

Virginia State Crime Commission

Civil Commitment of Sexually Violent Predators

2009

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

During the 2009 Regular Session of the Virginia General Assembly, Delegate Morgan Griffith introduced House Bill 1843, which would have made numerous changes to Virginia's civil commitment laws that pertain to sexually violent predators. A substitute version of this bill was adopted in the House Courts of Justice Committee, and was passed by the House. The engrossed bill was referred to the Senate Courts of Justice Committee, where a substitute was adopted. The bill advanced to the floor of the Senate, where yet another substitute was adopted. The bill then went into conference, and the conference substitute was passed by both the House and the Senate. The enrolled bill was signed into law by the Governor on March 30, 2009. The Senate Courts of Justice Committee requested the Crime Commission review those parts of the engrossed House bill that were not incorporated into the final bill that was enacted.

FINAL VERSION OF HOUSE BILL 1843

House Bill 1843 was enacted into law on March 30, 2009. This Act of the General Assembly made a number of changes to Virginia's laws relating to the process of civilly committing sexually violent predators.

District courts are now required to keep the court files pertaining to certain criminal offenses for a period of fifty years. This is to assist the Office of the Attorney General in obtaining information that may be useful in civil commitment proceedings; to this end, the Attorney General is now permitted access to Juvenile and Domestic Relations district court records, and the Department of Juvenile Justice records, for purposes of handling the civil commitment of sexually violent predators. Also, the Virginia Department of Corrections, the Commitment Review Committee, ("CRC") and the Office of the Attorney General are now allowed to "possess, copy, and use all records, including records under seal" from all state agencies, boards, departments, commissions and courts, to assist them in their respective tasks involving the civil commitment process. The CRC is now clearly authorized to evaluate and make recommendations on all potential respondents, not just those who are in the custody of the Department of Corrections.

Throughout Chapter 9 of Title 37.2 of the Code of Virginia, the phrase "prisoners and defendants" has mostly been replaced with the word "respondents." A respondent in a civil commitment suit is now not permitted to raise an objection based on defects in the institution of proceedings unless he files a written motion to dismiss, stating the legal and factual grounds therefore, at least 14 days prior to the hearing or trial. Any ambiguity as to whether or not these suits must be filed in the circuit court for the judicial district or circuit where the respondent was convicted of a sexually violent offense or deemed incompetent to stand trial for such an offense, have been removed. The time requirements of Virginia Code § 37.2-905 are now deemed procedural, and not substantive or jurisdictional.

When a petition is filed, the probable cause hearing now must be held within ninety days, not sixty. The respondent is permitted to waive this hearing. If the circuit court judge finds there is probable cause to believe the respondent is a sexually violent predator, the trial must now be held within 120 days. Any expert witness for the respondent must provide, in writing, his findings and conclusions to the court and the Attorney General, not less than 45 days prior to trial. If he fails to do so, he shall not be permitted to testify. The parties may agree to a different time period, however.

If it is proven at trial that the respondent is a sexually violent predator, the trial may then be continued for not less than 45 to 60 days, rather than the previous 30 to 60 days. An additional continuance may be granted for good cause shown or by agreement of the parties. If the trial is continued in order for the court to receive additional evidence on possible alternatives to commitment, the court must then specifically consider a list of enumerated factors in making its decision. Previously, the court was allowed to consider such factors, but did not have to.

If a sexually violent predator is put on conditional release, and an emergency custody order is issued for him based on his failure to comply with the terms and conditions of his release, a law enforcement officer may lawfully travel anywhere in the Commonwealth to execute such an order and bring the predator into custody. Once taken into custody, the predator must be taken to a "secure facility" designated by the Virginia Department of Behavioral Health and Developmental Services ("DBHDS"), not just a "convenient location." The predator is then to be

evaluated by a mental health professional, who now must consider a number of specific enumerated factors in forming his opinion on whether the predator should remain on conditional release or be committed. The evaluation must now include a personal interview. The evaluator's report will now be part of the record of the case, and the evaluator may testify at the subsequent court proceeding to determine whether the predator should be committed. Finally, any predator on conditional release, who is given permission to leave the state and then fails to return in violation of a court order, shall be guilty of a Class 6 felony. This new penalty is the same as for predators who escape from the custody of the DBHDS.

DIFFERENCES BETWEEN THE ENGROSSED VERSION OF HOUSE BILL 1843 AND THE FINAL VERSION

In the engrossed version of House Bill 1843, language was added to Virginia Code § 37.2-901, prohibiting counsel for the respondent, and any experts appointed or employed to assist him, from disseminating the contents of victim impact statements, presentence reports, or post-sentence reports, to any person. This language was deleted from the enacted version of the bill. Such a prohibition could interfere with the respondent's experts, or his attorney, from seeking outside assistance in a case, and could make the preparation for trial more difficult as a result.

Under current Virginia law, anyone who receives a score of four on the Static-99 risk assessment instrument, and was convicted of aggravated sexual battery in violation of Virginia Code § 18.2-67.3, is only subject to an evaluation by the CRC for possible civil commitment as a sexually violent predator if the victim of the crime was under the age of 13 and suffered physical bodily injury as a result of the crime. The engrossed version of House Bill 1843 would have eliminated the requirement that the victim actually suffer a bodily injury; in other words, anyone convicted of aggravated sexual battery against a victim under the age of 13, who receives a score of four on the Static-99, would possibly be subject to civil commitment.

In the engrossed version of House Bill 1843, all pre-trial proceedings, including those that involve evidentiary and discovery issues, could be held via two-way electronic video and

audio communication systems. In addition, the bill stated that, "When a witness whose testimony would be helpful to the conduct of the proceeding is not able to be physically present, his testimony may be received using a telephonic communication system." This language was deleted from the enacted version of the bill.

Under current Virginia law, the details of previous offenses committed by the respondent may be shown by documentary evidence, including such items as police reports, presentence reports, and mental health evaluations, but only at the probable cause hearing. The engrossed version of House Bill 1843 would allow such documentary evidence at the trial as well. In addition, the bill states that the initial Static-99 evaluation, and any expert report prepared and offered into evidence, shall be admitted. There is no requirement that the Static-99 evaluation was done correctly, or that the author of any expert report be present for cross-examination. And, the engrossed bill states that any expert who meets the requirements set forth in either Virginia Code §§ 37.2-904(B) or 37.2-907(A) may be permitted to testify as to his opinions regarding the diagnosis, risk assessment and treatment of the respondent. However, this language does not seem to require that the expert ever personally meet with the respondent prior to testifying. None of these modifications to the evidentiary rules applicable in civil commitment trials were present in the enacted version of the bill.

In the enacted version of House Bill 1843, any experts appointed or employed by the respondent are now required to file a written report with the court and the Attorney General at least 45 days prior to trial. Failure to do so results in the expert being prohibited from testifying, although a modification of the 45 day time limit can be agreed to by the parties. In the engrossed version of House Bill 1843, there was no specific prohibition on an expert testifying if he failed to provide a written report of his findings. Also, there was no provision to allow for a modification of the 45 day time limit, even if the parties agreed. However, the engrossed bill did require that the experts for both the Commonwealth and the respondent file their reports. When the phrasing of the relevant sentences were changed from "expert employed or appointed pursuant to this chapter," to "expert employed or appointed pursuant to this section," it had the effect of removing the Commonwealth's experts from the requirement that a written report be provided to opposing counsel. Making this requirement apply to both parties in a civil commitment case would probably be a good idea; reverting to the language

in the engrossed bill could help prevent due process concerns from being raised.

Any changes in these statutes have the potential to affect the total number of people who are found to be sexually violent predators, which, in turn, has the potential to affect the total number of people who are civilly committed pursuant to Virginia Code § 37.2-908 and held in a secure, in-patient facility. The greatest impact in this regard, though, comes not from changes in procedure, but from any changes that Virginia makes in the statutes that govern who is potentially eligible to be committed.

When Virginia first created the statutes that allow for the civil commitment of sexually violent predators, only four crimes could be used to trigger an initial review by the Virginia Department of Corrections and then the CRC: rape, forcible sodomy, forcible object penetration, and a conviction of aggravated sexual battery involving a victim under the age of 13. When this list was significantly expanded in 2006, to include such crimes as carnal knowledge; carnal knowledge by a parent, guardian, or custodian; abduction with the intent to defile; capital murder involving an abduction with the intent to defile; first or second degree murder if committed with the intent to commit rape, forcible sodomy or forcible object penetration; or the attempt or conspiracy to commit any of the enumerated crimes, the potential number of inmates who might qualify as a sexually violent predator increased by around 350%, as estimated by DBHDS.

This, in turn, has led to an increase in the projected number of sexually violent predators who will be committed to an in-patient facility. Using the more limited, pre-2006 list of qualifying crimes, there would likely be 94 predators committed by 2012. With the post-2006, expanded list of qualifying crimes, there are projected to be 343 predators committed by 2012, according to DBHDS. Considering that the annual cost for securing one sexually violent predator in a facility is over \$100,000, the increased number of expected committed predators has significant fiscal implications for the Commonwealth.

If the list of qualifying crimes were increased still further, even larger numbers of prisoners could be found eligible for commitment. For example, pursuant to Virginia Code

§ 37.2-903, the Virginia Department of Corrections does not refer to the CRC any inmate who has scored a four on the Static-99 risk assessment instrument, if the qualifying crime was aggravated sexual battery of a victim under the age of 13, unless the victim suffered a physical bodily injury. It has been proposed that this requirement for a physical bodily injury be eliminated from the statute; the Department of Corrections has estimated that doing so would increase the number of evaluations performed by the CRC each year by nine or ten. If only half of those evaluated go on to be civilly committed, the cost to the Commonwealth by that one change would be around \$500,000 a year.

CONCLUSION

Considering that as of September of 2009, there were already 214 respondents found to be sexually violent predators, and there are more than 20 cases currently pending, the financial implications of any additional changes to Virginia's civil commitment laws for sexually violent predators should also be considered by the General Assembly.