

HOUSE BILL REPORT

ESSB 5122

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to civil commitment and related proceedings for sexually violent predators under chapter 71.09 RCW.

Brief Description: Revising procedures and standards for commitment of sexually violent predators.

Sponsors: By Senate Committee on Human Services & Corrections (originally sponsored by Senators Costa, Long and Hargrove).

Brief History:

Committee Activity:

Criminal Justice & Corrections: 3/21/01, 3/28/01 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by House Committee)

- Distinguishes the standard for continued civil commitment as a sexually violent predator from the standard for eligibility for conditional release to a less restrictive alternative.
- Provides that the court in deciding a civil commitment petition may only consider placement conditions and voluntary treatment options that would be in existence if the person was not committed.
- Makes changes to the definitions and procedures applicable to the civil commitment of sexually violent predators.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass as amended. Signed by 8 members: Representatives Ballasiotes, Republican Co-Chair; O'Brien, Democratic Co-Chair; Ahern, Republican Vice Chair; Lovick, Democratic Vice Chair; Cairnes, Kagi, Kirby and Morell.

Staff: Jean Ann Quinn (786-7310).

Background:

I. Initial Civil Commitment Petition. Under the Community Protection Act of 1990, a sexually violent predator may be civilly committed upon the expiration of his or her criminal sentence. A sexually violent predator is a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility. The term "predatory" is defined to mean acts directed towards strangers or individuals with whom a relationship has been established for the primary purpose of victimization. If the person is not totally confined when the petition for civil commitment is filed, the likelihood that the person will engage in these acts if not confined must be evidenced by a "recent overt act."

When it appears that a person may meet the criteria of a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if so requested may file a petition alleging that the person is a sexually violent predator. If the judge determines that probable cause exists to believe that the person is a sexually violent predator, the person is provided an opportunity to contest this determination at a probable cause hearing. If the probable cause determination is confirmed, the person is evaluated and the case set for trial. The court or a unanimous jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If this burden is not met, the court must direct the person's release.

In August 2000, the appellate court in Division II decided *In re the Detention of Ross* (102 Wn. App. 108, 6 P.3d 625 (2000)), holding that the subject of a civil commitment petition must be allowed to present evidence of conditions under which he or she is not likely to engage in predatory acts of sexual violence, whether or not the court would have the authority to order those conditions. The court did not allow the prosecutor to present evidence that the court could not order the conditions the person argued would make him unlikely to commit such acts if the jury did not find that he was a sexually violent predator. The result is that the subject of the petition can present conditions that are beyond the authority of the court to order but the prosecutor cannot inform the jury that the conditions on which it is basing its decision will not, and cannot, be ordered, if the person is not civilly committed as a sexually violent predator.

II. Less Restrictive Alternatives /Unconditional Release. A person who has been civilly committed is entitled to an examination of his or her mental condition at least once a year. The review shall include consideration of whether conditional release to a less restrictive alternative (LRA) is in the best interest of the person and would adequately protect the community. The committed person has a right to annually petition the court for conditional release to an LRA or unconditional release. If the court finds that probable cause exists to believe the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to an LRA or unconditionally discharged, then a hearing is held

on the issue. The hearing shall be before a jury if demanded by either side. At the hearing, the state has the burden of proving beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.

In addition, before the court can order that a person be conditionally released to a specific LRA, the court must find that: (1) the person will be treated by a certified sex offender treatment provider; (2) the treatment provider has developed a specific course of treatment for the person, has agreed to assume responsibility for the treatment, will make progress reports to the court, and will report any violations; (3) the person is willing to comply with treatment and supervision requirements; and (4) housing exists that is sufficiently secure to protect the community.

III. Testimonial Privileges. Generally, a person cannot testify against his or her spouse without the spouse's consent. However, in a proceeding relating to the involuntary commitment of a mentally disordered person a person may testify against his or her spouse without the spouse's consent, but the person cannot not be compelled to testify against the spouse.

Summary of Amended Bill:

I. Initial Civil Commitment Petition. In determining whether a person would be more likely than not to commit acts of sexual violence if not confined to a secure facility, the court or jury can consider only those placement conditions and voluntary treatment options that would be in existence if the person was not committed. The definition of "likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the petition. The term "predatory" includes persons of casual acquaintance with whom no substantial personal relationship exists. The term "recent overt act" includes threats, and the determination of whether the act or threat creates a reasonable apprehension of harm is determined by an objective person who knows of the history and mental condition of the person engaging in the act. If the jury cannot reach a unanimous verdict on the petition, the court must declare a mistrial and set a new trial within 45 days unless the prosecutor moves to dismiss the petition. The person may not be released prior to retrial or dismissal of the case.

At the probable cause hearing regarding the initial petition for civil commitment, witnesses for either party are permitted to testify by telephone.

II. Less Restrictive Alternatives /Unconditional Release. The annual examination of a committed person's mental condition is to be made by the Department of Social and Health Services (DSHS). It must include consideration of whether the committed person

currently meets the definition of a sexually violent predator, and whether conditional release to an LRA is in the best interest of the person and conditions can be imposed that would adequately protect the community. The report must be prepared by a professionally qualified person, certified to be true under penalty of perjury, served on the prosecutor and the committed person, and filed with the court.

At the probable cause hearing on the LRA/unconditional release issue, the prosecutor must present prima facie evidence that the person continues to meet the definition of a sexually violent predator and that an LRA is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. The state may rely exclusively on the annual examination report to make this required showing.

If a full hearing is then held, if the issue is whether the person should be unconditionally released, the burden of proof is on the state to prove beyond a reasonable doubt that the committed person's condition remains such that they continue to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible.

If the issue at the full hearing is whether the person should be conditionally released to an LRA, the burden of proof is on the state to prove beyond a reasonable doubt that conditional release to any proposed LRA either is not in the best interest of the committed person or does not include conditions that would adequately protect the community. A person must be civilly committed before the court can consider conditional release to an LRA. The first time that the court considers whether an LRA is appropriate, the court must consider the question without regard to whether the person's condition has changed. Evidence of the prior commitment trial and disposition is admissible.

The DSHS must, in consultation with interested stakeholders, develop recommendations for improving procedures to notify victims when a sexually violent predator is released to an LRA.

III. Testimonial Privileges. A person who is subject to a civil commitment petition cannot prevent his or her spouse from testifying, but the spouse cannot be compelled to testify. Also, any person agreeing to provide treatment, monitoring, or supervision of a committed person on an LRA may be compelled to testify and any privilege that might attach to such testimony is deemed waived.

The act applies to all individuals currently committed or waiting commitment on, before, or after the effective date of the act.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill removes the provision requiring the DSHS to verify that a proposed

LRA is not within 25 miles of a victim of the person, and instead requires the DSHS to work with interested parties to develop improved procedures for notifying victims when a sexually violent predator is released to an LRA. The amended bill also corrects the inadvertent deletion of language allowing a committed person to request a jury in an LRA hearing.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: The bill, which was in response to a court decision, was worked extensively through a subcommittee dealing with the issue of sexually violent predators, and revised numerous times. The main purpose of the bill is to bring the civil commitment of sexually violent predators in line with court decisions and practices around the state. Because of the *Ross* decision, the state now faces a catch-22 situation. The bill clarifies how risk is determined at the initial civil commitment hearing, and streamlines and clarifies the procedures used for determining an LRA. It closes up some of the loopholes, and should survive any constitutional challenge. It is extremely important that a jury understand the reality of the situation if a sexually violent predator is not committed. The bill will help protect the most vulnerable citizens in our society and ensure treatment for sexually violent predators as required by the law. Victim notification is an essential element of this.

(In support with concerns) There is a concern that the portion of the bill involving victim address verification may result in the release of the victim's confidential address. It also will cause great difficulty in locating an LRA placement. The bill may need to be changed so as to be sure that it doesn't interfere with the victim notification process.

Testimony Against: Under *In re Young*, it is unconstitutional not to allow for the consideration of an LRA prior to civil commitment. This bill will dare the courts to strike down the civil commitment law, or rewrite it, and will result in the further involvement of the federal court. It changes the scope of the statute and will result in more people being eligible for civil commitment, which will also have a fiscal impact. It is possible to write a narrowly tailored bill if the intent is just to deal with the *Ross* case, but this bill makes many other changes as well, including changing the standard for release to an LRA.

Testified: (In support) Senator Costa, prime sponsor; David Hackett and Sarah Sappington, King County Prosecuting Attorney and Attorney General's Office, Suzanne Brown, Washington Coalition of Sexual Assault Programs; and Diane Oberquell, County

Commissioner.

(In support with concerns) Tim Brown, Department of Social and Health Services.

(Opposed) Dennis Carroll, Washington Association of Criminal Defense Lawyers.