SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

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Author:	Bates		
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Consultant:	GC		

Subject: ***Sexually violent predators: open court proceedings***

HISTORY

Source: San Diego District Attorney's Office

Prior Legislation:
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 Association of Code Enforcement Officers; California News Publisher's Association; End Violence Against Women International; Global Hope 365; Peace Officers Research Association of California (PORAC)

Opposition: Association for the Treatment of Sexual Abusers; California Attorneys for Criminal Justice; California Public Defenders Association; Initiate Justice; Legal Services for Prisoners With Children; San Francisco Public Defender

PURPOSE

The purpose of this legislation is to: 1) make sexually violent predator (SVP) court proceedings open to the public unless "compelling and extraordinary circumstances" are met as specified; and 2) modify the procedure for SVP evaluation when a person is in the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR) for an offense committed while the person was previously serving an indeterminate term in a state hospital as an SVP.

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 requires that proceedings for the civil commitments of sexually violent predators (SVPs) be in open court, on the record, unless the court expressly makes the following findings:

- An overriding interest, based on "compelling and extraordinary circumstances" overcomes the right of the public to access to the proceedings. (Discussions of a petitioner or respondent's psychological treatment itself shall not constitute "compelling and extraordinary circumstances.");

- The overriding interest supports closing the proceedings;

- A "substantial probability" exists that the overriding interest will be prejudiced if the proceeding is open;

- The proposed closure is narrowly tailored to only include the interest in closure; and

- No less-restrictive means exist to achieve the overriding interest.

This bill specifies that the findings as to whether the proceedings may be closed to the public shall be made prior to the closure of any portion of the proceeding and shall be themselves in open court. Notice to all parties of the proposed closure shall be made at least 10-calendar days prior to the closure. Any closure is reviewable by writ of mandate of either party.

Existing law provides that whenever CDCR determines that an individual who is in custody under the jurisdiction of CDCR and who is either serving a determinate prison sentence or whose parole has been revoked, may be an SVP, the secretary shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, 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.

This bill modifies the procedures for the SVP evaluations of individuals in the custody of the Department of Corrections and Rehabilitation (CDCR)for a new offense committed while they were serving an indeterminate term in a state hospital as an SVP as follows:

- For persons in the custody of CDCR for the commission of a new offense committed while serving in a state hospital as an SVP, CDCR shall at least 6-months prior to the individual's scheduled release date, refer the person directly to the Department of State Hospitals for a full SVP evaluation.

- If the inmate was received by the department with less than 9-months of their sentence to serve, or if the inmate's release date is modified by a judicial or administrative action, CDCR may refer the person for evaluation in accordance with this section at a date that is less than 6-months prior to the inmate's scheduled release.

- If both evaluators concur that the person has a diagnosed mental disorder so that the person is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of State Hospitals shall forward a request for a court order no less than 20-calendar-days prior to the scheduled release date of the person to the county designated authorizing a transfer of the individual from the Department of Corrections and Rehabilitation to the State Department of State Hospitals to continue serving the remainder of the individual's original indeterminate commitment as a sexually violent predator if the original petition has not been dismissed.

- If the petition has previously been dismissed, the Director of State Hospitals shall forward a request for a new petition to be filed for commitment to the county designated no less than 20-calendar days prior to the scheduled release date of the person.

This bill requires that proceedings for the civil commitments of sexually violent predators (SVPs) be in open court, on the record, unless the court expressly makes the following findings:

- An overriding interest, based on "compelling and extraordinary circumstances" overcomes the right of the public to access to the proceedings. (Discussions of a petitioner or respondent's psychological treatment itself shall not constitute "compelling and extraordinary circumstances.");

- The overriding interest supports closing the proceedings;

- A "substantial probability" exists that the overriding interest will be prejudiced if the proceeding is open;

- The proposed closure is narrowly tailored to only include the interest in closure; and

- No less-restrictive means exist to achieve the overriding interest.

This bill specifies that the findings as to whether the proceedings may be closed to the public shall be made prior to the closure of any portion of the proceeding and shall be themselves in

open court. Notice to all parties of the proposed closure shall be made at least 10-calendar days prior to the closure. Any closure is reviewable by writ of mandate of either party.

COMMENTS

1. Need for This Bill

According to the author:

> SB 248 would extend the presumption of openness that exists in almost all California courtrooms to proceedings under the Sexually Violent Predator Act and closes a loophole regarding continuing commitment for sexually violent predators (SVP).
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> First, a trend has emerged recently where trial court judges, considering the potential release of sexually violent predators into our communities, are ordering that those proceedings be closed to the public. However, under U.S. constitutional law, members of the public should be allowed the right to be present and have access to court proceedings. In San Diego, Mary Taylor and Cynthia Medina, the victims of a sexually violent predator took part in multiple protests outside of a San Diego courthouse in 2018-2019 because the judge did not allow for an open court. The victims stated that the judge was violating Marsy's Law, which grants crime victims the right to attend a defendant's court proceedings and express their views. Marsy's Law traditionally applies to criminal proceedings; sexually violent predator proceedings do not possess all the qualities of a criminal prosecution. The legislative intent behind Marsy's Law, which is centered around victim notification and participation in his/her assailant's case, would support the ability of victims to be present at sexually violent predator court hearings, where the assailant's further detention or potential release are being considered by a jury or judge.
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> Second, when the Sexually Violent Predator Act changed from two-year commitments to indeterminate commitments, the laws governing screening of inmates did not change. The Sexually Violent Predator Act permits SVPs who are committed to the state hospital as a SVP for an indeterminate term who later receive a new prison commitment to be re-screened by CDCR as an SVP after serving their new prison commitment. This loophole creates an incentive for a SVP to get a "second bite at the apple" to relitigate a SVP commitment by committing a new felony in the state hospital while serving their original SVP commitment. This also results in the wasteful expenditure of CDCR resources screening an inmate as a SVP who has already been screened, evaluated and committed as an SVP.
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> Existing law provides that, "[a] trial open to the public" plays as important a role in the administration of justice today as it did for centuries before. Existing law includes a scheme for civilly confining dangerous sexual offenders with diagnosed mental disorders that make them likely to reoffend, under the Sexually Violent Predators Act. The law recognizes that proceedings under the Sexually

Violent Predator Act are neither criminal nor civil, but "special proceedings of a civil nature."

Existing law requires the Secretary of the Department of Corrections and Rehabilitation, within 6 months prior to the inmate's scheduled release date, to refer an inmate who is in custody under the jurisdiction of CDCR and is either serving a determinate sentence or whose parole has been revoked, for screening by the department and Board of Parole Hearings based on a review of the person's social, criminal, and institutional history. Under existing law, if this screening determines that the person is likely to be a sexually violent predator, the department is required to refer the person to the State Department of State Hospitals for a full evaluation.

SB 248 would require that proceedings for the civil commitment of a sexually violent predator and subsequent hearings regarding his/her potential release be in open court, on the record, unless compelling and extraordinary circumstances justify closing the courtroom to the public. This bill would require there be a notice to all parties of the proposed closure and that it be made at least 10 calendar days prior to the closed court hearing. SB 248 closes a loophole that ensures Sexually Violent Predators should return to the state hospital to continue serving the SVP original commitment after a new prison sentence has been completed so long as evaluators agree that the individual continues to meet SVP criteria.

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*

[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.)

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. Closed Hearings in SVP Proceedings

Public access to SVP proceedings is not currently expressly addressed by California code. This bill would be the first bill to dictate the standards for either permitting public access to these proceedings, or when to deny access. Current practice for public access to SVP proceedings have been developed through default civil and criminal proceeding rules for public access, court rules, and court decisions. The seminal case on this issue in the State of California is *People v Dixon* (2007), 148 Cal. App. 4th 414.

People v. Dixon

In People v. Dixon a jury found James Howard Dixon to be an SVP, and he was committed to a secure state mental hospital under the SVPA. Mr. Dixon appealed the judgment claiming that the court erred in granting the media's request to televise the proceedings.

The Court of Appeal pointed out that both state and federal courts acknowledge a presumption in favor of public access under the First Amendment made applicable to the states by the Fourteenth Amendment. (*Press-Enterprise v. Superior Court* (1986) 478 U.S. 1, 106.) And that the press does not have a special right to access, but instead enjoy the same right afforded to the rest of the public. *(Branzburg v. Hayes* (1972) 408 U.S. 665, 684.) The California Supreme Court reviewed the right to attend criminal trials and specifically also held that the public have a general right to attend civil trials as well. (*NBC Subsidiary, Inc. v.* Virginia (1980) 448 U.S. 555, 580.) This is specifically important because SVP petitions are quasi-criminal proceedings in civil court. They utilize many standards of criminal law in a civil proceeding to determine a person's liberty interest.

The Dixon Court recognized that because the public has a First Amendment right to access, the party seeking closure must offer a compelling interest that cannot be achieved through a less restrictive measure. (*NBC Subsidiary* at p, 1203). The right to public access is not absolute and "[I]n neither the criminal nor the civil context do the high court cases or their progeny described above grant an `unrestricted' right of access; each decision has been careful to

explain that, under certain circumstances, the presumption of openness can be overcome upon a proper showing." (Id. at 1211.)

In Dixon, the Court found that exclusion orders can be appropriate when necessary to ensure a fair trial under certain circumstances. These decisions are typically made on a case-by-case basis. In the case of Mr. Dixon the court looked at "confidential information concerning his mental health." SVP cases will necessarily involve discussion of mental health, and the granting of public access to psychological reports and medical treatment.

This Legislation

The sponsors of this legislation should be addressed by the legislature and further argue that while most courts keep SVP proceedings open that it can be traumatic to the community and particularly victims when they choose to close portions or all of proceedings from public scrutiny. They argue that while most courts operate in an open manner that there have been increased incidents of closed proceedings. They point out that while civil commitment proceedings involve a determination of the defendant's mental health, the case also involves the defendant's past convictions, which are a matter of public concern and the records of which already are available to the public. Also, a sexually violent predator has a lesser expectation of privacy in his psychological records. (See *People v. Martinez* (2001) 88 Cal. App. 4th 465, 478.) It is not entirely clear, therefore whether some access would be appropriate, provided that the court take precautions to protect confidential information. Because of these and other considerations, we think the decision is best left to the Legislature, which is better equipped to hear the competing interests involved in these cases and formulate a rule concerning public access in SVPA proceedings. (Id. at p. 430.)

Opponents to the bill argue that under existing law courts have the authority to weigh the competing constitutional rights of the public's right to access versus the patient's right to privacy. Both federal and state courts have repeatedly noted that the public has a right to attend both criminal and civil proceedings. (See *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)* (1986) 478 U.S. 1; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (hereafter *NBC Subsidiary*) (1999) 20 Cal.4th 1178, 1210.) However, the public's First Amendment right is not absolute. Courts have traditionally used a balancing test to weigh competing interests. Opponents point to Dixon for the following proposition, "… such proceedings are aimed at determining the status of a person's mental health, they involve primarily personal and confidential matters. As with juvenile dependency proceedings, while openness would expose any deficiencies and allow for improvements in the process, it would seriously undermine the goals involved in these cases. The two considerations set forth in *Press-Enterprise II,* therefore, appear to weigh against extending the public right of access to involuntary civil commitment proceedings… (T)here is, therefore, a compelling basis for arguing that involuntary civil commitment proceedings under the SVPA are not ordinary civil proceedings that must be open to the public (internal citations omitted.). (*People v. Dixon* (2007) 148 Cal App 4th 414)

The Standard Set Forth in This Bill

Under current decisional law, and court rules, in California there is a presumption that the public has access to SVP proceedings as a constitutional right guaranteed by the First and Fourteenth Amendments. Under the existing standard this compelling interest in attendance must be overcome by the right of the person petitioning for closure to privacy. .

This bill seeks to set the standard for public access SVP proceedings as whether or not the party petitioning for disclosure can show all of the following:

- An overriding interest, based on "compelling and extraordinary circumstances" overcomes the right of the public to access to the proceedings. (Discussions of a petitioner or respondent's psychological treatment itself shall not constitute "compelling and extraordinary circumstances.");

- The overriding interest supports closing the proceedings;

- A "substantial probability" exists that the overriding interest will be prejudiced if the proceeding is open;

- The proposed closure is narrowly tailored to only include the interest in closure; and

- No less-restrictive means exist to achieve the overriding interest.

This committee should decide whether this very high standard is appropriate to set for a civil proceedings of likely high interest, but where a person's mental and medical health records are going to be discussed openly. The bill would limit the discretion of judges to make case-by-case decisions on these matters weighing the facts and circumstances of each case under the existing constitutional and decisional law framework that exists for other civil and criminal cases where mental health and medical records are discussed in court.

5. Argument in Support

> The Office of the San Diego County District Attorney is pleased to sponsor Senate Bill 248. SB 248 seeks to create two important procedural amendments to the Sexually Violent Predator Act ("SVPA"). SB 248 seeks to codify a presumption of openness for SVP proceedings that will allow access to these proceeding for interested parties such as sexual assault victims, the public and the media. SB 248 also seeks to close a procedural loophole in current SVP law by requiring prison inmates who have already been committed under the SVPA to return to the state hospital if their sex offender treatment was interrupted by the commission of a new felony committed while in the state hospital that resulted in new prison commitment. So long as the inmate continues to meet SVP criteria upon completion of the new prison commitment, the inmate would return to the state hospital to finish serving their SVP commitment rather than requiring the filing of a new SVP petition.
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> A stated policy goal of California's judicial branch is access to the courts. The California Judicial Council states that "All persons will have equal access to the courts and court proceedings and programs." The Judicial Council further explains that "The branch must work to remove all barriers to access and fairness by being responsive to the state's cultural, ethnic, socioeconomic, linguistic, physical, gender, and age diversities, and to all people as a whole."
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> California law is consistent with the Judicial Council's policy goals. Existing law provides that "except as provided in Section 214 of the Family Code [divorces

and child custody] relating to any other provision of law, the sittings of every court shall be public." (Code of Civil Proc. 124). The California Supreme Court has held "the First Amendment provides a right of access to ordinary civil trials and proceedings, that constitutional standards governing closure of trial proceedings apply in the civil setting, and that section 124 must, accordingly, be interpreted in a manner compatible with those standards." (*NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court* (1999) 20 Cal. 4th 1178, 1213)

Although there is no statute or case law specifically governing public access in SVP proceedings, in *People v. Dixon* (2007) 148 Cal. App. 4th 414, the court stated the ultimate determination should be left up to the legislature:

"[W]hile civil commitment proceedings involve a determination of the defendant's mental health, the case also involves the defendant's past convictions, which are a matter of public concern and the records of which already are available to the public. Also, a sexually violent predator has a lesser expectation of privacy in his psychological records. (See *People v. Martinez* (2001) 88 Cal. App. 4th 465, 478.) It is not entirely clear, therefore whether some access would be appropriate, provided that the court take precautions to protect confidential information. Because of these and other considerations, we think the decision is best left to the Legislature, which is better equipped to hear the competing interests involved in these cases and formulate a rule concerning public access in SVPA proceedings." (Id. at p. 430.)

Historically, SVP proceedings have been conducted in a transparent manner with unlimited public access to the proceedings. Currently, most California judges conduct SVP proceedings in an open, transparent manner, providing public access to the courts. However, recently some courts have entertained motions to close these proceeding to the public. SB 248 is in response to several instances of a judge closing his courtroom to victims, media and the public during a conditional release trial involving an SVP petitioner. In San Diego County, some other courts are also allowing the sealing of court filings in SVP cases. This dangerous trend threatens Californians' constitutional rights which have been enshrined to ensure our government is accessible, transparent and uncorrupt. SB 248 will give clear guidance to courts on these issues and help insure there is a uniform process for determining whether the public, the media and sexual victims have access to SVP proceedings.

Recently, a San Diego judge closed his courtroom on nine separate occasions to the victims and family members, the public and the media during part of the trial for the conditional release of an SVP known as the "Bolder Than Most Rapist." This petitioner sexually assaulted, robbed and burglarized nearly two dozen San Diego residents during the 1980s. The SVP had petitioned for release from the state hospital where he had been committed under the SVP Act. During his SVP conditional release trial, the record reflects that in four of nine instances, the discussion about closing the courtroom occurred while the courtroom was closed preventing other interested parties such as the victims and the press from providing any input or lodging any opposition on the issue. The closing of the courtroom caused great trauma to the victims who requested to be present during the critical stages of the SVP release process. The victims had a strong interest in

following the proceedings out of concern that their former attacker could potentially be released back into the community where many of the victims still lived and worked.

SB 248 does not prevent a judicial officer from closing a courtroom or sealing records. SB 248 merely creates a presumption of openness and transparency in SVP proceedings. SB 248 allows a judge to close the courtroom so long as the judge makes specific findings that outweigh the presumption of public access to the proceeding and justifies closing the hearing. SB 248 simply codifies the concept that SVP proceedings should be open and transparent unless there is a compelling reason to order them closed. Open and transparent proceedings are the norm in most courtrooms in the state of California. SB 248 seeks to set a standard of transparency and public access to SVP proceedings in California. SB 248 will serve to educate the public about the SVP procedure, increase public understanding and confidence in the judicial process and dissipate misinformation and mystique about judicial outcomes through transparency.

The second part of SB 248 seeks to fix a procedural loophole in the SVPA by addressing a scenario not contemplated by the original version of the Sexually Violent Predator Act. When initially enacted in 1995, the SVPA provided for a two-year commitment to the state hospital. The SVPA was amended by Proposition 83 in 2006 to provide for commitments for an indeterminate term. After Proposition 83 lengthened the term of commitment, patients committed under the SVPA had an incentive to commit a new felony while in the state hospital under an indeterminate term because a new prison commitment would also provide an opportunity to re-litigate the SVP commitment after serving a new prison commitment. In other words, they could get a “second bite at the apple” by committing a new felony. Patients serving an indeterminate term under the SVPA could elect not to participate in sex offender treatment in the state hospital by committing a new crime that would bring about a shorter term in state prison. Instead, patients could commit a new felony, serve a new prison term and have another opportunity to litigate their commitment to state hospital under the SVPA upon release from their new prison commitment. A new felony committed while in the state hospital would provide a path to re-litigate their commitment to the state hospital. SB-248 would close this loophole and eliminate the incentive to earn release from an SVP commitment through the commission of a new felony rather through participation in sex offender treatment.

SB 248 addresses two critical areas of the SVPA in need of amendment. First, SB 248 provides for public access to SVP proceedings through a presumption of openness. Secondly, SB 248 fixes the SVPA’s “one size fits all” evaluation procedure to address those inmates who have already been adjudicated and committed as an SVP but returned to the state prison after having committed a new felony while in the custody of the state hospital.
SB 248 is an important legislative proposal that will provide much-needed improvements to the Sexually Violent Predator Act by eliminating incentives to obtain release through the commission of a new criminal offense and by supporting openness and transparency in SVP proceedings.

6. Argument in Opposition

The California Public Defenders Association (CPDA), a statewide organization of public defenders, private defense counsel, and investigators, regrets to inform you that we must oppose Senate Bill 248 ("SB 248") by Senator Bates.

SB 248 would mandate that Sexually Violent Predator Act (SVPA) civil commitment proceedings are open to the public and essentially bar courts from using their long-established discretion to close the courtroom to the public. In particular, the bill would both make it harder for courts to exercise their discretion and prevent courts from finding a discussion of the patient's psychological treatment is sufficient to close the hearing to the public by stating that the court "shall hold a hearing in open court" and that "the discussion of a petitioner's or respondent's psychological treatment shall not itself constitute compelling and extraordinary circumstances."

SB 248 is unnecessary and bad public policy. It eviscerates the courts' discretion, attacks the confidentiality of Californians' mental health records, and would waste precious taxpayer resources in a time of extraordinary health and economic crisis.

Under existing law courts have the authority to weigh the competing constitutional rights of the public's right to access versus the patient's right to privacy. Both federal and state courts have repeatedly noted that the public has a right to attend both criminal and civil proceedings. (See *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)* (1986) 478 U.S. 1; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (hereafter *NBC Subsidiary*) (1999) 20 Cal.4th 1178, 1210.) However, the public's First Amendment right is not absolute. Courts have traditionally used a balancing test to weigh competing interests.

Although the decision to open the court is generally made on a case-by-case basis, the courts have allowed legislation and courts to close certain civil proceedings. The public does not have a First Amendment right to attend juvenile dependency proceedings. *(San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal. App. 3d 188, 195.) Not unlike the SVPA, civil commitment proceedings under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst.Code,section 5000 et seq. Detention of Mentally Disordered Persons for Evaluation and Treatment) are not open to the public. The LPS Act applies to individuals who are held for involuntary treatment due to being a danger to self or others or gravely disabled. These proceedings are colloquially known as section "5150" for the provision allowing for the involuntary 72 hours hold for assessment, evaluation and intervention or placement in a facility (usually a county mental hospital or acute mental health bed in a private facility) designed for assessment and treatment. Other sections of the LPS Act provide for longer detentions for treatment.

Examining both United and California Supreme Court precedent and other civil commitment schemes, in an SVP case, *People v. Dixon* (2007) 148 Cal App 4th 414 the court reached the conclusion that SVPA proceedings should be closed to the public because "… such proceedings are aimed at determining the status of a

person's mental health, they involve primarily personal and confidential matters. As with juvenile dependency proceedings, while openness would expose any deficiencies and allow for improvements in the process, it would seriously undermine the goals involved in these cases. The two considerations set forth in *Press-Enterprise II,* therefore, appear to weigh against extending the public right of access to involuntary civil commitment proceedings… (T)here is, therefore, a compelling basis for arguing that involuntary civil commitment proceedings under the SVPA are not ordinary civil proceedings that must be open to the public (internal citations omitted.). (*People v. Dixon* (2007) 148 Cal App 4th 414)

SB 248 seeks to manacle judicial discretion by stating that the court "shall hold a hearing in open court". The *Dixon* Court relying on *(San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal. App. 3d 188) found that "(w)here the presumption of openness does not apply, the court exercises broader discretion to limit access. Rather than having to fashion an order that is narrowly tailored to achieve a compelling interest, the court may limit access where there is a reasonable likelihood of prejudice. (*Id* at 208.)"

SB 248 is an attack on the confidentiality of Californians' mental health records. Other proceedings that involve chapters of the Welfare and Institutions Code that are concerned with the care and treatment of the young or the mentally ill are closed to the public. The California Supreme Court has maintained that the SVPA is protective rather than punitive in its intent. The law declared its intent to establish civil commitment proceedings to provide treatment. The Legislature made it clear that despite criminal records theses persons were to be viewed, not as criminals, but as sick persons and to be treated like those with mental illness or disability.

The SVPA, moreover, is protective rather than punitive in its intent. As we observed in *Hubbart v. Superior Court*, in enacting the SVPA "the [25 Cal.4th 1232] Legislature disavowed any 'punitive purpose[ ],' and declared its intent to establish 'civil commitment' proceedings in order to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior. (See, e.g., Stats. 1995, ch. 763, § 1; Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 888 (1995-1996 Reg. Sess.) July 11, 1995.) The Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.' ([Welf. & Inst. Code,] § 6250.) Consistent with these remarks, the SVPA was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups. (See, e.g., §§ 5000 [LPS Act], 6500 [Mentally Retarded Persons Law].)" (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th at p. 1171 (*Hubbart*).) (*People v. Vasquez* (2001) 25 Cal 4th 1225, 1233; *Hubbard v. Superior Court* 19 Cal 4th 1138.)

The rights of those held in Mental Hospitals must be protected with as much vigor as those who have been victims. In fact, many of these persons held under the SVPA have been victims themselves. SB 248 violates their right to privacy.

SB 248 would be expensive and waste countless hours of attorney and court time as the issue of whether SVPA proceedings should be open to the public in each case would be extensively litigated in both the trial and appellate courts. California taxpayers cannot afford to waste scare resources at this time of national crisis.

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