HOUSE BILL REPORT
SB 5582

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to the use of demographic factors in proceedings under chapter 71.09 RCW.

Brief Description: Clarifying how demographic factors are used with regard to sexually violent predators.

Sponsors: Senators Regala, Hargrove, Stevens, Carrell, Franklin, McAuliffe and Kohl-Welles.

Brief History:
Committee Activity:
Criminal Justice & Corrections: 3/25/05, 3/31/05 [DP].

Brief Summary of Bill

- Establishes that, for purposes of a hearing on a sexually violent predator's petition for release from civil commitment from a state institution, a change in a person's age or any other single demographic factor, standing alone, cannot establish probable cause sufficient to warrant a new commitment trial.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Kirby and Strow.

Staff: Kathryn Leathers (786-7114).

Background:

If a person is found at trial to be a sexually violent predator, the state is authorized by statute to involuntarily commit a person to a secure treatment facility. A "sexually violent predator" means 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 which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

A "mental abnormality" is defined by statute as a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others. "Predatory" acts means acts directed towards: (a) strangers; (b) individuals with whom a

relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

Civil commitment as a sexually violent predator is for an indefinite period. Once a person is so committed, the Department of Social and Health Services (Department) must conduct annual reviews to determine whether: (1) the detainee's condition has "so changed" such that he or she no longer meets the definition of a sexually violent predator; or (2) conditional release to a less restrictive alternative is in the best interest of the detainee and conditions can be imposed to protect the community. The review is filed with the court and served on both the prosecutor and the detainee. Even if the Department's annual review does not result in a recommendation of any type of release, the detainee may nonetheless petition annually for conditional release or unconditional discharge.

If a detainee petitions for release or discharge, the court must set a "show cause" hearing to determine whether the detainee is still mentally ill and a danger to the public. In order for a new trial to be granted on the issue of the detainee's continued commitment, there must be probable cause to warrant a new commitment trial. Probable cause may be established in one of two ways: (a) if the state fails to provide prima facie evidence that the detainee continues to meet the definition of a sexually violent predator; or (b) if the detainee presents prima facie evidence that he or she no longer suffers from a mental abnormality or personality disorder, or is not likely to engage in predatory acts. "Prima facie" evidence means evidence of sufficient circumstances which, if accepted as true, would support a logical and reasonable inference of the facts sought to be proved.

Case Law:
The Washington State Court of Appeals (Court), Division I, issued two recent decisions regarding the sufficiency of a detainee's petition at a show cause hearing for a new trial on the issue of his or her release from civil commitment as a sexually violent predator.

1. *In re Young*, 120 Wn.App. 753 (2004): Following a jury trial, Mr. Young was civilly committed as a sexually violent predator in 1991. Mr. Young's criminal history included six felony rapes of adult females, two of which involved threatening the victims with a deadly weapon. He later petitioned the trial court for release from civil commitment. At a show cause hearing in 2002, Mr. Young presented the report and declaration of Dr. Barbaree, a licensed psychologist with extensive experience evaluating and treating individuals with sexual deviancy problems. This report was based on interviewing Mr. Young and reviewing all of the Commitment Center's psychological reports about his condition. Dr. Barbaree concluded that Mr. Young was no longer a sexually violent predator because, having reached the age of 61, his risk of re-offending was reduced to zero. The trial court terminated Mr. Young's show cause hearing without granting a new trial, ruling that Mr. Young had not established probable cause that his condition had "so changed" such that he no longer met the definition of a sexually violent predator.

On appeal, the Court reversed and remanded for a new commitment trial, holding: (1) a detainee can establish probable cause by making a prima facie showing that he or she has "so changed" or that conditional release to a less restrictive alternative is appropriate; (2) in

determining whether the detainee has established probable cause, the trial court may not weigh the evidence but, rather, may only determine whether the evidence, if believed, is sufficient to require a new commitment hearing; (3) the proper venue for exploring the credibility of any witnesses and validity of such witnesses' findings is at the new commitment trial; and (4) the report offered into evidence by Mr. Young was sufficient evidence to establish probable cause.

2. *In re Ward*, 104 P.3d 747 (2005): In the *Ward* case, the Court likewise reversed the trial court's determination that the evidence presented by the detainee in support of his petition for release from civil commitment was not sufficient to establish probable cause sufficient to warrant a new commitment trial.

Briefly, the facts in this case are as follows: At age 16, Mr. Ward was hit by a car and suffered a brain injury. After he was released from the hospital, Mr. Ward committed numerous sex offenses, including the making of 200 obscene telephone calls and exposing himself to others in public. After his arrest, Mr. Ward pleaded guilty to one count of indecent liberties and two counts of public indecency. His sentence included commitment at a school for rehabilitation, community supervision, and sex offender counseling. Mr. Ward was later sentenced to jail time for failing to complete the counseling program.

While in jail, the state petitioned to have Mr. Ward committed as a sexually violent offender. In 1991, Mr. Ward stipulated to being a sexually violent predator and was sent to a special commitment center for treatment. Mr. Ward has admitted to committing incest with his younger brother and to molesting at least five female children. In 2003, Mr. Ward petitioned the court for release from commitment, asserting that he did not meet the definition of a sexually violent predator.

The court held a show cause hearing to determine whether probable cause existed to warrant a full trial on the issue. In support of his petition, Mr. Ward filed a report written by Dr. Wollert, an expert in psychology who worked as a professor of psychology for over 25 years and authored numerous papers on sex offenders. The report was over 50 pages in length and detailed facts regarding Mr. Ward's history of sexual violence and treatment, diagnostic tests, and scientific literature. Dr. Wollert opined, in part, that Mr. Ward's sexually offensive behavior escalated after his brain injury and, because Mr. Ward was no longer a juvenile, his recidivism risk was very low, at 10 percent or less. Dr. Wollart concluded that Mr. Ward no longer met the definition of a sexually violent predator because: (1) Mr. Ward's brain injury is not the same as having a mental abnormality and Mr. Ward therefore has never suffered from a mental abnormality; and (2) Mr. Ward's behavior had changed such that he was no longer a threat to society.

It is undisputed that at the show cause hearing the state presented prima facie evidence that Mr. Ward's condition had not changed. The trial court denied Mr. Ward's petition, holding, in part, that changes in diagnostic practices (e.g., tests for brain injuries versus mental abnormalities) could not be the basis for change under the sexually violent predator commitment statute.

The Court reversed and remanded for trial, holding: (1) that a new diagnosis, which conflicts with the premise underlying a detainee's initial commitment, can be a basis for "change" pursuant to the sexually violent predator commitment statute; (2) Dr. Wollert's conclusion that Mr. Ward did not meet the definition of a sexually violent predator was supported by facts; and (3) Mr. Ward presented prima facie evidence establishing that he was not a danger to society.

The court went on to explain that the court's role in a show cause hearing is minimal – it's role is limited to determining whether a detainee has "presented facts that, if believed, would lead a reasonable person to conclude that, more probably than not, he no longer meets the definition of a sexually violent predator." Although the court must determine whether an expert's stated conclusions are supported by sufficient facts, it cannot weigh the evidence by comparing the opposing parties evidence and it cannot weigh the credibility of an expert's opinion – these determinations must be made by the fact finder at trial.

Summary of Bill:

This bill clarifies that, for purposes of a hearing on a sexually violent predator's petition for release from civil commitment, a change in a person's age or any other single demographic factor, standing alone, cannot establish probable cause sufficient to warrant a new commitment trial. Demographic factors include, but are not limited to, age, marital status, and gender.

Probable cause that a detainee's condition has "so changed" such that he or she no longer meets the definition of a sexually violent predator, is established when a detainee shows that, since his or her last commitment proceeding, there has been a *substantial change in his or her physical or mental condition* that indicates either: (a) that the person no longer meets the commitment standard; or (b) that conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed that adequately protect the community.

Sufficient evidence of such a change is established by showing: (a) an identified, permanent physiological change to the detainee (such as paralysis, stroke, or dementia) that renders him or her unable to commit a sexually violent act; or (b) a change in the detainee's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released. Absent such a showing, a detainee's petition must be denied.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: The civil commitment statute for sexually violent predators states that, in order to be granted a new trial on the issue of commitment, a sexually violent predator needs to have "so changed." The Legislature contemplated that this "change" meant that the detainee had been through some type of treatment, or that something very physical had changed for the detainee so that he or she was really no longer as great of a risk for committing such offenses in the future. In the *Young* case, the detainee was granted a new trial based on turning one year older. The Legislature meant for there to be something more than just turning one year older. Sexually violent predators are the worst of the worst. The idea of the statute is that you work your way through treatment to get released, not simply that you sit there and get a few years older and then ask for release based on your age. That does not protect the community and does not encourage treatment. The purpose of this bill is to bring that balance back – so that people are encouraged to go through the hard work of treatment and the community is protected. There are about 210 people at the Special Commitment Center (SCC) - about 80 are over 50 years old (or nearly 40 percent). This bill prevents a misapplication of relatively weak and sometimes not carefully thought through "scientific evidence" evidence that is not generally accepted or empirically validated. This population of offenders has extreme disorders. Mere passage of time would not likely ever change or rehabilitate such a person. Those of us in the community, including the victims, have learned to value actuarial risk assessment tools – but it is a sum of its parts, not any one individual part. A change in one factor, like age, simply doesn't hold water from the public and treatment/research perspective. The deciding factors regarding release should be whether the person has received the treatment and management that they should, and that they are progressing in a way that they should. Victims are generally called upon to testify at the underlying trial and then at the original commitment hearing. Victims are then asked to come back years later to testify in new commitment trials, which is particularly unreasonable if the alleged change is based solely on age. A detainee always has the ability to challenge the initial commitment proceedings through appellate procedures. Many of these offenders have not engaged in treatment but have, instead, waited and hoped that the commitment statute would be found to be unconstitutional or that they would be able to argue for some other legal loophole in their individual cases they would be released. In fact, only about 11 of the 210 committed individuals have gone through treatment and have been recommended for less restrictive alternatives. The treatment is very hard and these people have very severe, complicated disorders. The very nature of their disorders often makes it difficult for them to engage in treatment and to make the kind of changes we might see in other sex offenders who remain appropriately in the community. This bill will encourage the residents to put that extra, painful effort into the treatment.

Testimony Against: This bill is unnecessary and implicates constitutional problems regarding the review process under the statute. The *Young* and *Ward* decisions are based on well-established and well-recognized principles – that principle is, that to justify commitment, a person must have a current mental condition and risk such that they meet the criteria for commitment. This bill contravenes that principle. This bill also contravenes what has been found in the literature. The expert in the *Young* case is an internationally known, well-recognized expert. Nobody, including the doctors at the SCC, disagrees with the basic

premise that, as folks get older, their risk decreases with age. No one is saying that as one gets older one is unable to commit these horrible acts, only that the risk of it happening decreases. The question is its application to specific cases. This bill limits a detainee's "change" to a physical disability and to the effect of treatment. However, the literature is very ambiguous about the ability of treatment to reduce recidivism. This bill also creates conflicting standards for risk in the application of the statute. For example, if a detainee has a substantial physical disability (e.g., a stroke), no expert will ever state that this person is "unable to reoffend" forever. This is an unconstitutional standard. A different standard is set up for those who participate in treatment: whether they are safe to be at large. However, this standard is not defined anywhere. These two standards must be juxtaposed against the criteria for commitment, which is the standard that would exist if a detainee is granted a new trial. That standard is whether a person is "likely" (a more than 50 percent chance) to commit a future act of predatory sexual violence. These juxtaposed standards are inconsistent. The *Young* and *Ward* decisions do not let anybody out. They only allow the issue to go to trial, where a fact finder can decide the issue. The state has means through evidence rules to challenge scientific evidence if they believe it is not grounded in empirical evidence. The *Young* case recognizes that you can't come back year after year based on the same issue. The science for risk assessment has changed dramatically in the last 15 years. No one has ever been unconditionally released from this program. As far as the concerns raised regarding the victims, there are other ways to preserve a victim's testimony. There are ways to present that information through the experts. It is powerful testimony for the state and that is one reason, a strategic reason, that the state calls the victim. In the *Ward* case, Mr. Ward did not have an adversarial proceeding because he stipulated to being a sexually violent offender. He suffered from a brain injury and was a juvenile when he offended, but there is scientific evidence showing that a juvenile's brain does not completely develop until possibly as late as age 25. There does have to be an adversarial proceeding and some safeguards in place for the detainees.

Persons Testifying: (In support) Senator Regala, prime sponsor; David Hackett, King County Prosecutor's Office; Todd Bowers, Office of the Attorney General; Henry Richards, Special Commitment Center, McNeil Island and Department of Social and Health Services; and Suzanne Brown-McBride, Washington Coalition of Sexual Assault Programs.

(Opposed) Dennis Carroll, Washington Association of Criminal Defense Lawyers and Washington Defenders Association; and Christine Sanders, Snohomish County Public Defenders Office.

Persons Signed In To Testify But Not Testifying: None.