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SFA BILL ANALYSIS

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Senate Bill 649 (Substitute S-3 as passed by the Senate)
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 11-16-98

RATIONALE

Kansas enacted its Sexually Violent Predator Act in 1994 to provide for the civil commitment of certain violent sexual offenders who have completed their prison terms but suffer from a "mental abnormality" or "personality disorder, and are likely to engage in "predatory acts" of violence. The law, aimed at sexual predators, was declared unconstitutional by the Kansas Supreme Court in 1996, but upheld by the U.S. Supreme Court in a 5-4 ruling in *Kansas* v *Hendricks*, 1175 S.Ct. 2072 (1997). (See **BACKGROUND** for more information.) It has been suggested that there should be a similar law in Michigan aimed at violent predators who are approaching release from prison but are determined to pose a continuing threat to the public, such as Donald Miller, who confessed to killing four women in 1979. Miller was allowed to plead to four lesser charges in exchange for the locations of his victims' bodies and was sentenced to 30 to 50 years. Many people were concerned that Miller could be released in February 1999 if he were awarded 10 years of special good time for model behavior, or in 2009 when his sentence would expire (although he was recently sentenced to an additional 20 to 40 years for possessing a weapon in prison and will not be eligible for release sooner than 2018). Without a civil commitment procedure, it is feared that dangerous felons, such as Miller, may be back on the street when their criminal sentence is served.

CONTENT

The bill would amend the Mental Health Code to establish procedures for the civil commitment of a violent predator, after he or she had served a criminal sentence. The bill would do all of the following:

- **Require the Attorney General and each victim requesting notification to be notified when a violent offender who could be a "violent predator" under the bill was within six months of release from incarceration or the expiration of his or her maximum sentence.**
- **Require a trial to determine whether a person was a violent predator.**
- **Provide for the commitment of a person determined to be a violent predator.**
- **Establish provisions for the filing and review of a petition for discharge.**
- **Include legislative findings regarding the existence, danger, and treatment needs of violent predators.**

Definitions

"Violent predator" would mean a person who had been convicted of a "violent offense"; had committed two or more murders or voluntary manslaughters separate from and not arising out of the incident or incidents that were the basis for the "violent offense" as certified by court records of conviction in this State, another state, Federal court, or a foreign country; and who suffered from a "mental abnormality" that made him or her likely to engage in future "predatory acts" of violence.

"Violent offense" would mean any of the following:

- Assault with intent to commit murder (MCL 750.83).
- Attempted murder, solicitation to commit murder, first-degree murder, or second-degree murder (MCL 750.91, 750.157b(2), 750.316, & 750.317).
- Poisoning another person with an amount sufficient to cause death (MCL 750.436(2)).
- First-degree criminal sexual conduct (CSC) (MCL 750.520b).

Violent offense also would include a felony under Federal law or the law of another state substantially

corresponding to one of those offenses.

"Mental abnormality" would mean a congenital or acquired condition that affected a person's emotional or volitional capacity and predisposed him or her to commit violent offenses to a degree that rendered the person a menace to the health and safety of others.

"Predatory act" would mean an act directed toward a person for the primary purpose of victimization.

Notice and Petition

If the Department of Corrections (DOC) had jurisdiction over a person who was convicted of a violent offense, and determined that the person could be a violent predator, the DOC, within six months before the anticipated date of the expiration of the person's maximum sentence or anticipated release date, would have to provide written notification of the date of release to the Attorney General and to each victim who had requested notification of any change in the person's status under Crime Victim's Rights Act. If the DOC or DOC employee in good faith made a determination or gave notice in compliance with these provisions, the DOC or employee would not be liable in a civil action for damages based on the determination or notice.

The Attorney General could file a petition alleging that the person was a violent predator and stating sufficient facts to support the allegation, if the person were convicted of a violent offense and his or her sentence were about to expire, or had expired, on or after January 1, 1999; and had committed two or more murders or voluntary manslaughters that were separate from and did not arise out of the incident or incidents that were the basis for the violent offense, as evidenced by a certified copy of the court record of a conviction in this State, another state, Federal court, or a foreign country.

Upon the filing a petition under the bill, the judge would have to determine whether there was probable cause to believe that the person named in the petition was a violent predator. If the judge determined that probable cause existed, he or she would have to order that the person be evaluated by the Center for Forensic Psychiatry to determine whether he or she was a violent predator. The DOC would have to accept the person back after the evaluation. The person could not be released before trial. If his or her maximum sentence would expire before trial, the court would have to order the person to be confined in a secure facility.

Trial/Commitment

Within 45 days after a petition was filed, the court would have to conduct a trial to determine whether the person was a violent predator. The person alleged to be a violent predator, the Attorney General, or the judge would have the right to demand a jury trial. If no jury were demanded, the trial would be before the court. At all stages of the proceedings, a person subject to the bill would be entitled to the assistance of counsel. If the person were indigent, the court would have to appoint counsel to assist him or her.

If a person alleged to be a violent predator were subjected to an examination under the bill, he or she could retain an expert or professional person of his or her choice to perform an examination on his or her behalf. The selected expert or professional could have reasonable access to the person for the purpose of examination, and to all relevant medical and psychological records and reports. If the person were indigent, the court, upon his or her request, would have to assist the person in obtaining an expert or professional to perform an examination or participate in the trial on the person's behalf.

In a trial conducted under the bill, the court or jury would have to determine whether, beyond a reasonable doubt, the person was a violent predator. If the court or jury were not satisfied beyond a reasonable doubt that the person was a violent predator, the court would have to order his or her release.

If the court or jury determined that the person was a violent predator, he or she would have to be committed to the custody of the Department of Community Health (DCH) in a secure facility for control and treatment until the person's mental abnormality had changed so that he or she was safe to be discharged. The control and treatment would have to be provided at a facility managed by, or under contract to, the DCH and could not be located on the grounds of a State psychiatric hospital or regional center for developmental disabilities unless the DOC and the DCH certified that the facility was sufficiently appropriate and secure for that person.

A person committed under the bill would have to be examined at least once every three years. The person could retain a qualified expert or other professional person to examine him or her. If the person were indigent and requested it, the court could appoint a qualified expert or other professional to conduct the examination. The

expert or professional would have access to all records concerning the person. The DCH would have to provide an annual report to the court that committed the person.

Petition for Discharge

If the DCH Director determined that the person's mental abnormality had changed so that he or she was not likely to engage in future predatory acts if released, the DCH Director would have to authorize the person to petition the court for discharge. The petition would have to be served upon the court and the Attorney General. The Attorney General would have to notify each victim who was required to be notified by the DOC under the Crime Victim's Rights Act.

Upon receiving a petition for discharge, the court would have to order a hearing to be held within 45 days. The Attorney General would have to represent the State and would have the right to have the petitioner examined by an expert or professional person of his or her choice.

A hearing on a petition for release would have to be before a jury, if demanded by either the petitioner or the Attorney General. The Attorney General would have the burden of proving beyond a reasonable doubt that the petitioner's mental abnormality remained to the extent that the petitioner was not safe to be discharged and that, if discharged, would be likely to commit one or more future predatory acts of violence.

A person also could petition the court for discharge once every 12 months, without the approval of the DCH Director. The DCH Director would have to give the committed person an annual written notice of his or her right to petition the court for release over the Director's objection. The notice would have to contain a waiver of rights. The DCH Director would have to forward the notice and waiver form to the court with the annual report required under the bill.

If a committed person petitioned for discharge without the Director's approval, the court would have to set a show cause hearing to determine whether there were facts that warranted a hearing on whether the person's condition had changed so that he or she was safe to be discharged. The committed person would have a right to legal representation at the show cause hearing, but would not be entitled to be present at that hearing. If the court determined at the show cause hearing that there was probable cause to believe that the person's mental abnormality had changed so that the person was safe to be discharged and would not engage in future predatory acts of violence if discharged, the court would have to set a hearing on the issue. A committed individual would be entitled to be present at that hearing and to have the benefit of all constitutional protections afforded to him or her at the initial commitment proceeding.

The Attorney General would have to represent the State and would have the right to a jury trial and to have the committed person evaluated by experts chosen by the State. The committed person also would have the right to have experts evaluate him or her on his or her behalf. The court would have to appoint an expert if the person were indigent and requested an appointment. The Attorney General would have the burden of proving beyond a reasonable doubt that the committed person's mental abnormality had not changed, that the person was not safe to be discharged, and that, if released, the person would engage in one or more future predatory acts of violence.

The bill states that nothing in it would prohibit a person from filing a petition for discharge. If a person had previously filed a petition without the approval of the DCH Director and the court determined, either upon review of the petition or following a hearing, that the petition was frivolous or that the petitioner's condition had not changed sufficiently for him or her to be discharged, the court would have to deny a subsequent petition unless the petition contained facts upon which a court could find that the condition of the petitioner had changed so that a hearing was warranted. Upon receiving a first or subsequent petition from a committed person without the approval of the DCH Director, the court would have to review the petition and determine if it was based on frivolous grounds and, if so, would have to deny the petition without a hearing.

Legislative Findings/Intent

The bill states the following findings of the Legislature: "The legislature finds that a small but extremely dangerous group of violent predators exists who do not have a mental illness that renders them appropriate for the existing civil commitment process that is designed to provide treatment to individuals with serious mental illness. The legislature also finds that the likelihood of a violent predator engaging in repeat acts of predatory violence is high. The legislature also finds that the prognosis for curing this small group of violent predators is poor, that the treatment needs of the population are very long-term, and that the treatment modalities for this population are

very different from the traditional treatment modalities for individuals who are appropriate for commitment and treatment under this code."

The bill states that, "It is the intent of the legislature to separate and preserve the funds appropriated for the treatment of individuals under the other chapters of this code from the funds appropriated for the administration of..." the bill.

BACKGROUND

The Sexually Violent Predator Act enacted in Kansas requires a judge or jury to decide beyond a reasonable doubt that a person suffers from a "mental abnormality" or "personality disorder" before involuntary commitment for care and treatment. Any person committed under the Act is entitled to an annual evaluation to determine his or her mental status. Leroy Hendricks, a convicted child molester, was the first to be committed under the Act at the end of his prison sentence. He challenged the constitutionality of the Act on due process, double jeopardy, and ex post-facto grounds. In 1996, the Kansas Supreme Court invalidated the Act, ruling that substantive due process was denied because a precommitment condition of "mental abnormality" did not constitute a finding of "mental illness". The U.S. Supreme Court, however, upheld the Act and declared that its definition of "mental abnormality" satisfies substantive due process rights, the Act does not establish criminal proceedings or a second prosecution, and involuntary confinement under civil commitment is not punitive in nature.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

As the bill states, the existing civil commitment process is designed to treat individuals with serious mental illness. There is a small group of extremely dangerous predators, however, who do not have a mental illness for which the current commitment process is appropriate, but who have a high propensity to engage in repeat acts of violence. According to the bill's findings, the treatment needs of these predators are very long term, and the methods of treating them are considerably different from the modes of treating individuals who otherwise are subject to commitment under the Mental Health Code. The bill therefore would establish procedures enabling the State to hold repeat dangerous offenders until they were deemed no longer a threat to society. This carefully and narrowly drafted approach is justified by the proven danger posed by a few violent predators. If an offender has served his or her criminal sentence, but is still afflicted with a mental abnormality that makes the individual likely to engage in future predatory acts of violence, the State should have a mechanism in place to protect society from that offender.

Opposing Argument

Involuntary civil commitment of a criminal determined to be a "violent predator" would deny due process of law. Since the bill mirrors similar legislation in Kansas, it is important to note that although the decision was overturned by the U.S. Supreme Court, the Kansas Supreme Court in 1996 declared that the Sexually Violent Predator Act denied due process because, in order to commit a person involuntarily in a civil proceeding, under substantive due process a state must prove by clear and convincing evidence that the person is both mentally ill and dangerous to himself or others. The court determined that the Act's definition of "mental abnormality" (which this bill virtually adopts) did not satisfy the "mental illness" requirement in the civil commitment process. The U.S. Supreme Court also stated that "... freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action'".

Response: The bill would provide sufficient due process for criminals who may still pose a threat to any community into which they may be released. Only those criminals determined beyond a reasonable doubt to be a "violent predator" by a court or jury, after a trial, would be subject to the civil commitment provisions of the bill. The bill also would allow the committed person to petition the court for discharge and would require the Attorney General to prove beyond a reasonable doubt that the person's mental abnormality continued to pose a threat. The bill would reflect the opinion in *Kansas* v *Hendricks*, in which the U.S. Supreme Court held that the Kansas Act's definition of "mental abnormality" satisfied substantive due process requirements. Although the Court stated that a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify involuntary commitment, the Court cited prior Supreme Court decisions that consistently upheld involuntary commitment statutes when they coupled proof of dangerousness with proof of an additional factor, such as mental illness or mental abnormality. The Court held that the Kansas law unambiguously required a finding of dangerousness as a prerequisite to civil commitment and then linked it to the existence of a "mental abnormality" or "personality disorder" that

makes it difficult or impossible for the person to control the dangerous behavior. The Court stated that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context.

Opposing Argument

The bill would provide additional punishment without an additional conviction. It would be unjust to confine offenders based on what they *might* do in the future, not as punishment for crimes already committed. The decision for punishment should be made during the sentencing hearing and not after the offender served the sentence. Furthermore, as the U.S. Supreme Court pointed out, the Kansas law does not make a criminal conviction a prerequisite for commitment, which suggests that that state is not seeking retribution for a past misdeed. Under the bill, however, a person deemed a violent predator would have to have been convicted of a criminal offense.

In addition, according to the American Psychiatric Association's guidelines for commitment, a person's disorder must be treatable, the person's mental condition must be seriously deteriorating, or the person must be unable to make informed decisions. The bill states a legislative finding that the prognosis for curing violent predators is poor and the treatment needs are long term. Thus, indefinite confinement dependent upon a change in mental status would seem to have a punitive intent rather than the civil aim of treatment.

Response: The bill would not violate the double jeopardy prohibition because it would not impose a criminal penalty. After the criminal had served his or her sentence in a prison, if he or she were determined to be a "violent predator", then the person would be committed in a secure facility for control and treatment until he or she was safe to be discharged. The bill's conditions for confinement reflect the conditions for any involuntary commitment patient in a State mental institution. The indefinite confinement does not have a punitive intent because discharge would depend upon whether the person's "mental abnormality" had changed so that he or she no longer would pose a danger to others.

The U.S. Supreme Court found that the Kansas law does not establish criminal proceedings because it does not implicate retribution or deterrence, the primary objectives of criminal punishment. Although the Court mentioned that the Kansas law does not make a criminal conviction a prerequisite for commitment, the Court also examined other factors, such as the absence of a "scienter" (guilty knowledge) requirement. Further, the Court noted that the law does not function as a deterrent because persons suffering from a "mental abnormality" or "personality disorder" are not deterred by the threat of confinement.

Opposing Argument

The bill reveals a fundamental contradiction in the idea of confining sex offenders to mental facilities after they serve their prison sentences. An incarcerated offender is considered responsible enough to be criminally punished for his or her violent actions, yet civil commitment is based on the premise that an individual is not responsible for his or her future actions. Efforts should concentrate on implementing more effective sentencing laws, rather than turning mental facilities into prisons. The purpose of the mental health system is to treat or care for people who are mentally incompetent or are unable to make choices and accept responsibility for their choices, while the purpose of the criminal justice system is punishment for a crime that was already committed by a person responsible for his or her actions. This proposal could open the way for civil commitment of other types of violent felons who have trouble controlling their impulses. In addition, the cost of confining violent predators in mental health facilities should be considered, since that confinement costs three to five times more than imprisonment.

Response: The bill attempts to balance the safety of the community with the credibility and competence of the justice system.

Opposing Argument

The bill is unnecessary because current laws already provide for sentencing first- and second-degree killers to life in prison. There are plenty of options available for keeping dangerous violent predators behind bars. In addition to Donald Miller, the bill could apply to six other Michigan inmates as well. According to the State Appellate Defender's Office, even if Miller had not been found guilty of possessing a weapon, it is likely that the warden would not have granted special good time and the parole board would not have granted parole.

Response: The bill is designed to be used narrowly and infrequently in certain instances in which a "violent predator", as defined under the bill, was near release from incarceration or the expiration of his or her maximum sentence. The bill would provide a back-up system to protect the public from dangerous criminals.

Legislative Analyst: N. Nagata

FISCAL IMPACT

The bill is based on a similar Kansas law that was upheld by the United States Supreme Court last year. The major cost would be due to treatment of those judged to be "violent predators" in a secure mental health facility separate from typical mental health State hospitals.

The cost of treatment for individual at secure mental facilities is in the range of $60,000 to $100,000 per year. There is no clear evidence to date that large numbers of similar individuals will be covered by the law in Kansas; the number of those in Michigan who would be institutionalized is likely small, but uncertain.

Fiscal Analyst: S. Angelotti

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