

SEXUALLY LETHAL PREDATORS: ALLOW FOR INVOLUNTARY COMMITMENT

House Bill 5247 (Substitute H-2) First Analysis (6-9-98)

**Sponsor: Rep. Kirk Profit
Committee: Mental Health**

THE APPARENT PROBLEM:

Generally, there exist two legal ways for the state to hold someone against his or her will -- via the criminal justice system if the person has been convicted of violating a penal law, or through the mental health system if the person fits the criteria for involuntary treatment (also known as civil commitment). Both the criminal laws and mental health laws have been carefully crafted to ensure that an individual receives due process, and both systems contain a number of checks and balances to minimize or eliminate the possibility of abuse. For example, a person who has been arrested and charged with the commission of a crime has the right to, among other things, a speedy trial, a trial before a jury of his or her peers, a right to legal representation, and a right to appeal a conviction to a higher court, with the burden of proof resting on the prosecution.

A similar set of protections are afforded to individuals under the Mental Health Code. A petition to commit an individual to involuntary treatment must be accompanied by two clinical certifications (at least one done by a psychiatrist, the other by a physician or licensed psychologist) attesting to the person's need for treatment. The code establishes strict criteria for continuing hospitalization orders with reviews every six months, hearings on demand to challenge the order for treatment, and limits on hospitalization to periods of one year (at which time the court has to review the person's need for continuing treatment). This is to minimize the chance of a person being hospitalized indefinitely.

Generally, when people violate a law, they go to trial and if convicted, receive an appropriate sentence according to current sentencing guidelines. For various reasons, such as to reduce the caseload in the court system or because evidence linking a person to a crime may be weak, prosecutors may "plea-bargain" -- a process by which a person pleads guilty in return for a lesser charge and shorter sentence. Though

imperfect and not without criticism, it is a system that has enabled prosecutors in some instances to incarcerate a person (at least for a time) who may otherwise have eluded conviction. Unfortunately, sometimes, as is the case with some offenders such as serial rapists and murderers, the term of prison confinement given to such a person as part of a plea arrangement may not be enough to ensure the safety of the public.

Michigan is currently facing a situation in which certain persons convicted of a lesser offense or under a plea arrangement are approaching the end of their prison sentences, but are considered to still pose a considerable threat to the public. Currently, individuals with a mental illness who pose a threat to themselves or others may be ordered by a court to receive mental health treatment, which may include a period of hospitalization, until they no longer pose a threat. Therefore, a possibility exists whereby a person could be civilly committed under the Mental Health Code after he or she was released from prison.

However, not all sexual offenders are diagnosed as having a mental illness. Under current diagnostic guidelines in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), paraphilias (sexual disorders such as pedophilia, sexual masochism or sadism, fetishism, and exhibitionism) are generally classified as mental disorders rather than as mental illnesses. A criminal considered to be a psychopath (also referred to as a sociopath or as having an antisocial personality disorder) may pose a higher than average potential for reoffending due to the long-term pattern of behavior associated with the disorder that is characterized by self-gratification, lack of empathy, lying, impulsiveness, and general disregard for social and legal rules. However, as psychopathy is also generally considered by psychiatrists and psychologists to be a disorder and not a mental illness per se, it is

questionable as to whether such an individual would meet the statutory tests for civil commitment.

In 1994, in an attempt to address the problem of repeat sex offenders, Kansas enacted the Sexually Violent Predator Act to create a new civil commitment procedure. The act only applies to sexual offenders, and allows for persons meeting the act's criteria to be hospitalized in a psychiatric facility after their prison terms expire. Leroy Hendricks, the first man to be committed under the act, challenged the act on grounds that it violated several constitutional provisions including due process, double jeopardy, and ex post-facto laws. However, the U.S. Supreme Court upheld the act in a June 23, 1997 decision. Since Michigan also faces the problem of certain individuals who still may pose a threat to the safety of others nearing the ends of their prison sentences, legislation has been proposed to create a similar procedure for civil commitment of certain sexually lethal predators.

THE CONTENT OF THE BILL:

The bill would amend the Mental Health Code (MCL 330.1001 to 330.2106) by adding Chapter 10a to allow the involuntary confinement of an individual considered to be a sexually lethal predator through a new civil commitment procedure. "Sexually lethal predator" would be defined as an individual who had been convicted of a sexually violent offense, who had killed someone during the commission of a criminal offense, and who suffered from a mental abnormality that made him or her likely to engage in predatory acts of sexual violence if not confined in a secure facility. A "sexually violent offense" would include first, second, or third degree criminal sexual conduct (CSC) or an assault with intent to commit CSC as defined in the Michigan Penal Code (MCL 750.520b et al.), a felony offense under federal law or another state's law that under Michigan law would be a sexually violent offense, or another felony offense under Michigan law determined by a court beyond a reasonable doubt to have been sexually motivated, that was committed either on, before, or after January 1, 1998. A "mental abnormality" would be a congenital or acquired condition that affected an individual's emotional or volitional capacity and that predisposed the individual to commit sexually violent offenses to a degree that rendered the individual a menace to the health and safety of others.

Under the bill, if an agency with jurisdiction (such as a prison) over a person meeting certain conditions

determined that the person could be a sexually lethal predator, the agency would have to provide written notification of the date of the person's release to the attorney general and the multidisciplinary team established by the bill at least six months (180 days) prior to the person's release date. The notification would have to include the person's name, identifying factors, anticipated future residence, and offense history along with documentation of the person's institutional adjustment and any treatment received. The multidisciplinary team (created by the director of the Department of Corrections to review records of persons who may be sexually lethal predators) would have to assess, within 30 days of being notified, whether or not the person met the bill's definition of a sexually lethal predator and notify the attorney general of its assessment. The attorney general, in turn, would have to appoint a review committee to review the records of persons referred to his or her office. The review committee would have to include at least one physician and one licensed psychologist with expertise in mental abnormalities who were not state employees. The committee would assist the attorney general in determining whether or not the person met the definition of a sexually lethal predator. The bill would extend civil immunity from liability to the members and employees of the agency, multidisciplinary team, prosecutor's review committee, and any individuals who were contracted, appointed, or volunteered to perform services under the bill.

If the review committee unanimously determined that the person was a sexually lethal predator, within 75 days of receiving notification of a person's release date the attorney general could file a petition in court alleging that a person was a sexually lethal predator if the individual had been convicted of a sexually violent offense or found not guilty by reason of insanity and his or her sentence was about to expire. A court would then have to determine whether probable cause existed to support the allegation that the person was a sexually lethal predator, and order the person to be taken into custody. A petition could be filed in probate court in either the county in which the person had been sentenced or found not guilty by reason of insanity, the county the person resided in, or in Ingham County.

Hearing to determine probable cause. A person would have to be provided with notice of, and an opportunity to appear at, a hearing to contest the determination of being a sexually lethal predator. At the hearing, the state could supplement the petition with additional

documentation or live testimony. A court would have to verify the person's identity and determine whether probable cause existed to believe that the person was a sexually lethal predator. The individual would have the right to be represented by counsel at the hearing, to present evidence on his or her behalf, to cross-examine witnesses who testified against him or her, and to view and copy all petitions and reports in the court file. Counsel would be provided for indigent individuals. If probable cause were determined, the court would have to order the person to be transferred to the Center for Forensic Psychiatry for an evaluation as to whether he or she were a sexually lethal predator. The center would have to conduct the evaluation and issue a written opinion of the evaluation within 60 days of the date the evaluation had been ordered by the court. The person would have to remain in the custody of the center pending a trial if he or she were determined to be a sexually lethal predator in the center's written opinion, or discharged or returned to the custodial agency if found not to be a sexually lethal predator. Copies of the opinion would have to be sent to the attorney general, the individual, and to the court that ordered the evaluation.

Trial. Within five days of receiving the forensic center's written opinion (or at the conclusion of the case, proceeding, or other matter before the court at the time the written opinion was received), the court would have to conduct a trial to determine whether the person was a sexually lethal predator. The person, the attorney general, or the court could demand a jury trial. If no such demand was made, the trial would be before the court. The trial could be continued upon the request of either party and a showing of good cause, or by the court, and if the person would not be substantially prejudiced.

If the state alleged that the sexually violent offense that formed the basis for the petition for commitment was an act that was sexually motivated, the state would have to prove beyond a reasonable doubt that the alleged act had been sexually motivated. "Sexually motivated" would mean that one of the purposes for which the defendant committed the crime was the defendant's own sexual gratification. The court would have to order an individual's discharge or return him or her to the custodial agency if the court or jury was not satisfied beyond a reasonable doubt that the individual was a sexually lethal predator. In case of a mistrial, the court would have to order that the individual be held at an appropriate secure facility that

included a county jail until another trial was conducted.

Detention. Should the individual be determined to still be a sexually lethal predator, he or she would have to be committed to the custody of the Department of Community Health (DCH) in a department-operated secure facility for control, care, and treatment until such time as the individual was no longer a sexually lethal predator. The facility could not be located on the grounds of a state mental facility unless the Department of Corrections certified that the facility was sufficiently secure to house sexually violent predators. In addition, the individual would have to be segregated at all times from any other patient under the supervision of DCH except for other sexually lethal predators. The involuntary detention or commitment of individuals would have to conform to constitutional requirements for care and treatment.

Access to counsel. The bill would specify that at all stages of the proceedings under the bill, a person would be entitled to the assistance of counsel. A court would have to appoint counsel if a person were indigent. If an individual were subject to an examination under the bill, he or she could retain an expert of his or her choice to also perform an examination. The chosen expert would have to have reasonable access to the individual for the purpose of the examination, as well as to all relevant medical and psychological records and reports. The court would have to assist an indigent individual in obtaining an expert to perform an evaluation or participate in the trial on the individual's behalf.

Discharge. The bill would provide a mechanism by which an individual could be discharged if it were determined that the person was no longer a sexually lethal predator. Either the director of DCH or the director of the facility in which a person was committed can authorize the person to petition the court for discharge if either director determined that the person's mental abnormality had changed. The court would have to order a hearing within 60 days of receiving the petition. The state would be represented by the attorney general and the person would also have a right to counsel. Counsel would be appointed for an indigent person. The hearing would have to be before a jury if demanded by either party. The attorney general would have to prove beyond a reasonable doubt that the person were still a sexually lethal predator.

An individual could also petition the court for discharge without either of the directors' approval, and notice of such, along with a waiver of rights, would have to be provided annually in writing to the individual. If the individual did not waive the right to petition, the court would have to set a show cause hearing on whether the individual continues to be a sexually lethal predator. If it was determined at the show cause hearing that the individual was no longer a sexually lethal predator, then the court would have to conduct a hearing in the same manner as when a director approves a petition for discharge. The attorney general would have the right to have the individual reexamined by experts chosen by the state, and the individual would have the right to have experts of his or her choice also evaluate him or her. Once again, the attorney general would have to prove beyond a reasonable doubt that the committed person continued to be a sexually lethal predator. However, the bill would allow a court to review a petition filed under this provision and deny the petition without a hearing if it determined that the petition was based on frivolous grounds. All subsequent petitions could also be denied unless the petition contained facts to support a showing that the condition of the individual had so changed that a hearing was warranted.

Other provisions. Individuals committed under the bill would have to have their status as sexually lethal predators reviewed by a physician or licensed psychologist at least once each year, examinations would be provided for the indigent, and individuals could request discharge at that time. The department would have to submit an annual report on a committed individual to the court, and the court would also have to conduct an annual review to determine if the individual still met the criteria for commitment under the bill.

The department would be responsible for all costs of evaluation and treatment of persons committed under the bill, and could obtain reimbursement under provisions contained in Chapter 8 of the code, entitled "Financial Liability for Mental Health Services," that allows the department to seek reimbursement from the person, his or her spouse, the parents of a minor, and insurers.

Documents such as psychological reports, medical records, and victim impact statements submitted to the court or admitted into evidence would be part of the record but would have to be sealed and opened only as ordered by the court or as provided in the bill.

BACKGROUND INFORMATION:

Civil commitment. Previously, Michigan allowed for the civil confinement of sexual sociopaths, but the law was repealed in 1968 with the arrival of psychotropic drugs and the belief that people could be treated with medications rather than be institutionalized. Currently, under the Mental Health Code (MCL 330.400 et al.), a court can order a person to undergo involuntary mental health treatment, which can include hospitalization, out-patient treatment, or a combination of both, if a person meets the criteria for a person needing treatment. A "person requiring treatment" is defined as an individual with a mental illness who poses a risk of harming himself or herself or another person in the near future and who has exhibited behavior to support the expectation of harm, and those who as a result of a mental illness cannot attend to basic needs such as food, clothing, and shelter. A person cannot be committed for involuntary treatment without having two written clinical certifications, at least one from a psychiatrist and the other from a physician or licensed psychologist, attesting to the person's need for mental health treatment. A hearing must be held, and if the court determines that a person requires treatment, the code specifies that the court can order the person to be hospitalized, order community-based outpatient treatment, or order a combination of hospitalization followed by participation in an outpatient treatment program. The initial hospitalization cannot exceed 60 days, a second order of hospitalization cannot exceed 90 days, and a continuing order of hospitalization cannot exceed one year. Before a court can reissue a continuing order for hospitalization, a new petition specifying the reasons the person is still in need of treatment must be filed along with a clinical certificate executed by a psychiatrist. In addition, a review of the person's case must be made every six months, at which time either the individual or the director of the community mental health program can petition for discharge.

Kansas v Hendricks. The state of Kansas enacted the Sexually Violent Predator Act in 1994. The act established civil commitment procedures for individuals likely to engage in predatory acts of sexual violence due to a mental abnormality or personality disorder. Leroy Hendricks, the first to be committed under the act at the end of his prison sentence, challenged the constitutionality of the act on due process, double jeopardy, and ex post-facto grounds. Hendricks, who had a long history of molesting children, maintained that the new civil commitment

statute constituted a criminal procedure and was therefore punitive. The Kansas Supreme Court invalidated the act, but the U.S. Supreme Court upheld it in a June, 1997 ruling. The court held that the act's definition of "mental abnormality" satisfied due process rights as required under the constitution, did not constitute double jeopardy because it was a civil and not a criminal proceeding, and therefore did not violate the constitution's ex post-facto clause because the clause pertains only to penal statutes. Provisions in the act pertaining to treatment, mental abnormality and dangerousness, procedural safeguards, and confinement in a mental health facility rather than a corrections-operated facility, coupled with other supreme court decisions, led the court to hold that the Kansas act did not establish criminal proceedings and was not punitive in nature. It is important to note, however, that the Kansas act was upheld on a vote of 5-4.

FISCAL IMPLICATIONS:

According to a House Fiscal Agency note dated 5-29-98, the bill would result in an indeterminate increase in costs to state and local government as it is not known at this time how many individuals would be placed in a secure facility operated by the Department of Community Health. The fiscal year 1997-98 estimated per diem cost to house and care for an individual at the forensic center was \$415.99. However, the costs may be offset by the bill's provision for the department to be reimbursed by a responsible person's ability to pay for the mental health services.

In written testimony dated 10-21-97 that was presented to the members of the Mental Health Committee by a representative of the Department of Community Health, the department estimated that confinement of sexual predators could cost more than \$130,000 per person per year. According to the departmental memo, Kansas currently spends \$1 million per year for nine sexual predators confined under similar legislation, and cost estimates for implementing sexual predator legislation in Illinois are as much as \$1.5 billion a year.

ARGUMENTS:

For:

Though society holds to the tenet that once a person pays his or her debt (completing the prison term), the person should be given a fresh start, there are

individuals who engage in violent and terrible acts against others and who continue to pose a great threat of committing more crimes even after a period of

imprisonment. Michigan has one of the most comprehensive criminal justice systems in the nation, but occasionally a criminal sentence falls short of keeping a particularly reprehensible criminal incarcerated until he or she no longer poses a threat to the public. Often referred to as psychopaths, these individuals display antisocial behavior, lack of remorse for their deeds, an inability to connect emotionally with others, disrespect for the feelings of others, and aggressive and violent acts. Serial rapists and murderers by their very nature are often compelled to continue to harm others. Though most serial offenders receive life sentences without parole, there are times (for instance, when there is insufficient evidence to support a murder conviction) that a dangerous person may receive less than a life sentence. Because these people pose a danger to the public if released into the community, a way must be explored that could protect the public without violating the constitution's protection of due process rights. House Bill 5247 would create a mechanism that would provide for the civil commitment of individuals determined to be sexual lethal predators.

Michigan previously had a law that allowed for the civil commitment of psychopathic individuals, but the law was repealed when medications began to show great promise in treating many people with mental illnesses. Unfortunately, pharmacologic treatment has not been as successful for psychopathic behaviors as it has for many other illnesses. Closely modeled after a recently enacted Kansas law that was upheld by the United States Supreme Court, the bill would only apply to a person who had been both convicted of a sex offense or a felony determined to be sexually motivated, and who had killed someone. Therefore, the bill should apply to a narrow group, catching only the most serious offenders, such as serial rapists and murderers, who may still pose a threat to any community they may be released into.

For:

In civil proceedings, "preponderance of the evidence" is the level of proof that must be met. The bill would require that the attorney general meet the higher level of proof required in criminal cases of proving "beyond a reasonable doubt" that a person was still a sexually lethal predator and so continued to pose a threat. This provision for the higher level of proof should minimize any potential of the bill to unfairly or unnecessarily confine a person, and should also aid in

a person's release at a future hearing when he or she no longer posed a danger.

Against:

Many people have expressed concerns over the violations of the due process, double jeopardy, and ex post-facto clauses of the U.S. Constitution that the bill poses, as well as the problem of creating what appears to be retroactive punishment.

Response:

In *Kansas v Hendricks*, 117 S Ct 2072; 138 L Ed 2d 501, Hendricks challenged his commitment under a similar civil commitment law on the grounds that it violated constitutionally protected due process rights and the prohibition on states enacting a law that retrospectively changes the consequences of an action (an ex post-facto law), and that the act constituted double jeopardy (being tried twice for the same crime). In the opinion, Justice Thomas wrote that since various provisions of the Kansas act, such as limiting the scope of the act to a small segment of dangerous individuals and recommending available treatment, did not "establish criminal proceedings" and "involuntary confinement pursuant to the Act is not punitive", that "an essential prerequisite for both Hendricks' double jeopardy and ex post-facto claims" were removed. The court also held that the Kansas act's definition of "mental abnormality" satisfied substantive due process requirements (the supreme court has never required states to adopt any particular terminology in drafting civil commitment statutes) and cited prior supreme court decisions that consistently upheld involuntary commitment statutes to detain dangerous people. Because the court held that the Kansas act was by nature not punitive, it follows that the act does not pose a problem with retroactive punishment. Since House Bill 5247 is modeled so closely on the Kansas statute, the bill should be able to withstand any similar constitutional challenges.

For:

The bill affords many "checks" in the process of determining if a person met the criteria for commitment under the bill. For example, a person must be determined to be a sexually lethal predator by both a Department of Corrections multidisciplinary team and a review committee set up by the attorney general's office before a hearing is scheduled to establish probable cause that the person is a sexually lethal predator. If the court finds that there is probable cause to believe the person may be a sexually lethal predator, the person would also be examined by experts at the forensic center. Only if all three sets of evaluators determine that the person fits the criteria in

the bill does the case proceed to a civil commitment trial. Even then, the attorney general must prove beyond a reasonable doubt that the person fit the criteria for a sexually lethal predator or he or she would be discharged or returned to prison to finish out his or her sentence. Even if a person were committed under the bill, he or she would be reevaluated annually by a physician or licensed psychologist and could request a hearing for discharge at that time. The director of either the Department of Community Health or of the facility in which the person was committed could also determine that the person was no longer a sexually lethal predator and could recommend that the person petition for discharge. Therefore, after appropriate treatment, a person no longer fitting the bill's criteria for commitment would have a mechanism by which he or she could be discharged.

Response:

The bill does appear to afford due process protection for individuals subject to its provisions, at least until a person is found to be a sexually lethal predator. As written, it would be improbable, if not impossible, for a person once found to fit the criteria for commitment to ever be found not to meet it! For example, under current civil commitment provisions in the Mental Health Code, a person under court-ordered hospitalization can be discharged when the hospital director determines that the person's mental condition no longer fits the criteria of a person requiring treatment (with part of the criteria being that the person poses a danger to himself or herself or others). Basically, the decision of whether a person still meets the criteria for treatment rests with the mental health experts.

This is not the case with civil commitment for sexually lethal predators. Once a person has been labeled as a sexually lethal predator, having a treating physician or psychologist (or even the director of DCH or the facility) determine that the person no longer meets the criteria for commitment only gets him or her a hearing. In a nutshell, unlike current civil commitment laws, the bill would designate a judge or jury as the decision-making authority as to whether a person still posed a danger to others as a sexually lethal predator instead of the mental health professionals assigned to the care and treatment of the person. Given that the person had most likely been imprisoned for a particularly heinous crime, it is doubtful that a judge or jury, despite the bill's requirement that the attorney general prove beyond a reasonable doubt that the person is still a sexually lethal predator who poses a danger, would be willing

to have the release of such an individual on their consciences. Additionally, though the bill states that a person could petition for discharge at the annual review, a court could dismiss the petition as frivolous and so could potentially never grant a hearing.

A further problem exists with the bill's use of the term "mental abnormality." As previously stated, psychopathic behaviors are generally viewed as a type of mental or personality disorder rather than as a mental illness. The act of committing a certain behavior, as opposed to a condition or state of mind, is part of the means of diagnosing a disorder. Thus, unlike a state of mental illness that a person may pass in and out of, such as depression or psychotic episodes, once a person commits a particular action, he or she is considered to have that disorder regardless of whether the behavior continues. This means that a person found to have accosted a child would be considered to be a pedophile regardless of whether he or she ever molested a child again. Just the act of doing it once would get the diagnostic label. Therefore, the fact that a person was convicted of a sex offense and was involved in the death of a person would suffice to have the person always being classified as having a disorder such as antisocial personality disorder or a paraphilia (a sexual disorder). No length of confinement or amount of treatment would ever erase the fact that the person had committed such a crime. This puts mental health professionals in the difficult position of trying to say that the person was no longer a sexually lethal predator contrary to current diagnostic criteria. Secondly, though long-term treatment can minimize the chance a person would reoffend, no one could predict with any certainty if a person posed a danger of repeating a crime or not. To say that a person posed no danger would be going against ethical guidelines, but to say that it would be impossible to predict a person's future behavior would doom a person to a lifetime of commitment under the bill.

Against:

The bill is touted as a mechanism to protect the public from high-risk sexual predators by civilly confining them until such time that they no longer are sexually lethal predators who pose a danger to others. Besides the logical fallacy of the terminology as discussed above, no one can accurately predict a person's likelihood to repeat sexual offenses when the assessment is taking place in a setting that by its nature prevents such behaviors. Further, research on sexual offenders cited in *Vermont Treatment Program for Sexual Aggressors* by William D. Pithers et al. in

Relapse Prevention with Sex Offenders (D. Richard Laws, editor) reveals that programs relying on lengthy institutional treatment with no follow-up treatment after a person is released are generally ineffective because the programs do not provide a mechanism for relapse prevention outside of prison or a hospital that monitors and supports the individual in identifying and dealing with recidivism risks.

In a recidivism study conducted by the University of Alaska, it was found that outpatient therapy, in addition to inpatient therapy, was a critical component in reducing recidivism. In fact, in an eight-year study of sex offenders involving 411 inmates, those who had completed a full course of a three-phase relapse prevention program had a zero percent sexual offense recidivism rate. A Vermont study of 168 sexual offenders made up of rapists and pedophiles who had completed a full course of therapy had a combined recidivism rate of four percent in the six years following release from prison. In yet another study, this time conducted at Johns Hopkins Sexual Disorders Clinic, a five-year follow-up study of sexual aggressives (rapists) showed that those who complied with treatment had a 2.8 percent recidivism rate. Further, the likelihood of repeated offenses appears to diminish drastically as the offender ages, especially after the age of 45.

If the point is to protect the public from violent sexual offenders until such time as they no longer pose a threat, then it is imperative to implement an effective treatment program and to tie release from either prison or civil commitment to ongoing out-patient treatment. If current sentencing guidelines cannot be amended to allow for conditional releases for sexual offenders, then at the very least House Bill 5247 should be amended to allow for the conditional release of persons committed under the bill if deemed appropriate by the treating psychiatrist or psychologist. Only in this way will an individual who was perhaps needlessly entrapped by this bill have an opportunity to demonstrate that he or she was controlling the behavior associated with the disorder and no longer posed a threat to the community.

Against:

Though the Supreme Court ruled that the Kansas statute did not violate the Constitution's Due Process Clause, Justice Breyer wrote in his dissenting opinion that *Kansas v Hendricks* did not test whether or not the due process clause "would forbid civil confinement of an untreatable mentally ill, dangerous person." In the Kansas case, the defendant was a pedophile with a

long history of child molestation; but, pedophilia can be successfully treated with a combination of medication and counseling. In Michigan, the person who most likely would have the bill's civil commitment requirement applied to him is a confessed serial rapist and murderer. According to mental health experts, there is little to no available treatment for psychopaths such as this man. In fact, this point is used by some to argue the necessity of the bill -- that since no treatment exists for psychopaths, the man poses a grave danger to the public and so should be committed. However, civil confinement of a person with an untreatable disorder may not withstand a constitutional challenge under the due process clause.

Response:

Justice Thomas, in the majority opinion, wrote that the court had "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." He continued by stating that "it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions." Therefore, it is likely that the bill would not violate the due process clause just because treatment for psychopaths may not exist.

Against:

Despite the fact that the bill is modeled on legislation that withstood a supreme court challenge, there is wide agreement between mental health professionals, advocates for the mentally ill, and members of the criminal justice system such as judges and defense attorneys, that the bill is problematic on many levels. The following are concerns that have been raised by more than one group:

The bill is simply not needed. Criminals are already serving longer sentences due to the abolishment of the old "good time" system, judges imposing longer sentences, and the trend for parole boards to deny probation for sex offenders. Further, legislation is pending before the legislature to toughen sentencing guidelines for violent crimes and enact the "truth in sentencing" provisions created under Public Acts 217 and 218 of 1994 (for more information, see the House Legislative Analysis Section's analysis of House Bills 5419, 5421, 5398, and Senate Bill 826 dated 5-12-98). The risks inherent in the bill are too great to justify the possible benefit of detaining a few individuals for a longer time.

- The bill may act as a deterrent for confessions and guilty pleas. Reportedly, approximately 90 percent of criminal cases are plea agreements. If a person thinks that he or she may fall under the bill's definition of a sexually lethal predator, the person may choose to take his or her chances on a jury trial. So, the bill may increase the number of cases going to trial (which would increase costs to local governments) and possibly decrease the number of convictions.

- The bill may act as a deterrent for inmates getting treatment while in prison because statements made in a treatment program may be used to support the contention that a person was a sexually lethal predator and used to confine someone involuntarily in a psychiatric hospital. Reportedly, similar legislation in the state of Washington had a substantial negative effect on participation in prison sex offender programs.

- Not all persons with a mental illness are dangerous, nor are all sexually lethal predators mentally ill. However, the bill's use of the term "mental abnormality" would further stigmatize persons with a mental illness as being dangerous.

- Using mental health dollars to confine individuals who may not have a mental illness would divert funds from serving the mentally ill population. According to the Department of Community Health, if the bill is not narrowed sufficiently, as much as 15-20 percent of the approximately 40,000 persons currently incarcerated in Michigan prisons could qualify for commitment. Unless funds are specifically appropriated to implement the bill, civil commitment of sexually lethal predators would gobble up existing mental health resources.

- In an attempt to closely conform to the Kansas statute so that the bill would withstand any constitutional challenges, the bill contains provisions that may fit the state of Kansas, but not Michigan. For example, the bill specifies that the involuntary detention or commitment of individuals would have to "conform to constitutional requirements for care and treatment." No such provision exists in the Michigan Constitution. The bill should be amended to reflect Michigan law.

- The definition of "sexually violent offense" should be amended to remove the inclusion of a felony

determined to have been “sexually motivated,” as inclusion of such an offense gives rise to potential abuse. For example, anything from breaking into a women’s apparel store to slapping a woman during a fight could be argued to fit the definition of a “sexually motivated” crime. If the intent of the bill is to narrowly restrict the application of the bill, such ambiguous provisions should be deleted.

- The bill separates the commission of a sexual offense from a crime that results in a person’s death. Therefore, the crimes used as evidentiary criteria in involuntarily committing someone could be two separate crimes spanning decades. In the case of one noted serial killer, the bodies of the women he confessed to murdering reportedly were too badly decomposed for forensic tests to confirm a sexual assault. However, since he was subsequently convicted of a rape (the victim lived), he would still be subject to confinement under the bill. Unfortunately, this provision is also ripe for potential abuse, as it could be made to apply to individuals who had committed a CSC or attempt to commit a CSC, served their time, showed no signs of repeated offenses, but years or decades later were involved in the death of a person -- even if the death was ruled negligent homicide or reckless endangerment. This is not to minimize the seriousness of any sexual offense or crime in which a person dies, but merely to underscore that the language of the bill is still too broad, especially coupled with the possible interpretations of “mental abnormality,” and therefore would capture, most likely forever, individuals who do not pose a high risk of reoffending. Not only would the bill then result in extraordinary costs to confine a large population, such broad provisions could weaken the contention that the bill is not punitive in nature and so open the door for constitutional challenges down the road.

- The bill would potentially place psychopathic killers on the same grounds as persons who are particularly vulnerable to victimization due to severe mental illness. Even though the bill specifies that the Department of Corrections would have to verify the safety of the arrangement, it is easier put on paper than done in reality. If indeed these people pose such a threat to the general public that they must be confined indefinitely, then they should be housed in secure facilities away from the public and vulnerable mentally ill patients.

- The bill represents a very dangerous first step of carving out a targeted set of symptoms or behaviors

for indefinite confinement in a psychiatric facility. It is difficult to restrain from drawing parallels to other countries that have engaged in such practices or not to note the tremendous abuse of civil rights that have resulted.

- The bill represents a move away from the Mental Health Code’s current focus on providing treatment in the least restrictive setting and providing person-centered treatment. How much are policymakers willing to sacrifice of the principles of the mental health philosophy and the belief that a person is presumed innocent until proven guilty?

- The bill should be tie-barred to legislation requiring more comprehensive mental health evaluation before sentencing and more appropriate mental health treatment while incarcerated. Then, mental health professionals could better predict the potential risk an offender posed to others.

- Instead of spending billions on a back-end remedy such as the bill proposes, more attention should be given to early childhood interventions and mental health treatment at the point of entry into the criminal justice system.

- At the very least, the bill should have a sunset clause so that the issue would have to be re-visited and re-evaluated in the near future.

Against:

The primary driving force behind the bill and similar legislation pending in the Senate appears to be the impending release of serial killer and rapist Donald Miller. Apart from the obvious reasons as to the inappropriateness of creating a piece of law to deal with one or even a few individuals, the bill may be unnecessary. Not all options under the criminal justice system that would allow continued detention of Miller have been exhausted. Due to Miller receiving a major misconduct offense in prison for having a strangulation device called a garotte, the warden has discretion to deny all or a part of Miller’s special good time. If all of the special good time were rescinded, which some members of the criminal justice system predict will happen, Miller could not be released from prison until late 2008. In addition, Miller may get additional years, reportedly up to ten years, if found guilty of having a lethal weapon in prison (the garotte) in a criminal trial scheduled for July. If found guilty, any sentence handed down could be deemed consecutive, which would extend his current sentence. This means that Miller may not get out of prison until

closer to the year 2018, which would put him in his mid-60's. Appropriate treatment provided for the duration of his incarceration, along with his advanced age at his release, should greatly minimize any risk that Miller would pose to the community. Before legislation is enacted that could implement a costly civil commitment procedure fraught with potential for abuse, a long hard look should be taken to determine if it is even needed.

POSITIONS:

The Department of Community Health has not taken a position at this time, but does have some concerns regarding the bill. (6-3-98)

The Michigan Probate Judges Association has no official position on the bill. (6-3-98)

The Michigan Association of Community Mental Health Boards has no official position at this time. (6-8-98)

The Michigan Association of Counties has no official position at this time. (6-8-98)

The Criminal Defense Attorneys of Michigan oppose the bill. (6-5-98)

The American Civil Liberties Union opposes the bill. (5-29-98)

The Michigan Psychological Association opposes the bill. (6-2-98)

The Michigan Psychiatric Association opposes the bill. (6-2-98)

The Association for Community Advocacy opposes the bill. (6-3-98)

Michigan Protection and Advocacy opposes the bill. (6-2-98)

The Mental Health Association in Michigan opposes the bill. (6-2-98)

The State Appellate Defender Office opposes the bill. (6-7-98)

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.