SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 141	**Hearing Date:**	April 9, 2019
Author:	Bates		
Version:	January 17, 2019		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Sexually Violent Predators***

HISTORY

Source: District Attorney of San Diego County

Prior Legislation: None

Support: California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Correctional Supervisors Organization; California Narcotic Officers Association; California Police Chiefs Association; California State Sheriffs' Association; Crime Victims United of California; Los Angeles County Professional Peace Officers Association; Riverside Sheriffs' Association

Opposition: ACLU of California; California Public Defenders Association

PURPOSE

The purpose of this bill is to require the Secretary of the California Department of Corrections and Rehabilitation (CDCR) to refer offenders who are serving indeterminate prison sentences if the secretary determines that the offender meets the requirements for qualification as a sexually violent predator (SVP).

Existing law states that whenever the Secretary of CDCR determines that when a person who is in custody of CDCR, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the secretary shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation by the Department of State Hospitals to determine if the person qualifies as an SVP. (Welf. & Inst. Code, § 6601, subds. (a)(1).)

Existing law provides that if the inmate was received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the secretary may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate's scheduled release date. (Welf. & Inst. Code, § 6601, subds. (a)(1).)

Existing law provides that an SVP petition may be filed if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold, at the time the petition is filed. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law. (Welf. & Inst. Code, § 6601, subds. (a)(2).)

Existing law specifies that an offender who has been referred for SVP evaluation shall be screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of State Hospitals in consultation with the Department of Corrections and Rehabilitation. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer the person to the State Department of State Hospitals for a full evaluation. (Welf. & Inst. Code, § 6601, subd. (b).)

This bill provides that the provisions for referral of an offender by CDCR for evaluation as an SVP shall apply to persons serving indeterminate prison sentences.

This bill additionally authorizes the referral to be made less than 6 months prior to the individual's scheduled release date if the inmate's scheduled release date is less than 6 months after the decision to grant parole is made.

COMMENTS

1. Need for This Bill

According to the author:

> The most violent and dangerous sexual offenders in our state prisons, who were sentenced to prison for an indeterminate term, are not being evaluated for potential commitment to a state hospital as a Sexually Violent Predator (SVP) before they are released on parole. Current law requires the screening of inmates sentenced to a determinate term for sexually violent offenses, but not inmates who have been sentenced to an indeterminate term for similar offenses.
>
> For example, in San Diego, a man who was convicted of murder and rape with a foreign object in 1989 is now eligible for parole. When the San Diego District Attorney's office contacted the California Department of Corrections and Rehabilitation (CDCR), they were informed that he would not be screened for SVP commitment if granted parole because he was sentenced to an indeterminate term. This inmate previously was committed as a Mentally Disordered Sex Offender (MDSO) to Patton State Hospital for previous crimes, has been diagnosed with Sexual Sadism, and has been convicted for a sexually violent offense that otherwise qualifies for an SVP commitment. This offender, who should be screened for an SVP commitment before being released from state prison, will not be due to a grievous loophole in our current laws.

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; *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).)

---

[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.)

4. California State Auditor Report

In March of 2015 the California State Auditor issued an audit report on the DSH's Sex Offender Commitment Program (program). The report summary stated, "The program targets a small but extremely dangerous subset of sexually violent offenders (offenders) who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behaviors. State Hospitals evaluates these offenders to determine whether they meet criteria to be considered sexually violent predators (SVPs) and whether courts should consider committing such offenders to a state hospital.

"Our report concludes that State Hospitals' evaluations of potential SVPs were inconsistent. Although state law requires that evaluators consider a number of factors about offenders, such as their criminal and psychosexual histories, we noted instances in which evaluators did not consider all relevant information. We noted that gaps in policies, supervision, and training may have contributed to the inconsistent evaluations. Specifically, State Hospitals' standardized assessment protocol for how to perform evaluations. Further, State Hospitals' headquarters lacks a process of supervisory review of evaluators' work from a clinical perspective. We also noted that State Hospitals has not consistently offered training to its evaluators, and did not provide SVP evaluators with any training between August 2012 and May 2014. Also, State Hospitals could not demonstrate that its evaluators had training on a specific type of instrument used when assessing whether an individual would commit another sexual offense until it began offering such training at the end of 2014.

"We also noted additional areas in which State Hospitals could improve its evaluation process. Specifically, it has not documented its efforts to verify that its evaluators met the experience portion of the minimum qualifications for their positions. In addition, in March 2013, State Hospitals developed a process for assigning and tracking the workload of its evaluators and recently revised it in January 2015. Although the revised process addresses some concerns about workload assignments, it omits other elements and State Hospitals has not established a formal process for periodically reviewing its workload assignment process. Finally, State Hospitals need to address its backlog of annual evaluations of currently committed SVPs at Coalinga State Hospital (Coalinga). When Coalinga fails to promptly perform these evaluations, it is not fulfilling one of its critical statutory obligations, leaving the State unable to report on whether the SVPs continue to pose risks to the public and whether unconditional release to a less restrictive environment might be an appropriate alternative."[2]

5. Determinate v. Indeterminate Sentencing as Applied to SVPs

California has not one, but several sentencing schemes. Most felonies are punished under the determinate sentencing scheme. Under the determinate sentencing scheme, a court has the ability to sentence a defendant to a fixed term in custody. If imposing a sentence for more than one offense, the court must select one term as the principal term, and when concurrent sentencing is an option, must decide whether to sentencing concurrently or consecutively. At the conclusion of the determinate sentence, an offender is released on parole or post-release community supervision.

[2] https://www.auditor.ca.gov/pdfs/reports/2014-125.pdf.

Indeterminate sentences are imprisonment for "life" or for a term of "years to life." These sentences are not fixed by the court. The Board of Parole Hearings (BPH) is the parole authority that sets the parole dates for prisoners serving life sentences.

The SVPA, as envisioned, applied to determinate prison terms because the offenders had a determined date for release. It has been presumed that the law need not apply to indeterminate sentences because a person with a sexually violent offense, who is still a danger to the community because they have a mental condition that cannot be controlled without further custodial supervision or forced medical treatment would not be granted parole by the BPH. This bill would clarify that should the BPH grant parole to an individual with an indeterminate term, that CDCR still believes meets the qualifications of an SVP, they can be referred for evaluation.

6. Proposed Amendment

The bill could be amended to make sure that any parole decision for indeterminately sentenced offenders who have a prior sexually violent conviction must involve a validated risk assessment for sex offenders such as the Static-99 risk assessment. This would prevent potential duplication of work and an unnecessary quasi-criminal SVP procedure.

7. Argument in Support

According to the Riverside Sheriffs Association:

> The most violent and dangerous sexual offenders in our state prisons, who were sentenced to prison for an indeterminate term, are not being evaluated for potential commitment to the state hospital as a Sexually Violent Predator (SVP) before they are released on parole. Current law requires the screening of inmates sentenced to a determinate term for sexually violent offenses, but not inmates who have been sentenced to an indeterminate term for similar offenses. This defies common sense, as those sentenced to indeterminate terms are generally more dangerous.
>
> SB 141 creates parity in our laws by requiring that all inmates convicted of a sexually violent offense are administered a mental health evaluation before release. As the Legislature continues to expand the possibility of early release of inmates sentenced to life terms, SB 141 provides additional assurance that the people we are releasing into our communities do not pose a risk to the health and safety of others.

8. Argument in Opposition

According to the ACLU of California:

> SB 141 would bypass the well-informed, careful decisions of the Board of Parole Hearings (BPH) by requiring that certain people be evaluated to determine whether they are sexually violent predators (SVPs) ***after*** BPH has already determined that they can safely be released on parole without posing an unreasonable risk of danger to the community, and wastes state resources.

Current law provides that under specified circumstances the Department of Corrections and Rehabilitation (CDCR) can refer an individual who is in custody serving a determinate sentence for evaluation to determine if they may be an SVP. In order to determine whether or not to refer someone for a full evaluation, the person is screened by both CDCR and BPH to determine whether the individual has committed one of the sexual offenses listed in Welfare and Institutions Code section 6600, subdivision (b), and whether the person is likely to meet the other criteria the other criteria outlined in Welfare and Institutions Code section 6600, which includes that the person poses "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."

SB 141 proposes to expand this screening to individuals serving life sentences when the BPH has already conducted a careful, rigorous analysis of the individual's criminal history, conduct in prison, mental health, and prior violence; reviewed a comprehensive risk assessment conducted by a BPH licensed psychologist; considered"[a]ll relevant, reliable information available to the panel…;"[3] and determined that the individual will not "pose an unreasonable risk of danger to society if released from prison."

The expansion proposed by SB 141 is costly, unwarranted, and duplicative. SB 141 will not make our communities safer, but it will waste scarce public resources that could be used to prevent future sexual violence and provide support to survivors of sexual violence.

-- END –

[3] California Code of Regulations, Title 15, section 2281(b).