SB 533

Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 533 (Senator Stone, *et al.*)
Judicial Proceedings

Criminal Procedure - Sexually Violent Offender in Need of Commitment

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

The bill takes effect October 1, 2013.

Fiscal Summary

State Effect: General fund expenditures increase by $5.3 million in FY 2014. Future year costs reflect annualization, inflation, and 45 new patients annually. The estimated expenditures do not include likely expert witness or capital costs. Revenues are not affected.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Revenues	$0	$0	$0	$0	$0
GF Expenditure	0	0	5,311,700	13,463,000	20,841,000
Net Effect	$0	$0	($5,311,700)	($13,463,000)	($20,841,000)

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.

The federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 required all states to register sex offenders, sexually violent predators, and offenders who commit certain crimes against children. These laws have become popularly known as either "Megan's Law" or "Jessica's Law" in memory of children who have been sexually assaulted and murdered by convicted sex offenders.

The federal Sex Offender Registration and Notification Act (SORNA), enacted as Title I of the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248), conditioned receipt of federal grant assistance on conformity by the states with various aspects of sex offender registration provisions, including registration of specified juvenile offenders, collection of specific information from registrants, verification, duration of registration, access to and sharing of information, and penalties for failure to register. Failure to comply with SORNA puts a state at risk of losing 10% of Byrne Justice Assistance grants, which all states use to pay for crime fighting efforts including drug task forces, anti-gang units, police overtime, and other law enforcement activities.

In 2010, Maryland's sex offender registration laws were substantially revised in an effort to comply with SORNA and increase penalties for certain sex offenses committed against minors. Among the enacted provisions, sexual offenders are now sorted into three separate tiers, replacing the four former categories of sexual offenders. A Tier I sex offender must register every six months for 15 years, a Tier II sex offender must register every six months for 25 years, and a Tier III sex offender must register every three months for life. A sex offender is required to register in each county where the offender habitually lives. The term "habitually lives" includes any place where a person visits for longer than five hours per visit more than five times within a 30-day period. A sex offender who is homeless is required to register in person within a specified period of time with the local law enforcement unit in the county where the registrant habitually lives and to reregister weekly while habitually living in the county.

Sex offender registration provisions are applied retroactively to a person who is under the custody and supervision of a supervising authority on October 1, 2010; was subject to registration on September 30, 2010; or is convicted of any crime on or after October 1, 2010, and has a prior conviction for an offense for which sex offender

registration is required. The term of retroactive registration for a Tier I or II sex offender must be calculated from the date of release.

Lifetime Supervision

Lifetime supervision of the following sexual offenders is required for a crime committed on or after October 1, 2010:

- a sexually violent predator;
- a person convicted of first or second degree rape, first degree sexual offense, or certain circumstances of second degree sexual offense;
- a person convicted of attempted first or second degree rape, first degree sexual offense, or the same form of second degree sexual offense cited above;
- sexual abuse of a minor if the violation involved penetration of a child younger than the age of 12;
- a person required to register with the person's supervising authority because the person was at least 13 years old but not older than 18 years old at the time of the act; or
- a person convicted more than once arising out of separate incidents of a crime that requires registration.

For a person who is required to register because the person was at least 13 years old but not older than the age of 18 at the time of the act, the term of lifetime sexual offender supervision begins when the person's obligation to register in juvenile court begins and expires when the person's obligation to register expires, unless the juvenile court finds, after a hearing, that there is a compelling reason for the supervision to continue and thus orders the supervision to continue for a specified time. A court is authorized to sentence a person convicted of a specified third degree sex offense to lifetime supervision and require a risk assessment before that sentence is imposed.

A person subject to lifetime supervision is prohibited from knowingly or willfully violating the conditions of the supervision, with possible imprisonment and/or monetary fines as sanctions. The sentencing court must hear and adjudicate a petition for discharge from lifetime sexual offender supervision. The court may not deny a petition for discharge without a hearing. Further, the court may not discharge a person unless the court makes a finding on the record that the petitioner is no longer a danger to others. The judge who originally imposed the lifetime sexual offender supervision must hear the petition. If the judge has been removed from office, has died or resigned, or is otherwise incapacitated, another judge may act on the matter.

The sentencing court or juvenile court must impose special conditions of lifetime sexual offender supervision at the time of sentencing or imposition of the registration requirement in juvenile court and advise the person of the length, conditions, and consecutive nature of that supervision. Before imposing the special conditions, the court must order a presentence investigation. Allowable special conditions, including global positioning satellite tracking or equivalent technology and required participation in a sexual offender treatment program, are cited in statute. A victim or a victim's representative must be notified of hearings relating to lifetime sexual offender supervision.

Under Maryland law, when the victim is younger than age 13, there is a mandatory minimum, nonsuspendable and nonparolable 25-year sentence for a person at least 18 years old who is convicted of first degree rape or first degree sexual offense. A 15-year nonparolable minimum sentence is required under the same circumstances for second degree rape or second degree sexual offense. The maximum imprisonment for such an offense was set at life in 2010.

Juveniles

A police record concerning a child is confidential and must be maintained separately from those of adults. Unless certain exemptions apply, the contents may not be divulged, except by court order upon a showing of good cause. However, a person who has been 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 must register with a supervising authority at the time the juvenile court's jurisdiction terminates (usually at age 21), 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.

Sexual Offender Advisory Board

The Sexual Offender Advisory Board, created initially in 2006, has several specified reporting requirements including (1) the review of technology for the tracking of offenders; (2) reviewing the effectiveness of the State's laws concerning sex offenders; (3) reviewing the laws of other jurisdictions regarding sex offenders; (4) reviewing practices and procedures of the Parole Commission and the Division of Parole and Probation regarding supervision and monitoring of sex offenders; (5) reviewing developments in the treatment and assessment of sex offenders; and (6) developing

standards for conditions of lifetime supervision based on current and evolving best practices in the field of sex offender management.

The board's duties also include developing criteria for measuring a person's risk of reoffending, studying the issue of civil commitment of sexual offenders, and considering ways to increase cooperation among states with regard to sexual offender registration and monitoring.

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, based on the 2005 study. States with small numbers of program residents will naturally have higher costs per resident. A 2006 survey of states with civil commitment laws by the National Association of State Mental Health Program Directors (NASMHPD) found inpatient treatment costs (per patient, per year) ranging from $40,108 (in Massachusetts) to $237,000 (in the District of Columbia). A February 21, 2011, story in the *Washington Post* reports that "Virginia has expanded the crimes eligible for civil commitment from 4 to 28, and the number of offenders admitted to the program has soared, from one a month, to six to eight a month. The cost is expected to hit $32 million next year – more than 10 times what it was eight years ago."

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, is currently at capacity. The *Washington Post* story cited above also states that Virginia is currently considering the additional capital costs of building a second 300-bed facility for these civil commitments.

According to the 2010 Annual Report of Maryland's Sexual Offender Advisory Board (SOAB), surveys conducted by the Forensic Division of NASMHPD in 2006 and by SOCCPN in 2008 and 2009 "show that there are at least 5,094 individuals confined in sex offender commitment facilities nationally. States with the largest patient populations include California (1,045), Florida (670), Minnesota (565), New Jersey (402), Illinois (365), Wisconsin (349), and Massachusetts (317). Other states report the following numbers: 68 in Arizona; 74 in Iowa; 170 in Kansas; 147 in Missouri; an undetermined number in Nebraska; 2 in New Hampshire; 175 in New York; 60 in North Dakota; 24 in Pennsylvania; 90 in South Carolina; 0 in Texas (where only outpatient commitment is permitted); more than 200 in Virginia; and 285 in Washington State. The District of Columbia serves a population of only 4 offenders committed under a first generation commitment law that no longer is used for new commitments but is still on the books to provide authority for the retention of earlier committees.

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. This case essentially challenged the civil commitment provisions in SORNA applicable only to federal inmates. The Supreme Court held that [t]he Necessary and Proper Clause grants Congress authority sufficient to enact" these provisions.

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 opened in fiscal 2010 and operates at 100% capacity with a total of 238 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 was never made.

Sexual Offender Advisory Board

The 2010 Annual Report of SOAB, released on December 31, 2010, discussed the civil commitment of sex offenders in some detail, and found the process not advisable for Maryland – especially in light of all of the statutory changes enacted in Maryland in 2010.

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 $5.3 million in fiscal 2014, which reflects the bill's October 1, 2013 effective date. This estimate is based on the following four assumptions: (1) approximately 350 persons per year are due to be released by DOC based on recent intake and release data 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; (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; and (4) adequate space is found for the program by fiscal 2014 (though it is more likely that construction of a new facility would eventually be needed). In addition, it is assumed that the same professional expertise for multidisciplinary teams would be needed for annual status reviews of committed persons.

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 2012, excluding staffing and overhead costs, based on a census of 238 patients, is $23,510. It is also assumed that such 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 $5.2 million in fiscal 2014 for 34 commitments, which reflects the bill's October 1, 2013 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 77 new positions (2 physician/psychiatrists, 2 psychologists, 3 assistant Attorneys General, 1 paralegal, 4 social workers, 10 registered nurses, 12 licensed practical nurses (LPN), 40 LPN-security attendants, 2 administrative accountants, and 1 office secretary). 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 2014 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	$4,113,816
Medical Treatment Costs	853,488
Other Operating Expenses	198,639
DHMH FY 2014 Total	**$5,165,943**

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. In each

succeeding year, beginning in fiscal 2015, an equal number of 73 patient care staff positions (absent additional assistant Attorneys General and paralegal), would be required to handle the anticipated patient growth rate of 45 additional persons per year.

In addition, 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 would 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 three new assistant Attorneys General and one paralegal assigned to DHMH. This does not include potential costs for expert witnesses.

Office of the Public Defender

The Office of the Public Defender (OPD) advises that this bill will lead to a significant increase in workloads for assistant public defenders. OPD stated "it is too speculative to determine the fiscal impact." However, in 2010 for a similar bill, OPD advised 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. OPD also reported in 2010 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 $145,726 in fiscal 2014, which accounts for the bill's October 1, 2013 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	$145,405
Other Operating Expenses	321
OPD FY 2014 Total	**$145,726**

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: SB 405 of 2010, a similar bill, received a hearing by the Senate Judicial Proceedings Committee, but no further action was taken. Similar bills were also introduced in 1998, 2001, 2002, and 2006. SB 16 and SB 49 of 2006 each received a hearing before the Senate Judicial Proceedings Committee, but no further action was taken. SB 280 of 2002 and SB 134 of 2001 each received an unfavorable report from the Senate Judicial Proceedings Committee. HB 450 of 2001 received an unfavorable report from the House Judiciary Committee. Other prior bills also received unfavorable committee reports.

Cross File: None.

Information Source(s): Harford, Montgomery, and St. Mary's counties; 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 Legislative Services

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