialized treatment, weekly drug screening, surveillance, polygraph examinations, and active Global Positioning System (GPS) tracking.

After a court has made the judicial determination that a person be conditionally released, it is the responsibility of the Department of State Hospitals to recommend to the court a suitable housing placement. As a general matter, the person is released to the county where the person resided before their incarceration – also known as the county of domicile – unless there is an extraordinary circumstance.

State law requires the county of domicile to designate a county agency or program that will provide assistance and consultation in the process of locating and securing housing within the county where the CONREP is going to be placed. However, state law does not specify exactly who in a designated county should participate and does not describe the manner of this assistance and consultation which creates challenges for the court to make meaningful and appropriate housing placement decisions.

This bill is intended to bring more transparency and a more structured process for all relevant community stakeholders to collectively make appropriate local housing placement decisions. This additional accountability reduces the risk of transient placements and ultimately increases public safety.

## **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).)

#### **4. Changes in the Process**

Existing law provides that when determining where an SVP shall be placed the county of domicile, or other designated county, shall provide assistance in locating an appropriate place for the person to live. This bill specifies that the counsel for the committed person, the sheriff or chief of police, the county counsel, and the district attorney should all be involved in the process.

This bill further provides that DSH shall convene a committee with the participants for the purpose of obtaining the necessary assistance and that the court may order a status conference where all parties are required to participate to make sure the entities are participating in helping find suitable housing.

Making it clear who should be involved in this process will hopefully help the process of placing SVPs after a court has found they will not be a danger. However, it is important that the process does not take too long so the person is not kept longer than they should be once they have been found not to be dangerous. As the bill moves along in the process, the author may wish to consider whether time lines would be appropriate to keep the process on track.

#### **5. Extraordinary Circumstances to not be Placed in County of Domicile**

Under existing law, a court may determine that the placement of a person in the county of domicile is not appropriate if they find extraordinary circumstances. Extraordinary

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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.)

circumstances is defined as circumstances that would inordinately limit the DSH's ability to effect conditional release of the person in the county of domicile but does not require any findings on the record or allow for any appeal of that this decision.

This bill sets up a process that to determine when a finding of extraordinary circumstances is appropriate. The county of domicile must show that they have engaged in an exhaustive housing search. They must provide at least one alternative county, and have notified the district attorney in that county and state any connection the person has to the county, if there is one. The district attorney in the proposed county also needs to have an opportunity to be heard on the issue of placement.

If the court does find extraordinary circumstances to place in another county, this bill requires the court to make its findings on the record. Costs of finding housing is not alone enough of a reason for finding extraordinary circumstances.

A question has been raised as to when the person is placed in a different county, whether the jurisdiction remain in the domicile county. The Court, District Attorney, and Defense Counsel are all familiar with the case, would it be appropriate to consider keeping the jurisdiction in the domicile county even if the person is placed in another county?

## **5. Judicial Council Report**

This bill requires Judicial Council to report to the Legislature on the instances in which a court issues a finding of extraordinary circumstances and include details of the court's findings and ground. Is the Judicial Council the appropriate entity to report this information to the Legislature?

## **6. Argument in Opposition**

The San Diego District Attorney's Office opposes this bill stating:

\Regretfully, we must oppose your measure, Senate Bill 1034. This bill would require the district attorney to provide assistance and consultation in the Department of State Hospital's process of locating and securing housing within the county for persons committed as sexually violent predators who are about to be conditionally released into the community. As the party that typically opposes the decision to conditionally release sexually violent predators, requiring the district attorney to assist and consult in the housing decision would pose a conflict. Mandating that the district attorney play a role in the treatment decisions of the committee would negatively impact the committee's therapeutic relationship with treatment providers if the committee's treatment history were disclosed to the district attorney. Alternatively, if the committee's treatment history is not disclosed to the district attorney, the district attorney's participation would be rendered meaningless and would actually hamper discussions that could not occur in the presence of someone unauthorized to receive confidential treatment information.

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