SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 507	**Hearing Date:**	April 28, 2015
Author:	Pavley		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Sexually Violent Predators***

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation:
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

Support: Crime Victims United of California; California District Attorneys Association

Opposition: American Civil Liberties Union; California Public Defenders Association

PURPOSE

The purpose of this bill is to provide that the prosecutor or county attorney petitioning for commitment of a person alleged to be a sexually violent predator and the attorney for the person shall have the same access to records as the expert evaluators, and to prohibit any other use of the otherwise confidential records.

COMMENTS

Existing law provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a sexually violent predator (SVP) after the person has served his or her prison commitment. (Welf. & Inst. Code, § 6600, et seq.)

Existing law defines an SVP 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 provides that where the Department of Corrections and Rehabilitation determines that an inmate fits the criteria for evaluation as an SVP, the inmate shall be referred for evaluation to the Department of State Hospitals (DSH). (Welf. & Inst. Code § 6601, subd. (b).)

Existing law provides that the inmate "shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of the DSH." If both evaluators concur that the person meets the criteria for SVP commitment, DSH shall request a district attorney or county counsel[1] in the county of commitment to prison to file a commitment petition. (Welf. & Inst. Code § 6601, subd. (d).)

Existing law provides that if the evaluators designated by DSH disagree, additional, independent evaluators are appointed. The second pair of evaluators must agree that the person meets the requirement for SVP commitment or the case cannot proceed. (Welf. & Inst. Code § 6601, subd. (c)-(e).)

Existing law provides that if DSH requests the district attorney to petition for commitment, the prosecutor shall have access to "copies of the evaluation reports and any other supporting documents" considered by the evaluators. (Welf. & Inst. Code § 6601, subd. (d).)

Existing law provides for a hearing procedure to determine whether there is probable cause to believe that a person who is the subject of a petition for civil commitment as an SVP is likely to engage in sexually violent predatory criminal behavior upon his or her release from prison. (Welf. Inst. Code § 6602.)

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

Existing law requires a jury trial at the request of either party with a determination beyond a reasonable doubt that the person is an SVP. (Welf. & Inst. Code § 6603.)

Existing law grants an alleged SVP "access to all and to have access to all relevant medical and psychological records and reports." (Welf. & Inst. Code, § 6603, subd. (a)

Existing law provides that if the attorney petitioning for commitment of an SVP determines that updated evaluations are necessary in order to properly present the case for commitment, the

[1] The counsel for the state is designated by the board of supervisors and is typically the district attorney. (Welf. and Inst. Code § 6601, subd. (f).)

attorney may request the Department of Mental Health (now denominated the Department of State Hospitals – DSH) to perform updated evaluations.

- If one or more of the original evaluators is no longer available to testify for the prosecution in court proceedings, the prosecutor may request the DSH to perform replacement evaluations.
- DSH shall perform the requested evaluations and forward them to the prosecutor and counsel for the alleged SVP.
- Updated or replacement evaluations shall be ordered only as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings.
- Updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the alleged SVP.
- If an updated or replacement evaluation results in a split opinion as to whether the alleged SVP meets the criteria for commitment, DSH shall conduct two additional evaluations, as specified. (Welf. & Inst. Code § 6603, subd. (c)(1).)

Existing law provides that if the second pair of experts performing the updated evaluations conclude that the person is not an SVP, or if there is a split of opinion, the case shall proceed on the basis of the original evaluations concluding or finding that the person is an SVP. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641.)

Existing law defines "no longer able to testify for the petitioner in court proceedings" as the evaluator is no longer authorized by DSH to perform evaluations of SVPs as a result of any of the following:

- The evaluator has failed to adhere to the protocol of the DSH;
- The evaluator's license has been suspended or revoked;
- The evaluator is legally unavailable, as specified; or
- The evaluator has retired or not entered into a new contract with to continue as an evaluator. (Welf. & Inst. Code § 6603, subd. (c)(1)-(2).)

Existing law provides that a new evaluator shall not be appointed if the resigned or retired evaluator has opined that the individual named in the petition has not met the criteria for commitment, as specified. (Welf. & Inst. Code § 6603, subd. (c)(1).)

Existing law requires that an SVP patient have an annual examination on his mental condition. The report on the examination shall include consideration of whether or not conditional release to a less restrictive alternative or an unconditional release is in the SVP patient's best interest and what conditions would adequately protect the community. (Welf. & Inst. Code, § 6604.9.)

Existing law provides that if DSH determines that an SVP patient's condition has so changed that he or she no longer meets the SVP criteria, or that he can be safely and conditionally released under supervision, the SVP patient can file a petition for unconditional release or a petition for conditional release. (Welf. & Inst. Code, § 6604.9.)

Existing law provides that upon receipt of a petition for unconditional release, the court shall set a hearing to determine if there is probable cause that the SVP patient "has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior. If the court finds probable to support such a finding, the matter shall be set for a jury trial as though it were an original petition for commitment. (Welf. & Inst. Code, §§ 6604.9 and 6605.)

Existing law provides that if DSH, independent of the annual review and report of an SVP's mental condition, that the SVP patient can be safely and conditionally released under supervision, the court shall forward a report and recommendation for conditional release to the prosecutor and the attorney for the SVP patient. (Welf. & Inst. Code, § 6607.)

Existing law provides that if DSH does not concur that an SVP can be safely and conditionally released under supervision, the SVP can petition for conditional release or an unconditional discharge any time after one year of commitment. (Welf. & Inst. Code § 6608, subd. (a).)

Existing law provides that, if the court finds the conditional release petition is not frivolous, the court shall give notice of the hearing date to the attorney designated to represent the county of commitment, the 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 provides that where DSH in the annual report on the mental status of an SVP patient finds that the conditional discharge would be in the best interests of the patient under conditions that would protect the public, the following shall:

- The state shall have the burden of proof by a preponderance of the evidence that the SVP would be likely to commit sexually violent offenses if conditionally released.

- If the petition for conditional release is denied by court, the SVP may not file another petition for conditional release for one year. (Welf. & Inst. Code § 6608, subd. (i).)

Existing law provides that if in the annual report DSH does not find that conditional discharge is appropriate, the SVP patient shall have the burden of proof by a preponderance of the evidence at the hearing. (Welf. & Inst. Code § 6608, subd. (i).)

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 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.

Existing law provides that the attorney designated 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 (CONREP) 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.

Existing law provides that a substantial portion of SVP CONREP shall include outpatient supervision and treatment. The court shall retain 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. If the court finds probable cause that the person is no longer an SVP, the court shall set the matter for jury trial. The state shall bear the burden to prove beyond a reasonable doubt that the person remains an SVP. (Welf. & Inst. Code §§ 6605, subds. (a)-(b) and 6608, subd. (k).)

Existing law provides that a person petitioning for conditional release is entitled to assistance of counsel in the conditional release and county of domicile hearings. (Welf. & Inst. Code § 6608, subd. (a.))

Existing law provides that the procedure for a conditional release hearing in a case in which the county of domicile has not yet been determined by the court, proceed as follows:

- The court, upon deeming that a conditional release petition is not frivolous, shall provide notice to the attorney for the committed person, the designated attorney for the county of commitment, and the Director of State Hospitals of its intent to set a conditional release hearing, and requires these entities to notify the court within 30 court days of receiving the notice of intent if it is alleged that a county other than the county of commitment is the domicile county.

- The court shall deem the county of commitment as the county of domicile and set a date for the conditional release hearing, with at least 30 court days' notice, as specified, if no county, other than the county of commitment, is alleged to be the county of domicile.

- The court shall, after giving 30-days' notice, hold a hearing to determine the county of domicile if any other county, other than the county of commitment, is alleged to be the county of domicile. Allows the designated attorney for any alleged county of domicile, the attorney for the county of commitment, the attorney for the petitioner, and the Director of State Hospitals to file and serve declarations, documentary evidence, and other pleadings, specific to the issue of domicile only, at least 10 court days prior to the hearing. Allows the court, in its discretion, to decide the issue of domicile based upon the pleadings alone or permit such additional argument and testimony as is in the interest of justice.

- The court, after determining county of domicile, shall set a date for a conditional release hearing and give notice of the hearing, as specified, including to the designated attorney for the county of domicile at least 30 court days before the date of the hearing.

- The designated attorney of the domicile county has the right to represent the state at the conditional release hearing, and to provide notice to parties, as specified, if he or she elects to do so. The designated attorney from each of the county commitment and domicile may mutually agree that the attorney for the county of domicile will represent the state in the conditional release hearing. The attorneys from each county should cooperate.

- The court's determination of a county of domicile is final and applies to future proceedings relative to the commitment or release of a SVP. (Welf. & Inst. Code §§ 6608, subd. (b). 6608.5.)

Existing law provides that a conditional release hearing in a case in which the county of domicile has been determined by the court, shall proceed as follows:

- The court, upon deeming that a conditional release petition is not frivolous, to provide notice to the attorney for the committed person, the designated attorney for the county of commitment, the attorney for the county of domicile and the Director of State Hospitals of the date of the conditional release hearing at least 30 days prior to the hearing.

- Provides that representation of the state at the conditional release shall be the attorney for the county of commitment unless the attorney for the county of domicile has been deemed to represent the state. (Welf. & Inst. Code § 6608, subd. (c.).)

Existing law provides, if a committed person has been conditionally released by a court to a county other than the county of domicile – the county of placement - and the jurisdiction of the person has been transferred to that county, the notice required for a subsequent conditional release hearing is to be given to the designated attorney of the county of placement, who will represent the state in any further proceedings. (Welf. & Inst. Code § 6608, subd. (d).)

Existing law provides that if the committed person has been placed on conditional release in a county other than the county of commitment, jurisdiction of the person shall, upon the request of the designated attorney of the county of placement, be transferred to that county. (Welf. & Inst. Code § 6608.5, subd. (g).)

This bill provides that where updated or replacement evaluations have been prepared, the attorney petitioning for commitment and the SVP patient's counsel "shall have the same *access* to records as an [expert psychologist or psychiatrist] evaluator." The court shall issue a subpoena or court order for those records upon request. The attorneys may only use the records in proceedings under this article and shall not be disclose them for any other purpose. The records are confidential to the extent otherwise provided by law.

This bill does not limit the access of the prosecutor and counsel for an SVP patient or alleged SVP to records relied upon by the evaluators.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> In 1996, the Legislature created the Sex Offender Commitment Program to target a small, but extremely dangerous subset of "sexually violent predators" (SVPs) who present a continuing threat to society because their mental disorders predispose them to engage in sexually violent behavior. Specifically, an SVP is a person who was previously convicted of a sexually violent offense and committed to prison for that or another offense. Prior to release from prison, experts from the Department of State Hospitals evaluate the inmate to determine if he is likely, because of a mental disorder, to commit a sexually violent offense if released. The person is then entitled to a trial in which the prosecutor must establish beyond a reasonable doubt that the experts' opinions are correct. If the jury or court agrees, the person is committed to a state hospital as an SVP.
>
> Despite the critical role DSH evaluations play in the SVP commitment process, as the California State Auditor cited in its March 2015 report, the California Department of State Hospitals "has not ensured that it conducts these evaluations in a consistent manner" and have noted "instances in which evaluators did not demonstrate that they considered all relevant information."
>
> The court in *Albertson v. Superior Court* (2001) 25 Cal. 4th 796, held that Welfare and Institutions Code (WIC) Section 6603 grants express authority for updated expert evaluations and clarified an exception to the general rule of confidentiality of treatment records that allows the prosecutor "access to treatment record information, insofar as that information is contained in an updated evaluation." Some trial courts have interpreted this language to grant the DA access only to treatment information and not to the records themselves. Section 6603 states that the updated evaluations shall include a review of medical and mental health records. It does not explicitly grant prosecutor's access to the records, nor did it explicitly deny or limit access. The *Albertson* court noted that "in a SVPA proceeding, a district attorney may obtain, through updated mental evaluations otherwise confidential information concerning an alleged SVP's treatment." Whether the DA is granted direct access to the records, or only allowed to access records relied upon by the evaluators, depends upon each judge's reading of *Albertson*. As a result, the issue is repeatedly litigated and the results vary throughout California.
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> In *Seaton v. Mayberg* (2010) 610 Fed.3rd 530, 539, the U.S. Ninth Circuit court held that sexually violent predator evaluations fall within a number of long-established exceptions to the confidentiality of medical communication. These include cases of restraint due to insanity, contagious diseases, abuse of children and gunshot wounds. In *People v. Martinez*, the 4th District Court of Appeal held that it is not a violation of the California right to privacy (to provide copies of mental health treatment records to the prosecutor in an SVP case. (*People v. Martinez* (1994) 88 Cal App 4th 465.

> Some of California's most violent sexual predators can be released back into society if complete information is not available to prosecutors and defense lawyers at the time the predator's cases are being reviewed. This bill is needed to help ensure such mistakes are prevented in the future, providing more peace of mind to already traumatized victims, their families and the public at large.
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> According to the National Intimate Partners and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, there are an estimated two million female victims of rape in California, and estimated 8.5 million survivors of sexual violence, other than rape, in the United States.
>
> Twenty others states and the federal government allow involuntary civil commitment of sexually violent predators. California is the only state that does not have a specific legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

2. SVP Law Generally

The Sexually Violent Predator Act (SVPA) establishes a civil commitment scheme for sex offenders who are about to be released from prison. The DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. A person may be deemed a SVP if: (a) the person has committed specified sex offenses against one or more victims; (b) he has a diagnosable mental disorder that makes him[2] 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

[2] Virtually all SVPs have been men.

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, 1185-1187.) 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.) The standards and procedures for conditional release proceedings were changed by SB 295 (Emmerson) Ch. 182, Stats. 2013.

3. Extent of Confidentiality of Psychotherapy Treatment Records of Persons Committed as SVPs and Alleged SVPs

a. *Privacy Rights Generally and the Psychotherapist-Patient Privilege*

The California Constitution includes an explicit right to privacy. (Art. I, § 1.) The "penumbras" of specific rights in the United States Constitution include a right to privacy for matters relating to family and procreation. (*Griswold v. Connecticut* (1965) 381 US. 479, 481-486; *Roe v. Wade* (1973) 410 U.S. 113.) The United States Supreme Court has not clearly described a more general right to privacy, except as is created by the Fourth Amendment right to be free from unreasonable searches and seizures. (*People v. Gonzales* (2013) 56 Cal.4th 353, 370-372.)

The California Evidence Code includes a psychotherapist-patient confidentiality privilege. (Evid. Code § 1014.) The patient is the holder of the privilege and the privilege is substantially broader than the doctor-patient privilege. (*People v. Gonzales*, *supra*, 46 Cal.4th, at p.384.) The privilege applies apart from any privacy rights a person may have in medical records generally.

b. *Involuntary Forensic Mental Health Treatment*

The SVP law and program is one of a number of "forensic" involuntary commitment categories in California. Forensic patients are involuntarily committed to DSH from the criminal justice system for treatment. Forensic patients include mentally disordered offenders (MDO), persons found not guilty by reason of insanity (NGI) and defendants who are incompetent to stand trial (IST). Forensic patients comprise over 90% of DSH patients. DSH also treats is true civil commitment patients pursuant to the Lanterman-Petris-Short (LPS) Act. An LPS patient is a person with a mental illness who is either gravely disabled and cannot care for himself or herself, or is a danger to self or others. (Welf. & Inst. Code §§ 5000-5550.)

As described above, an SVP is involuntarily committed for mental health treatme*nt because he has a mental disorder that makes it likely that he will engage in sexually violent and* predatory sex crimes if released into society. Nevertheless, the SVP is constitutional because it "establish[es] a nonpunitive, civil commitment scheme covering persons who are to be viewed, "'not as criminals, but as sick persons.'" (*Hubbart v. Superior Court* (*People*) (1999) 19 Cal.4th 1138 1166-1167; Welf. and Inst. code § 6250.)

c. Treatment *and Confidentiality in SVP Commitments*

Generally, records of treatment of DSH patients, including SVP records, are confidential, unless otherwise specified. (Welf. & Inst. Code 5328.)[3] Section 5238 states that "[a]ll information and

[3] However, the confidentiality and other rules concerning treatment of mentally disordered offenders, persons not guilty by reason of insanity and persons who are incompetent to stand trial can be described as a patchwork of

records obtained in the course of providing services under… Division 6 [including SVP law] to either voluntary or involuntary recipients of services shall be confidential." (See, *Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376,)

However, subdivision (c) of Section 6603 creates a limited exception to confidentiality rules in the context of updated or replacement expert evaluations on the issue of whether a person is an SVP: Under section 6603, subdivision (c)(1), the People may obtain updated evaluations of an alleged SVP and obtain access to "otherwise confidential treatment information … *to the extent such information is contained in an updated mental evaluation*." (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 807, italics added.)

The Supreme Court recently reiterated the limitations on the prosecution's access to treatment information, specifically holding that section 6603 does not authorize disclosure of therapy records directly to the People but authorizes review of such records by the independent evaluators and grants the People access to otherwise confidential treatment information only to the extent it is contained in the updated mental evaluation. (*People v. Gonzales* (2013) 56 Cal.4th 353, 379, fn. 11.)

The SVP law requires that an SVP be given or offered treatment if the state has proved that he is too dangerous to be released into society after he has served his full prison term. It appears that the most complete way to determine if an SVP patient continues to pose an unacceptable danger is through an evaluation of his or her most recent psychiatric records, as well as past reports and transcripts. However, review of treatment records for purposes of recommitment proceedings raises constitutional privacy and statutory confidentiality issues. (*Sporich v. Superior Court* (2000) 77Cal.App.4th at pp. 426-427.)[4]

The sponsor and author cite *People v. Martinez* (1994) 88 Cal.App.4th 465 in explicitly or implicitly arguing that an SVP or alleged SVP has little or no expectation of privacy in any of his medical or psychological records, including records of individual psychotherapy sessions. It does not appear that *Martinez* can be read that broadly, although the opinion includes some statements to that effect. The court in *Martinez* also recognized that an SVP patient has substantial privacy expectations or rights in medical or psychological matters, including psychotherapy records that are generally protected by the psychotherapist/patient privilege. The court, nevertheless, held that the state's interest in the records outweighed Martinez's privacy interests, although the opinion can be read as holding that giving the prosecutor access to psychotherapy records was error, although harmless in the context of the SVP trial. (*Id*., at p 479.). Further, the court specifically rejected a privacy claim as to the records *relied upon by the experts who evaluated Martinez*. The court held:

> The examination of records by the prosecutor was harmless. The relevant information in the records was available to the prosecutor in summary form in the reports from Drs. Vognsen and Malinek. Defendant concedes that these witnesses

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statutes and court decisions. For example, there are Evidence Code provisions concerning MDOs and specific provisions authorizing release of records where specified forensic patients are accused of a crime in a DSH facility. (Welf. & Inst. Code 5328.1.)

[4] The core holding in *Sporich* was that prosecutor could not obtain updated or new evaluations for a commitment proceeding. The Legislature superseded this holding by granting express authority for the state to obtain updated or new evaluations in Welfare and Institutions Code Section 6603, subdivision (c) – the section and subdivision considered by this bill.

> were authorized to examine and consider defendant's records, and because they relied upon these records in forming their opinions, it was proper for the prosecutor to examine them concerning this information. (See *People v. Visciotti* (1992) 2 Cal. 4th 1, 81["It is proper to question an expert about matter on which the expert bases his or her opinion and on the reasons for that opinion"].) Moreover, their testimony constituted substantial, if not compelling, evidence to support the trial court's decision to sustain the commitment petition. Consequently, any impropriety by the prosecutor in reviewing defendant's records was harmless under any standard of review. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal. 2d 818.) (People v. Martinez, supra, 88 Cal.App.4th 465, 482.)

The court in *Martinez* also appears to have relied upon upheld the disclosure of Martinez's treatment records based on the "dangerous patient" exception in Evidence Code Section 1024 to the confidentiality of psychotherapy records.[5] (*Id*., at p. 479-484.) It appears that the court applied the dangerous patient exception because the purpose of the former MDSO law and the SVP law is to protect the public from sexual crimes. Such reasoning could arguably establish a blanket exception to confidentiality in any involuntary commitment based on the danger to the public that flowed from a person's mental disorder.

The California Supreme Court in *People v. Gonzales*, supra, 56 Cal.4th 353, held that the dangerous patient exception does not, per se, authorize disclosure to the prosecutor in a SVP case of the alleged SVP or SVP patient's psychotherapy records. (*Id*., at pp. 959-960.) The dangerous patient exception allows disclosure of confidential treatment information to prevent a specific and imminent harm. Gonzalez's holding that the dangerous patient exception does not generally apply in an SVP case does not, however, tell us when prosecutors can get access to such records.

This bill would essentially eliminate the restrictions and limitation imposed on the state in seeking to obtain treatment records that were considered in updated evaluations. The sponsor – the Los Angeles Attorney – emphasizes the public safety purpose of the SVPA and essentially argues that any right or expectation of privacy for an SVP in his treatment records must yield to the prosecutor's need to obtain all information necessary to establish that a person is an SVP or remains an SVP.

d. *Federal Court Opinion noted in Author's Background Material– Seaton v. Mayberg*

The author's background cites a decision of the Federal 9th Circuit Court of Appeal in arguing that an SVP or an alleged SVP has no viable claim of confidentiality or privacy in treatment records:

> In a section 1983 civil rights claim, the Ninth Circuit court evaluated the claim and determined that there is no constitutional right to privacy in medical records protected by the due process clause. "Whatever constitutional right to privacy of medical information may exist, the California civil commitment procedure for sexually violent predators falls outside it." (*Seaton v. Mayberg* (2010) 610 P.3rd

[5] The opinion in *Martinez* analyzes SVP privacy and confidentiality from a number of perspectives, without clearly explaining the basis for its ruling. The opinion can arguably be cited as supporting opposing arguments.

> 530, 539.) The court set forth several examples where those without criminal convictions have no right to privacy and found that a sexually violent predator evaluation falls within those long established exceptions to the confidentiality of medical communications. Other public health and safety requirements overcoming a right to privacy include cases of restraint due to insanity, contagious diseases, abuse of children, and gunshot wounds. ...California is the only state that does not have a legislative provision granting prosecutors access to mental health and medical records for the purpose of carrying out sexually violent predator commitment law.

Seaton concerned the confidentiality of the records of a prison inmate who was being evaluated as an alleged SVP, not treatment records of a person already committed to the SVP program. (*Id*., at pp. 532-533.) *Seaton* can be read as holding that the federal constitution does not include a substantial right of privacy beyond family and procreative matters. Specifically the court stated that constitutional protections do not extend to medical records generally, contrary to the assumptions of many. For example, the privacy protections in HIPPA cannot be asserted by an individual citizen. (*Id*., at pp. 533-541.)

e. *California Courts and Seaton*

California courts have considered *Seaton* and noted that the opinions of lower federal courts concerning federal constitutional issues, although persuasive, are not binding on California courts. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) These California decisions have found that SVP treatment records are essentially presumed to be confidential until a contrary rule is demonstrated. (*People v. Gonzales*, *supra*, 56 Cal.4th 353, 387, fn. 19.)

f. *SVP Patients may be Reluctant to Engage in Psychotherapy if the Records are Completely Open to Prosecutors as Evidence that a Person is or Remains an SVP*

The policy basis for the confidentiality of psychotherapy records has been long recognized by California courts: "[A]n environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy." (*In re Lifschutz* (1970) 2 Cal.3d 415, 422.) This bill squarely presents the issue of how this principle should be applied to SVP treatment. It can be argued that if all therapy records are open to prosecutors, SVP patients may be particularly reluctant to be truthful in therapy, greatly reducing the effectiveness of treatment. If all psychotherapy records are available to the prosecutor, an SVP would have a considerable incentive to be dishonest and attempt to manipulate his therapist in the hope of creating a record that he is no longer a sexual predator.

Prior to 2006 - when an SVP was subject to recommitment every two years - DSH personnel noted that many SVP patients did not actively engage in treatment because they were afraid that admissions of prior sexual misconduct would be used against them at a recommitment trial. Under current law, an SVP is committed indefinitely. He must essentially create a record that he is no longer an SVP, rather than hope that the prosecutor would not prevail at a recommitment trial

As noted above, the SVP law is constitutional because its purpose is treatment of mentally disordered persons, not punishment or preventive detention. (*Hubbart v. Superior Court* (*People*), *supra*, 19 Cal.4th 1138 1166-1167.) If all psychotherapy records are open to

prosecutors, SVP patients will likely argue that the records simply become evidence for prosecutors of SVP status, equivalent to evidence of guilt at a criminal trial.

Should this bill be enacted, the Legislature in coming years may wish to review how the opening of all treatment records to prosecutors changes the conduct of SVP patients, the matters considered at trial and trial outcomes. Committee members may wish to consider whether access to psychotherapy records by prosecutors should be obtained through a motion to the court in which the prosecutor can establish good cause for release of the records.

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