1999 SENATE JUDICIARY

SB 2367

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2367

Senate Judiciary Committee

❑ Conference Committee

Hearing Date February 3, 1999

Tape Number		Side A	Side B	Meter #
	1		x	733 - 2367
2-10-99	2	x		4920 - 5590
2-15-99	2		x	0 - 300
Committee Clerk Signature		Jackie Follmer		

Minutes:

SB2367 relates to the definition of sexually dangerous individual.

SENATOR STENEHJEM opened the hearing on SB2367 at 10:30 a.m.

All were present.

SENATOR NETHING, District 48, testified in support of SB2367. I am on the Board at the State Hospital. They asked me to introduce this bill.

DR. ROSALIE ETHERINGTON, Director of Psychology and Director of the Sex Offender Treatment at the Jamestown State Hospital, testified in support of SB2367. Testimony attached.

We presently have 3 offenders under treatment and 1 under assessment.

SENATOR STENEHJEM asked that sometimes there are people you cannot convict, does this bill provide an escape of responsibility to some.

ROSALIE ETHERINGTON stated that yes, this could happen. It makes it difficult in proving in our commitment procedures that this person indeed committed acts. In the civil commitment procedure, we do not have to prove beyond a reasonable doubt but we do have to have some reasonable conviction that they committed these acts.

SENATOR STENEHJEM stated the standard of proof is clear and convincing evidence.

HEIDI HEITKAMP, Attorney General, testified in opposition of SB2367. Testimony attached.

SENATOR STENEHJEM asked if we are talking a numbers game, should there be a fiscal note.

HEIDI HEITKAMP stated that question should be reserved for those of the state hospital.

ALEX SCHWEITZER, Superintendent of the State Hospital of Jamestown, testified in support of SB2367 and to answer some questions. There is no budget for this program. Our concern is that these individuals serve their time. There is no separate appropriation.

SENATOR STENEHJEM asked if they anticipate the passage of this bill will have an effect one way or the other on the number of people who are committed.

ALEX SCHWEITZER stated that the passage of the bill will prevent them coming in on the front end.

SENATOR STENEHJEM asked if there would be fewer then.

ALEX SCHWEITZER stated that yes. We have not received any post-incarcerations admissions to the hospital. They have all been on the front end.

SENATOR LYSON asked if you feel these people should serve their time before they receive treatment.

ALEX SCHWEITZER stated that yes, that is the opinion of our clinical staff at the hospital. I am not in opposition of this bill.

JEAN MULLEN, Assistant Attorney General, testified in opposition of SB2367. This is not a piece of legislation that is really needed. The vast majority of people going in will have previous convictions. Some are done as a juvenile and some are incapable of standing trial, under this bill these people will not be able to be committed. The clear and convincing proof is in the mentally ill statute.

SENATOR STENEHJEM asked about the last time we passed this law, what is different now that we need to change this. Perhaps fewer people will be committed under this new bill.

JEAN MULLEN stated that yes she would agree that fewer people will be committed.

RICK VOLK, Assistant State's Attorney for Burleigh County, testified in opposition of SB2367. I have a person who I am prosecuting that would not be committed under this proposed law. He has a mental defect and cannot be convicted of a crime. The evaluation specifically recommended he be committed under the current law. Under this new law, we could only commit him under the mental health commitment law which I don't believe is long enough time.

CYNTHIA FELAND, Assistant Burleigh County State's Attorney, testified in opposition of SB2367. We have strong concerns with this bill.

RICHARD RIHR, Burleigh County State's Attorney, testified in opposition of SB2367.

SENATOR STENEHJEM CLOSED the hearing on SB2367.

February 10, 1999 Tape 2, Side A

Discussion.

SENATOR WATNE made a motion for DO NOT PASS, SENATOR NELSON seconded.

Motion carried. 6 - 0 - 0

SENATOR WATNE will carry the bill.

February 15, 1999 Tape 2, Side B

Discussion.

SENATOR LYSON made a Motion to Reconsider, SENATOR WATNE seconded. Motion failed. 1 - 5 - 0

Date: 2-10-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2367

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By Watne Seconded By Nelson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Watne

REPORT OF STANDING COMMITTEE

SB 2367: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2367 was placed on the Eleventh order on the calendar.

Date: 2-15-99
Roll Call Vote #:

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2367

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Motion to Reconsider

Motion Made By Lyson Seconded By Watne

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem		X			
Senator Darlene Watne	X				
Senator Stanley Lyson		X			
Senator John Traynor		X			
Senator Dennis Bercier		X			
Senator Caroloyn Nelson		X			

Total (Yes) 1 No 5

Absent 0

Floor Assignment

1999 TESTIMONY

SB 2367

Why The North Dakota Sex Offender Law Should be Post Conviction Only

Introduction

No one doubts that the Sexually Dangerous Individual needs to be removed from society. Many states, including North Dakota, now use a civil commitment procedure in addition to a criminal justice procedure to do this. The civil commitment law in North Dakota is good, and it also needs improvement. One of the principal problems in North Dakota's current civil commitment law - Chapter 25-03.3 - is that it allows an individual to bypass any criminal justice involvement. Chapter 25-03.3 needs to be improved so that it can only be applied after a criminal conviction for the Sexually Predatory Conduct.[1]

I. Sex Offenders know what they do is wrong and they have some self control. This gives them criminal responsibility and they should face criminal justice.

Many if not most of the Sex Offender Assessment and Treatment laws in other states can only be applied after conviction and a period of incarceration. Among mental health professionals, there is general agreement that almost all of the time a Sex Offender recognizes his actions are wrong. There is also general agreement among mental health professionals that the mental illness predisposes; rarely if ever does it compel. So the Sex Offender has criminal responsibility and should not be allowed to avoid this.[2]

II. Most states which have Sex Offender commitment laws have post conviction laws. Many of these are post incarceration laws.

At least twelve states now have post conviction commitment laws for Sexual Offenders. Most of these are also post incarceration laws. This allows for a logical progression from consequences to treatment.

Perhaps the immediately neighboring state of Minnesota does not absolutely demand that the accused Sex Offender be tried criminally first. Nevertheless, documented in a letter from the director of that program, the vast majority of individuals committed under that law have been tried and convicted criminally and served their time first.

III. Since North Dakota's law was passed, The Supreme Court has upheld the constitutionality of post conviction laws.

Kansas is a state with a post conviction law. The landmark decision of the United States Supreme Court in Kansas v. Hendricks -- US -- (June 23, 1997) established the constitutionality of such post conviction laws. They do not constitute double jeopardy.

IV. Criminal conviction is a higher standard of proof that a person actually did the crime than the probable cause phase of civil commitment.

There is also the issue that under the current law there exists the possibility of no trial of fact beyond the probable cause hearing. This is a lower level of proof than full criminal conviction.

V. The scientific tools are built to predict behavior after incarceration. Leave out the incarceration and some people who ought to be held may be released.

Experts use scientific tools that are built to predict the likelihood that Sex Offenders will do it again. Such tools were made to analyze men who have been convicted. Experts debate how to apply these tools to men who have not been convicted.[3] [4] Changing to a post conviction law would strengthen the mental health professional's ability to use these tools well.

Summary

The state hospital stands ready and willing to do its role. As we have stated, the established practice of most states, the level of proof of guilt, and the best use of the scientific tools, all suggest the state hospital fills its role best when that role is post conviction.

1. Psychologists and Psychiatrists sometimes need to advocate for changes in law even while they practice under current law. Here are the relevant portions of the Ethics of the American Psychological Association which explain why we are mandated to do this.
American Psychological Association ethics apply in several places. All page number references are from American Psychologist 1992 Volume 47 Number 12 December Revised Ethical Principles Issue.

1.) Principle F: (Social Responsibility) "Psychologists comply with the law and encourage the development of law and social policy that serve the interests of their patients and clients and the public." (P. 1600)

2.) Standard 1.02 (General Standards: Relationship of Ethics and Law) "If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner." (P.1600)

3.) Standard 1.14 (General Standards: Avoiding Harm) "Psychologists take reasonable steps . . . to minimize harm where it is foreseeable..." (P.1601)

4.) Standard 7.06 (Forensic Activities: Compliance with Law and Rules) "Psychologists are aware of the occasionally competing demands placed upon them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner." (P.1610)

2. "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgements, for example, that take into account such issues as individual responsibility..." Page **xxvii** Diagnostic and Statistical Manual of Mental Disorders Fourth Edition 1994, American Psychiatric Association, Washington, D.C.

3. The full relevant quote is this:
"In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder" . . . .In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability) additional information is usually required . . . . Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments. . . . Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. . . . When used appropriately, diagnoses and diagnostic information

can assist decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment) the use of an established system of diagnosis enhances the value and reliability of the determination." Pages **xxiii-xxiv** Diagnostic and Statistical Manual of Mental Disorders Fourth Edition 1994, American Psychiatric Association, Washington, D.C.

4. Drs. Doren, Hanson, and Quinsey are all on record in various places on this issue.

TESTIMONY ON S.B. 2367
BEFORE THE
SENATE JUDICIARY COMMITTEE
FEBRUARY 3, 1999

HEIDI HEITKAMP
ATTORNEY GENERAL

Chairman Stenehjem and Members of the Committee, I appreciate the opportunity to be here to testify on S.B. 2367, an amendment to North Dakota law that provides for the civil commitment of sexually dangerous persons. Let me begin by saying I cannot emphasize how strongly I believe we must make every effort we can to remove sexually dangerous persons from the streets and to protect our children from these individuals. I believe S.B. 2367 will diminish our ability to protect our children, and I urge the Committee to oppose its passage.

If this amendment is adopted, we will be right back where we were in 1995 when we first introduced the civil commitment for sexual predator bill, in great part, based on one young man - David Anderson - who was a sexual predator in the Bismarck community, hanging around playgrounds. David had a juvenile record of sex offenses; the police knew about his activities; but he had no adult conviction as a sex offender. The civil commitment law was not adopted by the 1995 Legislature, and in 1996, David Anderson raped a young girl. He's off the streets now, but the cost was too high. If this amendment is adopted, it will put us right back where we were in 1995 - powerless to do anything against the next "David Anderson" until we catch him with a victim.

HISTORY

In 1997, the Legislature enacted the current law to provide for the commitment of sexually dangerous individuals. This law does not duplicate or supplant criminal statutes, which are for purposes of punishment and deterrence. Rather, it provides a secure treatment program for individuals with a mental disorder who are likely to engage in harmful sexual conduct and, thus, pose a danger to society.

Commitment is done through a procedure that is similar to the one used in civil commitment of mentally ill persons. Under the law, sexually dangerous individuals are committed to a treatment program that has been established at the State Hospital.

As some of you know, the effort to enact this law began, in North Dakota, in 1995. There was considerable controversy over the legislation at that time, much of it, I believe, born of a lack of knowledge -- of whether sex offenders can be evaluated, whether an assessment of the risk of reoffending can be made, the treatment potential of sex offenders, and the cost of providing a treatment program. There were also concerns about the constitutionality of civil commitment of sex offenders. The bill under consideration in 1995 did not pass.

However, at the request of Senator Donna Nalewaja, Chairman of the Interim Committee on Criminal Justice, a study group was established to address the issues involved with a civil commitment program and to draft legislation providing for commitment procedures. The study group was composed of me; Bud Wessman, Executive Director of the Department of Human Services; members of my staff and

the DHS staff, including the Superintendent of the State Hospital; psychologists with experience in treating sex offenders; legislators; and representatives of interested associations, including the Mental Health Association and the North Dakota Psychological Association. As a result of numerous working sessions, the study group developed a proposed bill that was adopted by the Interim Committee on Criminal Justice.

In developing its proposed draft bill, one of the guiding principles the study group followed was to protect the ultimate statute from constitutional challenges. A 1995 federal district court case had held a civil commitment statute adopted by Washington State unconstitutional on substantive due process, ex post facto and double jeopardy grounds.[1] From a review of United States Supreme Court cases, my staff and I had concluded the district court was wrong on the substantive due process issue. We have since been proved right by the Supreme Court's upholding the Kansas civil commitment statute.[2]

However, we saw problems with the Washington statute with regard to the challenges on ex post facto and double jeopardy grounds. My staff had carefully analyzed the problems with the Washington statute and led the study group in drafting a bill that would not raise constitutional problems with ex post facto and double jeopardy. We believe we were successful in drafting a statute that could withstand constitutional challenge on those grounds.

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[1] Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).
[2] Kansas v. Hendricks, 117 S.Ct. 2072 (1997).

S.B. 2367 will undermine that successful effort and could potentially place our law in constitutional jeopardy.

CONSTITUTIONAL PROBLEMS

The amendment seeks to add a provision to the definition of a sexually dangerous person that requires that the individual "has been convicted of an offense under chapter 12.1-20 or 12.1-27.2, or an offense under the laws of another jurisdiction that required proof of substantially similar elements." Those chapters relate to sex offenses and sexual performances by children. Currently, the civil commitment statute only requires that the individual has "engaged in sexually predatory conduct" and that the individual has a mental disorder that makes the individual likely to engage in further acts of sexually predatory conduct. By requiring the individual to also have a prior conviction, the amendment ties the sexually dangerous person to the criminal justice system. It is this type of provision that raises concern with the ex post facto and double jeopardy requirements.

The Supreme Court's 1997 decision in Kansas v. Hendricks, which upheld the constitutionality of the Kansas law providing civil commitment of sexually dangerous predators, was a 5 to 4 decision. The majority found the statute constitutional on substantive due process grounds and held that it did not violate the constitutional prohibition on double jeopardy or its ban on ex post facto laws.

However, Justice Kennedy, one of the majority justices, while basically concurring on ex post facto and double jeopardy issues, "caution[ed] against dangers inherent when a civil confinement law is used in conjunction with the criminal

process, whether or not the law is given retroactive application." The four justices in the minority found that the Kansas statute violated the ban on ex post facto lawmaking. The four justices looked at the statute to determine whether its import was "civil" or "criminal" (punitive). In particular, the justices considered whether the statute provided for treatment of the committed person. The Kansas statute did provide for treatment of the committed person; however, as with the amendment proposed to our statute, it required that there be a pre-existing criminal conviction for a sex offense and the commitment occurred when the individual was discharged from serving the sentence. The four dissenting justices found this made the statute "punitive," because it delayed treatment until a person had completed a jail term and further incapacitation was apparently considered necessary.[3]

The amendment proposed today would do the same. It would require that an individual be convicted of a criminal sexual act and presumably serve whatever sentence is imposed before that person could be committed for treatment under the civil commitment statute. This is the type of problem that the study group sought to avoid and that the 1997 Legislature avoided in enacting the civil commitment law. To adopt this amendment would be a step backward from providing committed persons with the most constitutional protection available.

IMPACT OF AMENDMENT

First, let me say that where no problem has been raised, a "solution" of dubious merit should certainly not be considered. At this point, there are three

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[3] Id. at 2091-092.

individuals who have been committed to the State Hospital for treatment. Each one of the three has had a prior criminal conviction for a sexual offense.

The amendment would not address any problem that has surfaced to date. But, it would create numerous problems. Not only does the amendment raise constitutional concerns; it eliminates from the potential pool of individuals subject to commitment many of the people the statute was originally enacted to encompass.

For example, two major categories of individuals who are omitted from commitment under the amendment are those individuals who are found not competent to stand trial and those found not guilty by reason of lack of criminal responsibility. Neither of these categories of criminal sexual predators will have a conviction, thus with this amendment neither could be committed for treatment. Both types of people may be put back on the streets immediately no matter how high risk the potential for reoffending.

Other individuals excluded from civil commitment are individuals who have had all of their sex offenses adjudicated in juvenile court. Those proceedings do not result in a conviction, but rather an "adjudication." Further, the amendment raises concerns about individuals who make an "Alford plea," the equivalent of a nolo contendere plea, and those individual who receive a deferred imposition of sentence, which will result in the conviction being deleted from the individual's criminal record.

Finally, individuals who are charged with a sexually predatory act but plead guilty to a lessor, non-sexual crime, would not be subject to civil commitment.

In any one of the above cases, the individual may have the mental disorder that is going to make him or her likely to offend again, but the State will be powerless to do anything but wait until there is one or more victims again left shattered by the sexual predator's acts.

CONCLUSION

The civil commitment of sexual predators is a new statute and only in its early implementation stages. I have followed the civil commitment of those individuals who have been committed to date and found that the commitment procedures progressed smoothly and the State Hospital experts who evaluated these individuals found them to have the requisite mental disorder that would make them likely to reoffend. The state's attorneys who submitted the petitions were also able to show these individuals had each committed a sexual predatory act. In fact, as noted above, each of these individuals had been convicted of a sexually predatory crime. At this point in time, there is nothing to suggest that the statute enacted in 1997 is not suitable for its purpose or workable in its process. If problems do surface, they can be addressed at the appropriate time.

I urge the Members of the Committee to vote against S. 2367.

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Possible Amendments to SB 2367

Section 1. Delete at lines 7 through 9 the words "for which the individual has been convicted of an offense under chapter 12.1-20 or 12.1-27.2, or an offense under the laws of another jurisdiction that required proof of substantially similar elements,"

Insert at the end of section 1 the following, "or anyone not otherwise convicted of an offense under chapter 12.1-20 or 12.1- 27.2 or similar statutes of another jurisdiction, unless the Court specifically finds by clear and convincing evidence that a conviction of the respondent is unlikely to be obtained."

Add a new section that substitutes the word "dangerous" for the word "predatory" throughout the chapter. See e.g. Definitions, NDCC 25-03.3-01(8) change "Sexually predatory conduct" to "Sexually dangerous conduct".
A similar change would be made in 25-03.3-11.

Two new sections to read as follows: 25-03.3-09.1 (?) At all stages of proceedings under this chapter, the respondent may not waive any personal appearances, or proceedings before the court, nor the right to counsel, and must be personally present before the court at all stages, except an application for an ex parte order under NDCC 25-03.3-08.

And the next new section: 25-03.3-13.1 (?) Any evidence of evaluations or examinations by experts must be presented in person before the Court. A person may not be committed as a sexually dangerous individual unless the Court first determines that the proceedings before the Court are not a result of any plea arrangements, or other agreements between the State's attorney, and the respondent, for avoiding criminal prosecution, or the revocation of any applicable parole or probation of the respondent.

Rationale for amendments:
the bill appears unacceptable in current form. New language #1 above would not make conviction a prerequisite, but would the preferred method and asks the Court to at least make such an inquiry.

eliminating the word "predator" from the chapter is the goal. I may have missed a few references, but the purpose is to use less inflammatory or emotionally laden terms.

Lastly, the two new sections are designed to keep the proceedings formal, before the Court, and reduce plea bargaining. If we require the respondent and expert testimony before the Court, and ask the court to make sure the civil commitment is not the result of a plea arrangement, then we should see that only the truly sexually dangerous are committed, and the criminal system is not being thwarted.

I hope to see you Monday morning. I would like to try and salvage this bill. There is a lot wrong with the law as it is currently written, and I hope we can find the means to fix it.

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