

HOUSE BILL REPORT

SSB 5202

As Passed House - Amended:
April 11, 2011

Title: An act relating to sexually violent predators.

Brief Description: Regarding sexually violent predators.

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

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 3/9/11, 3/22/11 [DPA];

Ways & Means: 3/30/11, 3/31/11 [DPA(PSEP)].

Floor Activity:

Passed House - Amended: 4/11/11, 96-0.

Brief Summary of Substitute Bill
(As Amended by House)

- Permits polygraph testing of persons the state seeks to commit as sexually violent predators and persons committed as sexually violent predators.
- Modifies the standard at the show cause hearing to require that there be probable cause to believe the person's condition has so changed since the person's last commitment trial.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: Do pass as amended. Signed by 11 members: Representatives Hurst, Chair; Ladenburg, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Armstrong, Goodman, Hope, Kirby, Moscoso and Ross.

Staff: Alexa Silver (786-7190).

HOUSE COMMITTEE ON WAYS & MEANS

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.

Majority Report: Do pass as amended by Committee on Public Safety & Emergency Preparedness. Signed by 27 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Carlyle, Chandler, Cody, Dickerson, Haigh, Haler, Hinkle, Hudgins, Hunt, Kagi, Kenney, Ormsby, Parker, Pettigrew, Ross, Schmick, Seaquist, Springer, Sullivan and Wilcox.

Staff: Melissa Palmer (786-7388).

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 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, the person is transferred to a facility for an evaluation on whether he or she is an SVP. The Washington Supreme Court recently determined in *In re Detention of 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.

Within 45 days of the probable cause hearing, a full trial is held. If the state proves beyond a reasonable doubt at the commitment proceeding that the person is an SVP, the person is committed to the custody of the Department of Social and Health Services (DSHS) for control, care, and treatment at the Special Commitment Center (SCC).

Review Proceedings. If, following an annual examination, 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 a less restrictive alternative (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. 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.

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 Detention of McCuiston*, 169 Wn.2d 633 (2010), the Washington Supreme Court (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.

Summary of Amended Bill:

Intent. The Legislature intends to act cautiously while constitutional jurisprudence is in doubt, but encourages the courts to stay proceedings related to the *McCuiston* decision. The Legislature intends to respond to the Supreme Court's decision in *Hawkins* by deciding that a polygraph test may be used at the SVP evaluation.

Sexually Violent Predator Commitment Proceedings. Once a judge determines there is probable cause to believe a person is an SVP, the judge may require the person to complete a clinical interview and psychological, plethysmograph, and polygraph testing if requested by the evaluator. An evaluation may be ordered regardless of whether the person was evaluated prior to the petition being filed.

Review Proceedings. The court must order a full review hearing if there is probable cause to believe the person's condition has so changed since the person's last commitment trial. Evaluations for the review hearing may include polygraph testing.

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

Staff Summary of Public Testimony (Public Safety & Emergency Preparedness):

(In support) In passing the Community Protection Act in 1990, the state was careful to ensure due process and to protect the community. The law originally provided extra-constitutional rights, which have costs. The bill will bring the law in accord with other types of civil commitment laws. Since *McCuiston*, there have been approximately 50 new trials on which the state is hemorrhaging money. Now it is easy to get a new trial because defense experts repeat the magic words. *McCuiston* held that the Legislature cannot limit the evidence

presented at hearings, but the Court was wrong. The bill will not impact *McCuiston*, regardless of what the Court decides on reconsideration. Judges will be able to screen out bad cases by weighing evidence. Before the *Hawkins* case, experts routinely relied on polygraph tests, because they encourage candor and prevent useless trials. Eliminating the jury unanimity requirement will bring the statute in line with other mental health commitments and will save money by preventing retrials. Many SVPs will not cooperate with the state's evaluator, but will cooperate with their own expert. The bill levels the playing field and will save money on experts.

(Other) The SCC is neutral on the bill.

(Opposed) It is problematic to require judges to order a polygraph test. Psychologists from the SCC agree that coercing an unwilling person to participate in a polygraph test is ethically questionable, and the results are presumed invalid. In *Hawkins*, the Court noted that polygraphs are intrusive and implicate constitutional concerns. Removing the jury unanimity requirement will result in commitments of persons who would not otherwise be committed, which will have a fiscal cost. It is punitive and arguably unconstitutional to require participation in the annual examination and to take away experts. To increase participation in the annual examination, an attorney should be permitted to attend or a recording should be made. Under current law, the show cause hearing is a 30-minute paper review to screen out cases. Attorneys advise their clients not to file for conditional release every year, because they have to prove they have "so changed," and the clock starts at the last proceeding. Thus, there is already a deterrent to filing for review every year, unless the person has a good chance of winning. The preponderance standard under the bill would put a heavy burden on the judge, and most judges would find good cause for witnesses, resulting in a mini trial. The trial would then be repeated, but it is unlikely that the outcome would be different. This process would be costly, and because SVPs would have nothing to lose, they would file for review every year.

Staff Summary of Public Testimony (Ways & Means):

(In support) None.

(Opposed) None.

Persons Testifying (Public Safety & Emergency Preparedness): (In support) Senator Regala, prime sponsor; Brooke Burbank and Malcolm Ross, Office of the Attorney General; and David Hackett, King County Prosecuting Attorney's Office.

(Other) Kelly Cunningham, Department of Social and Health Services.

(Opposed) Pete McDonald, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and Ken Henrickson, Washington Defender Association.

Persons Testifying (Ways & Means): None.

Persons Signed In To Testify But Not Testifying (Public Safety & Emergency Preparedness): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.