
**Public Safety & Emergency Preparedness
Committee**

SSB 5202

Brief Description: Regarding sexually violent predators.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Regala and Hargrove).

Brief Summary of Substitute Bill

- Removes the jury unanimity requirement for sexually violent predator (SVP) commitment proceedings.
- Permits polygraph testing of persons the state seeks to commit as SVPs and persons committed as SVPs.
- Permits a person committed as an SVP to retain or a court to appoint an expert to evaluate the person at the annual examination only if the person participated in the most recent evaluation by the state.
- Changes the burdens of proof at SVP review proceedings.

Hearing Date: 3/9/11

Staff: Alexa Silver (786-7190).

Background:

Sexually Violent Predator Commitment Proceedings: A sexually violent predator (SVP) is a person who has been charged with or convicted of 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 in a secure facility. An SVP may be civilly committed: when his or her criminal sentence expires; if he or she has been determined to be incompetent to stand trial; if he or she has been found not guilty by reason of insanity of a

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sexually violent offense; or if he or she was previously convicted of a sexually violent offense and has committed a recent overt act.

Once the prosecutor files a petition to civilly commit a person, the court first must determine whether there is probable cause to believe the person is an SVP. If there is probable cause, a full trial is held to determine whether the person is an SVP. The Department of Social and Health Services (DSHS) is responsible for the cost of an expert to evaluate the person on behalf of the prosecutor, as well as an expert to evaluate the person on behalf of the person. The state Supreme Court recently determined in *In re Hawkins*, 169 Wn.2d 796 (2010), that the court does not have authority to order the person to take a polygraph test as part of the evaluation.

At the proceeding, the burden is on the state to prove beyond a reasonable doubt that the person is an SVP. If the person requests a 12-person jury, the jury must be unanimous. If the person is found to be an SVP, he or she is committed to the custody of the DSHS for control, care, and treatment at the Special Commitment Center.

Sexually violent predator commitment proceedings are civil in nature, but some statutory protections, such as the beyond a reasonable doubt standard and jury unanimity, more closely resemble characteristics of criminal trials. Most states require unanimous juries for SVP commitment proceedings, with the exception of Arizona. The burden of proof in other types of civil commitment proceedings is clear and convincing evidence. At least seven states have a clear and convincing evidence standard for SVP commitment, while 10 states (including Washington) require proof beyond a reasonable doubt.

Annual Examinations: The DSHS must perform an examination of the mental condition of every person committed as an SVP at least once a year. The examination must be prepared by a professionally qualified person. It must address whether the person continues to meet the definition of an SVP and whether conditional release to a less restrictive alternative (LRA) in the person's best interest and conditions can be imposed to adequately protect the community. The report must be filed with the court, with copies sent to the prosecutor and the committed person. The person may have an expert appointed if he or she is indigent.

Review Proceedings: If the DSHS determines that: (1) the person's condition has so changed that he or she no longer meets the definition of an SVP, or (2) conditional release to an LRA is in the person's best interest and conditions can be imposed to adequately protect the community, the DSHS must authorize the person to petition the court for either unconditional discharge or conditional release to an LRA.

The committed person may also petition the court for release without the approval of the DSHS. The DSHS must send annual written notice of the right to petition the court, along with a waiver of rights. If the person does not waive the right, the court must set a show cause hearing.

At the show causing hearing, the prosecutor must present prima facie evidence that the person continues to meet the definition of an SVP and that an LRA is not in the person's best interest and conditions would not adequately protect the community. The court sets a final hearing if it determines either that: (1) the state failed to present prima facie evidence, or (2) there is probable cause to believe the person's condition has so changed that he or she no longer meets the definition of an SVP or that release to an LRA would be in the person's best interest and

conditions would adequately protect the community. Because the standard is probable cause, the court does not weigh conflicting evidence at the show cause hearing.

Probable cause is defined by statute to mean there is evidence of a substantial change in physical or mental condition since the person's last commitment trial. Under the statute, a change in a demographic factor alone does not establish probable cause. In *In re McCuiston*, 169 Wn.2d 633 (2010), the state Supreme Court struck down this portion of the statute, holding that it violated substantive due process. The court explained that due process requires that the detained person currently be both mentally ill and dangerous, and the person must therefore be able to submit the full range of relevant evidence at the show cause hearing, just as he or she was able to submit at the initial commitment proceeding. The *McCuiston* decision is under reconsideration.

At the final review hearing, the person is entitled to be present and is afforded the same protections as at the commitment proceeding, including the right to a jury trial and the right to be evaluated by an expert. The burden of proof on the state is beyond a reasonable doubt.

Summary of Bill:

Sexually Violent Predator Commitment Proceedings: Once a judge determines there is probable cause to believe a person is an SVP, the judge must require the person to complete a clinical interview, psychological testing, plethysmograph testing, and polygraph testing if requested by the evaluator. An evaluation must be completed regardless of whether the person was evaluated prior to the petition being filed. When the determination of whether a person is an SVP is made by a jury, a verdict is reached when 10 out of 12 jurors agree.

Annual Examinations: The annual examination must include an in-person interview. The person may retain or the court may appoint an expert to examine the person only if the person participated in the most recent interview and evaluation completed by the DSHS.

Review Proceedings: If the prosecutor meets his or her prima facie burden at the show cause hearing, the committed person then bears the burden to show by a preponderance of the evidence that his or her condition has so changed that he or she no longer meets the definition of an SVP, or that an LRA is in his or her best interest and conditions can be imposed to adequately protect the community. Only documentary evidence may be submitted at the show cause hearing. Language permitting the person to present responsive affidavits is deleted. If the court determines at the show cause hearing that there is a preponderance of evidence that the person's condition has so changed, then the court must set a final hearing.

If the issue at the final review hearing is whether the person should be unconditionally discharged, the burden is on the prosecutor to prove by clear and convincing evidence that the person continues to meet the definition of an SVP. If the issue at the hearing is whether the person should be conditionally released to an LRA, the burden is on the prosecutor to prove by clear and convincing evidence that conditional release is either not in the person's best interest or that it does not include conditions to adequately protect the community. Evaluations for the review hearing may include polygraph testing. Jury verdict forms are updated to reflect the new burden of proof.

These changes apply to all individuals committed or awaiting commitment on, before, or after the bill's effective date.

Appropriation: None.

Fiscal Note: Available.

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