SENATE BILL REPORT
SB 5718

As Reported by Senate Committee On:
Human Services & Corrections, February 23, 2009

Title: An act relating to the commitment of sexually violent predators.

Brief Description: Concerning the commitment of sexually violent predators.

Sponsors: Senators Regala, Stevens, Holmquist, Hobbs, Carrell and Hatfield; by request of Attorney General.

Brief History:
Committee Activity: Human Services & Corrections: 2/17/09, 2/23/09 [DPS, w/oRec].

Brief Summary of Bill (Recommended Substitute)

- Defines the prosecuting agency and which agency has the authority to file a petition for the commitment of a sexually violent predator is clarified.
- Allows the admittance of evidence at a commitment trial regarding the course of treatment at the Special Commitment Center and the graduated release process from that facility.
- Addresses the process for court consideration of a less restrictive alternative and subsequent revocation or modification of less restrictive alternatives.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 5718 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Brandland, Carrell and McAuliffe.

Minority Report: That it be referred without recommendation.

Signed by Senator Kauffman.

Staff: Shani Bauer (786-7468)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: Under the Community Protection Act of 1990, a sexually violent predator may be civilly committed upon the expiration of that person's criminal sentence. A sexually violent predator (SVP) is a person who has been convicted of or charged with a sexually violent offense 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. Crimes that constitute a sexually violent offense are enumerated in the statute and may include a federal or out-of-state offense if the crime would be a sexually violent offense under the laws of this state. 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.

An agency with jurisdiction to release a person serving a term of confinement must refer a person to the prosecuting agency when it appears that a person may meet the criteria of an SVP. A releasing agency will be the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services (DSHS), but referrals are generally generated through the End of Sentence Review Committee (ESRC). The referring agency is required to provide "all relevant information" about that person to the prosecuting agency. The ESRC is given broad authority to access relevant records, but many times does not have the time or the resources to gather all relevant documents.

If the person is not confined when the petition for civil commitment is filed but the person committed a sexually violent offense at some time previously, 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 an SVP, the prosecuting attorney of the county where the person was convicted or charged or the Attorney General's Office (AGO), if so requested by the prosecuting attorney, may file a petition alleging that the person is an SVP.

Once a petition is filed, the person may be taken into custody. A probable cause hearing must be held within 72 hours. If the judge determines that probable cause exists to believe that the person is an SVP, 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 is set for trial. The court or a unanimous jury must determine whether, beyond a reasonable doubt, the person is an SVP. If this burden is not met, the court must direct the person’s release.

If a person is found at trial to be an SVP, the state is authorized by statute to involuntarily commit a person to a secure treatment facility. Civil commitment as an SVP is for an indefinite period. Once a person is so committed, DSHS must conduct annual reviews to determine whether (1) the detainee's condition has "so changed" such that the detainee no longer meets the definition of an SVP; or (2) conditional release to a less restrictive alternative (LRA) 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 DSHS' 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 conditional release or unconditional discharge, the court must set a show cause hearing to determine whether probable cause exists to warrant a hearing on

whether the person still meets the definition of an SVP or if a less restrict alternative would be in the best interest of the person. If the court finds probable cause exists, the court must set a hearing. If the person no longer meets the definition of an SVP, the person must be released. The SVP or the state may propose a conditional release to an LRA. A state-endorsed plan will be a graduated release plan that entails the SVP moving to a Secure Community Transition Facility. A Secure Community Transition Facility is a facility that provides greater freedom to the SVP and is designed to allow the SVP to gradually transition back to the community while continuing treatment. If an SVP submits his or her own less restrictive alternative, the plan must meet specific statutory criteria.

Recent Caselaw. *In re Detention of Martin*, 163 Wn.2d 501 (2008). Martin was convicted in Clark County of burglary in the second degree with sexual motivation and indecent exposure, neither of which are sexually violent offenses under Washington law. Martin did, however, have a conviction in Oregon for kidnapping and sexual abuse, both of which qualify as sexually violent offenses. For out-of-state convictions, it has been the practice of the AGO to file civil commitment proceedings in Thurston County at the request of the Thurston County Prosecutor's Office. Martin appealed on the claim that the Thurston County Prosecutor's Office did not have the authority to file the commitment action as he was never convicted or charged with an offense in Thurston County. The court agreed with Martin and dismissed the petition against him for civil commitment.

In re Detention of Post, 145 Wn.App 728 (2008). Post was convicted of two counts of rape in 1974 and one count of rape in the first degree in 1988. The day before Post was scheduled to be released, the state filed a petition requesting that he be committed as an SVP. Post participated in sex offender treatment while incarcerated and also completed phases one and two of the six-phase treatment program at the Special Commitment Center (SCC) while awaiting trial. Post presented evidence of a voluntary community-based treatment program in which he could participate, if released from custody, so as to lessen the likelihood that he would reoffend. In response, the state presented evidence concerning the SCC's treatment program that would be available to Post only if he was committed as an SVP. The state also presented evidence of potential less restrictive alternatives to confinement that might also be ultimately available to Post, but only if he were first committed as an SVP.

On appeal, the court determined that the trial court erred in admitting evidence as to the potential LRA and content of the SCC treatment program. It found that the evidence was not relevant to the issue before the jury as to whether Post was an SVP and was highly and unfairly prejudicial to Post. The court relied, in part, on the fact that the Legislature did not choose to provide the state with the authority to present evidence of treatment programs or opportunities that would be available to the respondent only if he were committed as an SVP, or conditions of release that could be imposed on him after such a committal.

In re Detention of Harris, 141 Wn.App 673 (2007). Harris argued at trial that he should be allowed to present evidence that he was at a lower risk of reoffense because the state could file an SVP petition against him at any time after release (if he committed an overt act). The court denied his request. The appellate court affirmed, stating that Harris could only present evidence concerning conditions that would actually exist if he was released from custody.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Recommended Substitute): Prosecuting Agency. Prosecuting agency is defined as the prosecuting attorney of the county where the person was convicted or charged or the AGO if requested by the prosecuting attorney.

The prosecuting agency is given the same authority to obtain relevant records as that provided to ESRC. The prosecuting agency is also authorized to use the inquiry judge procedures to obtain subpoenas for relevant out-of-state records, so that it may obtain relevant records prior to filing an SVP petition.

The provisions regarding who has the authority to file an SVP petition are clarified to specify that a petition may be filed in:

- any county in Washington where the person was charged or convicted with a predicate offense (sexually violent offense);
- a county where the person committed a "recent overt act;"
- any Washington county where the person has been convicted of a sex offense when the person's predicate offense is from out of state; or
- any county where the person has been convicted of a crime (re: *Martin*) if the person has no prior sex offense convictions in Washington.

When the AGO is acting as the prosecuting agency, the court clerk must charge the AGO the same fees that would be levied against the local prosecuting attorney.

Evidentiary Provisions Pre-Commitment. Formal discovery (e.g. depositions) is not available until after the probable cause hearing and the court makes the determination that the matter will be set for trial. Within 24 hours of filing a petition, the state must give the defense a complete copy of all of the materials provided to the state by the referring agency as well as any material gathered by the state during the course of the pre-filing investigation. The detainee may be held in the county jail until the conclusion of the probable cause hearing.

Less Restrictive Alternative. The court may not order an LRA trial at the annual review hearing unless the proposed LRA submitted by the SVP meets all of the statutory requirements. The SVP's proposed housing for the LRA must be in the state of Washington. A person released to an LRA is subject to GPS monitoring.

The court may not modify the LRA order without the agreement of the parties or through a release proceeding stemming from the annual review process.

The process for revoking an LRA is clarified:

- Revocation of an LRA and modification of an LRA are treated separately.
- The determination of whether to take an SVP on an LRA into custody pending a revocation/modification is the responsibility of the supervising community corrections officer, SCC personnel, or law enforcement.
- The prosecuting agency has the authority to represent the state at the revocation/ modification hearing.
- The factors to be considered by the court in a revocation hearing are listed.
- The court has no authority to lessen conditions at a revocation/modification hearing unless the prosecuting agency agrees or an LRA trial is held.

Other Provisions. Personality disorder is defined, using the definition from the Diagnostic and Statistical Manual of Mental Disorders. Evidence of a personality disorder must be supported by the testimony of a licensed professional.

A person may be required to be housed at the local jail for any hearing that lasts more than one day without the need to transport the person back and forth each day from McNeil Island. The person may be returned to the SCC for weekends and holidays. Counties are eligible for reimbursement and transport costs.

In the event the court finds a person does not or no longer meets commitment criteria, the state may hold the person for 24 hours prior to release.

The SCC must provide to SVP prosecutors copies of all reports made by the SCC to law enforcement that involve an SCC resident as a suspect, witness, or victim.

This act applies retroactively to all persons currently committed or awaiting commitment. If any provision of the act is held invalid, the remainder of the act is not affected.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Substitute as Passed Committee): Evidence of a personality disorder is required to be supported by the testimony of a licensed professional. The court may require a person to be held in the county jail or returned to the special commitment center during a pending proceeding. The authority for a witness to testify by telephone is restored.

The following provisions are removed:

- allowing the state to have the person evaluated by additional persons chosen by the state;
- permitting treatment evidence to be admitted at a commitment trial or less restrict alternative hearing including evidence that a person's risk may be ameliorated by treatment;
- limiting expert testimony at a hearing for a less restrictive alternative to professionals licensed in the state of Washington; and
- limiting the court's authority to allow discovery prior to an annual review hearing.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Proposed Substitute as Heard in Committee: PRO: There are currently 300 sexually violent predators locked up, either obtaining treatment or refusing to obtain treatment. This bill is request legislation from the Attorney General's office. First, this bill would strengthen the connection between treatment and

commitment by allowing the prosecutor to bring evidence of treatment into court. If a person refuses to participate in treatment, this can be evidence of a person's increased risk. Second, the bill clarifies a current court ruling regarding what county has jurisdiction to hear a petition when the underlying conviction is from out of state. These changes will make the process more efficient and increase the safety of the public.

CON: This bill would effectively change the entire standard for commitment. The current standard is whether the person is mentally ill and, more probable than not, might commit a sex offense. This bill extends the consideration to whether the person's risk to commit an offense would be reduced by treatment in a secure facility. This standard would almost apply to anyone and would vastly broaden the net of who can be committed. It is likely that the blanket approach to including treatment evidence is unconstitutional. Treatment evidence can, and frequently is, introduced on a case by case basis.

The judge should have the flexibility to order a person to the county jail or the SCC when it is convenient for the person to stay in the SCC. The addition of an expert chosen by the state is yet another expert onto the current evaluations, and unnecessarily increases costs. The bill limits the use of experts to those licensed in Washington. There aren't enough experts in the state to go around and some of the leading experts in the field are from Canada. The bill also requests that a resident create the apparatus of an LRA before the person is even granted a hearing. It takes a great deal of time, money, and effort to put a plan together. It is a waste of resources to do this even before you know whether the court is going to grant the hearing.

This bill will create more victims because it is using up valuable resources on lower risk individuals. The process should be targeted to the truly dangerous. With the addition of other mechanisms in law to address sex offenders, the idea was that the number of SVP commitments would decrease over time. This is not the case and, in fact, the net is growing wider and the state's case has gotten progressively weaker.

The current success rate of the prosecution for these cases is 99.8 percent. There isn't a need for this legislation. The bill should be tabled until next year to come back with legislation that is targeted to the most dangerous individuals.

Persons Testifying: PRO: David Hackett, King County Prosecutor's Office.

CON: Michael Kahrs, Washington Association of Criminal Defense Attorneys; Martin Mooney, Snohomish County Public Defenders; Ken Henrikson, Attorney; Pete MacDonald, Washington Defenders Association, Washington Association of Criminal Defense Lawyers.