SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 1333	**Hearing Date:**	April 5, 2022
Author:	Bates		
Version:	April 19, 2022		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Sexually violent predators***

HISTORY

Source: San Diego County District Attorney's Office

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: California District Attorneys Association; California State Sheriffs' Association; Crime Victims United of California

Opposition: ACLU California Action; California Public Defenders Association; Disability Rights California; Ella Baker Center for Human Rights

PURPOSE

The purpose of this bill is to makes changes to the laws regulating sexually violent predators including: adding to conditions that must be met before placing the person in a county that is not the county of domicile and, giving the district attorney access to specified documents when they are asked to make a motion to revoke conditional release of an SVP.

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 DSH 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 fo 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 adds the following to the requirements that must be met before a person is placed in a different county:

> The proposed designated county of placement was provided, prior to the court ordering the person to be placed in a county other than the county of domicile, all evidence, documents, records, reporter's transcripts, and court clerk transcripts upon which a finding of extraordinary circumstances, including but not limited to, evidence of the search of suitable housing, site assessments, and lease documentation.

Existing law provides that for any person who is proposed for community outpatient treatment under forensic conditional release program, the department shall provide to the court a copy of the written contract entered into with any public or private person or entity responsible for monitoring and supervising the patient's outpatient placement and treatment program. The terms and conditions of conditional release shall be drafted to include reasonable flexibility to achieve the aims of conditional release, and to protect the public and the conditionally released person. (Welf. and Inst. Code, § 6608.8 (a) and (b))

Existing law provides that the court in its discretion may order the department to, provide a copy of the written terms and conditions of conditional release to the sheriff or chief of police, or both, that have jurisdiction over the proposed or actual placement community. (Welf. and Inst. Code, § 6608.8 (c).)

This bill provides that, notwithstanding other provisions, if DSH or designee request that the county of placement petition the court to revoke a person's conditional release, the department or its designee shall provide the county of placement any information or records relating to the person's treatment or performance on conditional release that the department or tis designee believes serves as the basis for a revocation or community outpatient treatment.

COMMENTS

1. Need for This Bill

According to the author:

> Most of California's SVPs currently reside in San Diego County, and more SVPs are pending release throughout the state. Finding placement for an SVP has become increasingly difficult. Recently, the San Diego County Board of Supervisors voted

unanimously to oppose any further placements of sexually violent predators under the current process. This action was in response to the placement of two different SVPs in Rancho Bernardo and Mt. Helix, which were perceived as a threat to public safety. San Diego County also recently experienced attempts to place an SVP from another jurisdiction within its jurisdiction. Judges denied these placements after immense public outcry. Efforts to release SVPs will continue to face public scorn unless current law is reformed.

Currently, there is no statutory requirement for the records supporting a finding of "extraordinary circumstances" from the underlying SVP litigation to be provided to the proposed placement county (WIC 6608.5). Current law doesn't allow the proposed placement county to seek appellate review of the "extraordinary circumstances" finding (WIC 6608.5). Current law also doesn't require the Department of State Hospitals to consider the availability of county property for possible community placement of an SVP. (WIC 6608.5(e)). Additionally, the law does not prohibit placement of an SVP near preschools, daycares, school bus stops, or facilities that provide congregate care to foster youths or dependent adults.

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 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. 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).)[1] 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;

[1] 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.)

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. Placement in county of domicile

Existing law generally provides that an SVP who is released shall be placed in the county of domicile unless the court finds extraordinary circumstances requiring placement outside the county of domicile and that 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.

This bill adds to the requirements before a person is placed outside their domicile the following:

> That the proposed designated county of placement was provided, prior to the court ordering the person to be placed in a county other than the county of domicile, all evidence, documents, records, reporter's transcripts, and court clerk transcripts upon which the finding was made, including evidence of a search of suitable housing; and,

The sponsor argues that under existing law, a court in the domicile county can find extraordinary circumstances but there is not opportunity for the placement county to challenge those findings or even see the basis for the findings before being able to comment on the proposed placement. Thus, this bill give the proposed placement county access to the documents that surrounded the decision. It also gives a meaningful opportunity to seek appellate review.

Is access to all evidence, documents etc. necessary for the county where placement is proposed to comment on the placement?

This bill does not define "meaningful opportunity." A person has already been determined to not be a danger when they are being conditionally released, should there be a timeline places on what constitutes a "meaningful opportunity" to not needlessly delay a person's release or to allow a county to drag out the process with the hopes that the SVP will be released elsewhere?

5. Documents for revoking conditional release

When a provider finds that an SVP on conditional release is not complying with a treatment plan or other requirement of the conditional release, the provider may request that the district attorney seek a revocation of that conditional release. The sponsor states that arguing for that release can at times be difficult because the SVP will argue against release of certain documents related to their mental health for privacy reasons. This bill would provide an exception to the general HIPAA privacy rules and allow the district attorney to receive information regarding the person's treatment or performance on conditional release that the provider or DSH believes serves as a the basis for a revocation of community outpatient treatment.

6. Argument in Support

According to the sponsor, the San Diego District Attorney's Office:

> Many of California's 16 SVP's who are on supervised release from the state hospital are placed in San Diego County, and more SVPs are pending release throughout the state. Finding placement for an SVP has become increasingly difficult. The Forensic Conditional Release Program (CONREP) and The Department of State Hospitals (DSH) is responsible for notifying the county of domicile (where the SVP resided prior to incarceration), coordinating their release placement, and contracting with Liberty healthcare to oversee their treatment. This has resulted in several botched placement efforts where Liberty Healthcare has attempted to place SVPs in inappropriate locations causing community outrage. CONREP often turns to more rural parts of counties where there are fewer people to object to the placement. However, these parts of the county often become disproportionately saturated with SVP placements, most of whom did not come from those parts of the county. Recently, the San Diego County Board of Supervisors voted unanimously to oppose any further placements of sexually violent predators under the current process. This action was in response to the placement of two different SVPs in Rancho Bernardo and Mt. Helix, which were perceived as a threat to public safety. San Diego County also recently experienced attempts to place an SVP from another jurisdiction within our jurisdiction. Judges denied these placements after immense public outcry. Efforts to release SVPs will continue to face public scorn unless current law is reformed.
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> Currently, there is no statutory requirement for the records supporting a finding of "extraordinary circumstances" from the underlying SVP litigation to be provided to the proposed placement county Current law doesn't allow the proposed placement county to seek appellate review of the "extraordinary circumstances" finding. Current law also doesn't require the Department of State Hospitals to consider the availability of county property for possible community placement of an SVP. Additionally, the law does not prohibit placement of an SVP near preschools, daycares, school bus stops, or facilities that provide congregate care to foster youths or dependent adults.

9. Argument in Opposition

According to the California Public Defenders Association:

> SB 1333 would render the SVPA unconstitutional. The patients who are the subject of SB 1333, ones eligible under existing law for conditional release, have been adjudicated to no longer pose a threat to public safety. A patient who no longer poses such a threat must be released from confinement. (See *Kansas v. Hendricks* (1997) 521 U.S. 346; *People v. Superior Court (George*) (2008) 164 Cal.App.4th 183, 193.) Release from confinement may be unconditional release or conditional. The SVPA provides for both, with conditional release a prerequisite to unconditional release. Under the SVPA, conditional release allows a supervised transition, continued treatment, and an opportunity to monitor to ensure that the

patient continues to present no danger to the public while in the community -- before the patient may be considered for unconditional release.

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SB 1333's record sharing provisions run afoul of privacy protections, and would endanger the safety, peace, and medical progress of conditionally released patients. SB 1333 would require provision of a patient's treatment records to parties in "the designated county of placement" before an out-of-domicile placement, and to the county of placement upon a request by DSH for revocation of outpatient treatment. There are no guardrails in SB 1333 on who in the county may access the records, how they may be used, and whether the information in the records can be disseminated further. Unlike in court proceedings, there is no provision in SB 1333 allowing a patient to move to seal or otherwise protect especially sensitive records. At a minimum, the exposure of a patient's treatment records would chill the therapeutic relationship. At worst, a county could allow records in support of a revocation to be published, before they may be answered by the patient in court, subjecting a patient to harassment or even assault. This is not an idle concern. Individuals who have been released from SVP commitment have been repeatedly harassed and threatened in California.

Finally, SB 1333 is unnecessary because it duplicates a county's existing notice and participation rights. Under existing law, when it recommends community placement of a person who has been adjudicated an SVP, DSH must notify the community's law enforcement, its designated counsel, and its district attorney. Through counsel, the proposed placement community is entitled to be heard and to present expert testimony. (See Gov. Code, § 6608.5.) In the exercise of these rights, the county can move the court for discovery of the documents and records covered by SB 1333. The countervailing privacy concerns can be balanced, and orders crafted to prohibit improper use of the records and to protect the patient while enabling the county to access and use records consistent with its interests. Similarly, the provision for a meaningful opportunity to seek appellate review duplicates the existing right to seek a stay of placement pending appeal.

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