

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 405 (Senator Stone, *et al.*)

Judicial Proceedings

Criminal Procedure - Sexually Violent Offender in Need of Commitment

This bill creates a procedure for the civil commitment of certain sexually violent offenders.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$8.2 million in FY 2011 and by \$46.4 million in FY 2015, excluding likely capital costs. Future year costs reflect annualization, inflation, and 45 new patients annually. Revenues are not affected.

(in dollars)	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	8,168,200	17,982,200	27,442,100	36,905,600	46,372,900
Net Effect	(\$8,168,200)	(\$17,982,200)	(\$27,442,100)	(\$36,905,600)	(\$46,372,900)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Minimal. While the bill would generate an indeterminate number of additional trials in the circuit courts, the total number is assumed to be minimal for any individual circuit and is not anticipated to have a measurable effect on the expenditures of the Judiciary.

Small Business Effect: Potential meaningful increase in business opportunities for psychiatrists and psychologists who are likely to be called by the State or the defense in trials and review hearings relating to the civil commitment of sexual offenders.

Analysis

Bill Summary: This bill provides civil commitment procedures by which some persons convicted of a sexually violent offense may be placed in the custody of the Department of Health and Mental Hygiene (DHMH), in a facility owned and operated by DHMH, until the person is not likely to engage in a predatory sexual act if released. The bill requires the Attorney General to make determinations as to whether such persons meet a statutory definition of a sexually violent offender in need of commitment prior to their release from the custody of the Division of Correction (DOC). The actual commitment of such a person must be made via a circuit court finding, as specified.

The bill defines a sexually violent offender in need of commitment as a person who (1) has been convicted of a sexually violent offense; and (2) suffers from a mental abnormality or personality disorder that makes the person likely to engage in a predatory act involving a sexually violent offense.

Specifically, the bill provides that the Attorney General must be notified in writing by DOC within 90 days of the anticipated release of a person who has been convicted of a sexually violent offense. The Attorney General must then make the determination as to whether the person meets the criteria of a sexually violent offender in need of commitment. The Attorney General is required to receive recommendations upon which to base such a determination from (1) a review committee of prosecutors appointed by the Attorney General; and (2) a multidisciplinary team consisting of representatives of DHMH and the Department of Public Safety and Correctional Services (DPSCS). Within 75 days of receiving written notice of the prospective release of a person convicted of a sexually violent offense, the Attorney General may petition a circuit court to determine if probable cause exists to believe that the person is a sexually violent offender in need of commitment. If probable cause is found, the court must direct the person to be taken into custody and conduct a trial within 60 days. A person subject to such a proceeding is entitled to counsel and, if indigent, the court is required to appoint counsel.

The bill substantially protects all persons involved in the determination process from civil liability for acts performed in good faith under the provisions of the bill.

The bill provides for the manner in which such a trial may proceed. The defendant, the Attorney General, or the judge may ask for a jury trial. The State has the burden of proof of beyond a reasonable doubt. A person found to be a sexually violent offender in need of commitment must be placed in the custody of DHMH for “control, care, and treatment at a State facility until the defendant’s mental abnormality or personality disorder of the person has so changed that the person is not likely to engage in a predatory act involving a sexually violent offense if released.” The bill provides for specified annual mental examinations, court reviews, notifications, and reports. The bill also provides for release hearings and the criteria upon which a person must be released.

Current Law: Generally, a person convicted of a sex crime or other specified crime in Maryland, including kidnapping and false imprisonment, is required to register with the State sex offender registry upon release from prison or release from court if the person did not receive a prison sentence. Offenders who are required to register in other states and who come to Maryland are required to register upon entering Maryland. Offenders from other states who may not be required to register in the home state are required to register in Maryland if the crime would have required registration in Maryland if committed in Maryland.

Juveniles who are adjudicated delinquent for an act that would constitute first or second degree rape or first or second degree sexual assault if committed by an adult are required to register at the time the juvenile court's jurisdiction terminates for inclusion on the State's sex offender registry if (1) the person was at least 13 years old at the time the qualifying delinquent act was committed; (2) the State's Attorney or the Department of Juvenile Services requests that the person be required to register; (3) the court determines by clear and convincing evidence after a hearing (90 days prior to the time the juvenile court's jurisdiction is terminated) that the person is at significant risk of committing a sexually violent offense or an offense for which registration as a child sexual offender is required; and (4) the person is at least 18 years old. Juveniles who are adjudicated delinquent through the juvenile court system for an act that does not constitute first or second degree rape or first or second degree sexual assault if committed by an adult are not included in the registry.

Maryland has four categories of persons convicted of sexual offenses: (1) a child sexual offender; (2) an offender; (3) a sexually violent offender; and (4) a sexually violent predator.

"Offender" means a person who is ordered by a court to register and who has been convicted of (1) child kidnapping; (2) kidnapping; (3) fourth degree sexual offense, if the victim is under 18; (4) false imprisonment, if the victim is under 18 and the person is not the victim's parent; (5) a crime that involves soliciting a person under 18 to engage in sexual conduct; (6) production or distribution of child pornography; (7) prostitution or related criminal prohibitions if the intended prostitute or victim is under 18; (8) any crime that involves conduct that by its nature is a sexual offense against a person under 18; (9) an attempt to commit any of these offenses; or (10) has been convicted in another state or in a federal, military, or Native American tribal court of a crime that, if committed in Maryland, would constitute one of these crimes.

"Child sexual offender" means a person who has been convicted of (1) sexual abuse of a minor; (2) first or second degree rape or first, second, or third degree sexual offense involving a child under 15 years of age; (3) fourth degree sexual offense involving such a child and has been ordered by the court to register under these provisions; or (4) a crime

in another state or in a federal, military, or Native American tribal court that, if committed in this State, would constitute one of these crimes.

“Sexually violent predator” means a person who (1) is convicted of a sexually violent offense; and (2) has been determined to be at risk of committing another sexually violent offense. Also included under this definition are persons who are or were required to register every 90 days for life under the laws of another state or a federal, military, or Native American tribal jurisdiction.

“Sexually violent offender” means a person who (1) has been convicted of a sexually violent offense; or (2) has been convicted of an attempt to commit a sexually violent offense. “Sexually violent offense” means:

- first or second degree rape; first, second, or third degree sexual offense;
- attempted first or second degree rape or sexual offense;
- assault with intent to commit first or second degree rape or sexual offense; or
- a crime committed in another state or in a federal, military, or Native American tribal jurisdiction that, if committed in Maryland, would constitute one of these offenses.

Sexual offenders are required to register, every three months or every six months, with the Crimes Against Children and Sexual Offender Registry for a term of either 10 years or life depending on the offense. Registration must include a photograph, which must be updated at least annually. The registry is operated by the Sexual Offender Registry unit of DPSCS. Under the State’s sexual offender registration laws, a State’s Attorney may request that a sexual offender be designated a sexually violent predator. Lifetime registration is required for (1) sexually violent predators; (2) persons convicted of a sexually violent offense; (3) persons convicted of child abuse for commission of a sexual act involving penetration of a child under 12 years old; and (4) recidivist sexual offenders.

Background: This bill is modeled after an existing statute in Kansas, the Sexually Violent Predator Act, that established procedures for the civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.”

To date, the constitutionality of the civil commitment provisions in Kansas (and other states) has been upheld. The U.S. Supreme Court sustained the constitutionality of the Kansas statute, in general, finding the statute civil in nature and, as such, nonpunitive. The civil commitment statute for sexual predators in Washington State, which predates the Kansas law, has also withstood constitutionality tests. In 2001, the U.S. Supreme

Court found, in essence, that a state's failure to provide treatment required by law does not turn a sex predator's lawful confinement into unlawful punishment.

However, also in 2001, in *Kansas v. Crane*, the court held that a state must prove convicted sex offenders cannot control themselves if they are to be kept confined after their prison terms expire. Although the ruling did not ban such civil commitments, sexual offenders must be treated the same as other people singled out for involuntary commitment.

The Kansas Legislative Post Audit Committee reviewed the growth of the state program in a performance audit released in April 2005. According to the report, as of March 2005, the Kansas Department of Corrections had 2,423 sex offenders in custody. Since 1998, the number of residents in the civil commitment program increased from 16 to 136. Few offenders are leaving the program. Most have been diagnosed as pedophiles.

Persons civilly committed as sexual predators in Kansas are sent to the Larned State Hospital, a state-owned facility (under the Division of Social and Rehabilitation Services), with a capacity to serve over 450 patients daily. It is the largest psychiatric facility in the state.

According to the 2005 audit report, the percentage of eligible offenders committed to the Kansas program increased from 3% in fiscal 2000 to a peak of 11% in 2003. In fiscal 2000, an average of 1.3 offenders entered the program each month. During the first seven months of fiscal 2005, that average was 2.7.

Since fiscal 2001, annual program costs have increased about 478% (\$1.2 million to \$6.9 million). During that same period, staffing levels increased by 342%, and the number of residents in the program increased by 144%. The program's 2006 budget request was \$7.8 million. With the increased number of residents, the estimated annual cost for treatment and confinement per sexual predator offender in Kansas has decreased from about \$75,000 to \$50,700. In a survey of six other state programs, Kansas found its costs to be the lowest.

The audit report drew the following conclusion: "If current trends continue, Program census and costs will be much greater in the years to come. It appears Kansas will either have to change its policies so that it commits fewer sex offenders to the Program or allows those in the Program to be released sooner, or it will have to reconcile itself to supporting a new class of institutionalized individuals." The Larned State Hospital continues to house the state's sexual offender civil commitments.

Civil Commitment Programs in Other States

A study by the Washington State Institute for Public Policy (March 2005) found it difficult to directly compare reported costs for state programs because the service delivery models vary so much among the states with programs. Frequently, budget figures are spread across multiple parts of state government and not pro-rated to capture the sexually violent offender program portions. In any case, the cost of operating secure facilities for such commitments in the United States is at least \$224 million annually. States with small numbers of program residents will naturally have higher costs per resident.

According to the Sex Offender Civil Commitment Programs Network (SOCCPN), in addition to the federal government, there are currently 20 states with statutes that authorize the confinement and treatment of sexually violent offenders: Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, North Dakota, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. Washington opened a new facility for such commitments in 2004 and California opened a new 1,500 bed facility in 2005, based on a commitment percentage of about 15% of eligible persons over an eight-year period. Florida completed construction on a new Civil Commitment Center in April 2009, at a cost of \$62 million. The Florida facility, which has a maximum capacity of 720, currently houses approximately 675 individuals.

Recent U.S. Supreme Court Case

In January 2010, the U.S. Supreme Court heard arguments in *United States v. Comstock* (08-1224) as to whether Congress had the constitutional authority to enact 18 U.S.C. 4248 authorizing court-ordered civil commitment by the federal government of: (1) “sexually dangerous” persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) “sexually dangerous” persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

Treatment Facility in Maryland

Maryland’s Clifton T. Perkins Hospital Center was established in 1960. The hospital serves as the State’s sole maximum security psychiatric hospital. In the 2006 capital budget, funding was provided to complete design and construction on a new 48-bed maximum security wing to create additional capacity and allow the consolidation of the more difficult forensic mental health clients at Perkins. The services at Perkins include comprehensive treatment for violent offenders of correctional institutions and detention centers who meet the criteria for involuntary commitments and psychiatric treatment for

those patients whose mental illness manifests itself in such aggressive and violent behavior as to render it impossible for them to be treated within the regional State psychiatric hospitals. The new wing is anticipated to open sometime during fiscal 2010, and Perkins will continue to operate at 100% capacity with a total of 262 beds.

Federal Funding for Civil Commitment Programs

Title III of the federal Adam Walsh Act, the Jimmy Ryce Civil Commitment Program, provides for grants to the states for civil commitment programs for sexually dangerous persons. A “civil commitment program” means a program that involves (1) secure civil confinement, including appropriate control, care, and treatment during such confinement; and (2) appropriate supervision, care, and treatment for individuals released following such confinement. The term “sexually dangerous person” means a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation. Title III authorized an appropriation of \$10 million for each of fiscal 2007 through 2010. However, such an appropriation has not been made to date.

State Fiscal Effect: While it is difficult to reliably predict what Maryland’s costs would be under a civil commitment statute for violent sexual offenders, it is known that program costs and growth rates in Kansas and other states have far exceeded earlier estimates. In addition, it is unclear as to when, on average, a sexually violent offender committed as a sexual predator to the “control, care, or treatment” of DHMH might successfully petition for release. In existing programs in other states, very few individuals have been thus far released. In any event, what follows is a broad discussion of the potential costs that could arise from this bill.

General fund expenditures may increase by at least \$8.2 million in fiscal 2011 and by \$46.4 million in fiscal 2015. This estimate is based on the following three assumptions: (1) approximately 350 persons per year are due to be released by DOC based on recent intake and release data (**Exhibit 1**) which would trigger the Office of the Attorney General to seek sexual predator determinations; (2) 45 persons per year (13% of the 350 due for release, based on California’s experience) would be subject to actual commitment; and (3) a staff to patient ratio of 1:5 must be maintained for hospital accreditation purposes as established by the Joint Commission on Accreditation of Healthcare Organizations. In addition, it is assumed that the same professional expertise for multidisciplinary teams would be needed for annual status reviews of committed persons. **Exhibit 2** summarizes the projected costs in fiscal 2011 and 2015.

Exhibit 1
DOC Releases by Qualifying Sex Offense
As of June 30, 2009

Rape – 1 st Degree	39
Rape – 2 nd Degree	107
Attempted Rape	11
Sex Offense – 1 st Degree	17
Sex Offense – 2 nd Degree	51
Sex Offense – 3 rd Degree	108
Assault with Intent to Rape	13
Assault to Rape	2
Total	348

Exhibit 2
Summary of Quantifiable State Costs in Fiscal 2011 and 2015

<u>Agency</u>	<u>FY 2011</u>	<u>FY 2015</u>
DHMH ¹	\$8,038,200	\$46,170,200
Public Defender ²	130,000	202,700
Total	\$8,168,200	\$46,372,900

¹Represents staffing, treatment, and other related costs, but does not include significant eventual capital costs.

²Does not include potential costs for expert witnesses.

Department of Health and Mental Hygiene

It is assumed that persons committed under this bill would be maintained in a maximum security hospital setting such as the Clifton T. Perkins Hospital Center. The per-patient budgeted cost for fiscal 2011, including overhead, based on a census of 238 patients, is \$208,600. It is also assumed that such maximum security costs for the “control, care, or treatment” of sexual predators would grow at a rate of 3% per year.

Accordingly, general fund expenditures for DHMH increase by an estimated \$8.0 million in fiscal 2011 for 34 commitments, which reflects the bill’s October 1, 2010 effective date, as well as a pro-rated patient population adjustment to reflect the gradual nature of annual commitments. This estimate reflects the cost of 18 new positions

(2 physician/psychiatrists, 2 psychologists, 4 social workers, 2 registered nurses, 2 licensed practical nurse (LPN), 4 LPN-security attendants, 1 assistant Attorney General, and 1 office secretary) to participate in evaluations required of the multidisciplinary teams convened by the Attorney General and other duties related to hearings and trials statewide. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses, especially the maximum security costs of hospitalization. The information and assumptions used in calculating the estimate are stated below:

- 350 persons annually for whom sexual predator determinations will be sought by the Attorney General;
- 34 cases in fiscal 2011 and 45 additional cases annually thereafter for which commitment proceedings will be successful; and
- sexual predators will tend not to be successful in achieving release from civil commitment.

Salaries and Fringe Benefits	\$ 938,637
Medical Treatment Costs	7,041,566
Other Operating Expenses	<u>58,026</u>
DHMH FY 2011 Total	\$8,038,229

Future year expenditures reflect (1) full salaries with 4.4% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses. By fiscal 2015, total personnel and operating costs for DHMH are estimated to be \$46.2 million which includes the care, control, and treatment of 214 patients under the bill, reflecting an annual growth rate of 45 new commitments.

In addition, only a limited number of new maximum security patients could be immediately absorbed at a currently operating DHMH facility. While some additional space might be created by moving some current patients to other sites, this bill would eventually, perhaps shortly, give rise to a need for additional maximum security beds at Perkins or elsewhere. Accordingly, the bill could result in the need for a significant amount of additional capital expenditures. Total capital expenditures for design, planning, and construction of the new Perkins' 48-bed high security wing were authorized at about \$11.6 million.

Office of the Attorney General

Costs for the Office of the Attorney General, are included under the costs associated with DHMH's as cited above, for the hiring of a new assistant Attorney General assigned to DHMH. This does not include potential costs for expert witnesses.

Office of the Public Defender

The Office of the Public Defender advises that, based on recent experience in other states, initial trials could be from two to six weeks in duration. In addition, each person is entitled to representation at all annual status review hearings. Assuming that there would be nearly 45 new proceedings per year, it is estimated that an additional two attorneys would be needed to handle this new caseload. The Public Defender also reports that since extensive use would be made of expert witness testimony at the various proceedings, significant additional costs for such witnesses (including travel expenses) would accrue.

Accordingly, general fund expenditures may increase for OPD by an estimated \$130,000 in fiscal 2011, which accounts for the bill's October 1, 2010 effective date. This estimate reflects the cost of two assistant public defenders to handle the new caseload of sexual predator trials and hearings, including background investigations and trial preparation. It includes salaries, fringe benefits, and ongoing operating expenses.

Salaries and Fringe Benefits	\$129,683
Other Operating Expenses	<u>315</u>
OPD FY 2011 Total	\$129,998

Future year expenditures reflect (1) full salaries with 4.4% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses.

Department of Public Safety and Correctional Services

The requirements of this bill will not have any significant effect on the Division of Correction's operations or funding. The division's current operations include procedures for assessing sex offenders' risk to public safety, suitability for release, and registration. This should include procedures for coordinating preparation for trials and hearings. In addition, the bill will have no fiscal impact on the Division of Parole and Probation.

Additional Comments: Assuming the need for a facility to house and treat the subject offender, eventual additional staffing costs would arise. The number of necessary

additional staff, including security personnel, would depend on the size and capacity of the new facility and the actual growth rate of the program.

Additional Information

Prior Introductions: Similar bills were introduced in 1998, 2001, 2002, and 2006. SB 16 and SB 49 of 2006 each received a hearing before the Senate Judicial Proceedings Committee and had no further action taken. SB 280 of 2002 and SB 134 of 2001 each received an unfavorable report from the Senate Judicial Proceedings Committee. All prior bills also received unfavorable committee reports.

Cross File: None.

Information Source(s): Caroline, Howard, Montgomery, and Prince George's counties; Baltimore City; Commission on Criminal Sentencing Policy; Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Department of Juvenile Services; Office of the Public Defender; Department of Public Safety and Correctional Services; Department of Legislative Services

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Analysis by: Guy G. Cherry

Direct Inquiries to:
(410) 946-5510
(301) 970-5510