

# HOUSE BILL REPORT

## SSB 5202

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**As Reported by House Committee On:**  
Public Safety & Emergency Preparedness

**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].

**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.

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### 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).

**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

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*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.*

predatory acts of sexual violence if not confined in a secure facility. A 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 a SVP. If there is probable cause, a full trial is held. 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 Washington Supreme Court (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.

If the state proves beyond a reasonable doubt at the commitment proceeding that the person is a SVP, the person is committed to the custody of the DSHS for control, care, and treatment at the Special Commitment Center.

*Annual Examinations.* The DSHS must perform an examination of the mental condition of every person committed as a SVP at least once a year. The examination must address whether the person continues to meet the definition of a SVP and whether 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 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 a SVP, or (2) conditional release to a 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 a 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 a SVP and that a 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 a SVP or that release to a 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 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 has 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.

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**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 Court's decision in *Hawkins* by deciding that a polygraph test may be used at the SVP evaluation.

*The SVP Commitment Proceedings.* Once a judge determines there is probable cause to believe a person is a SVP, the judge may 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.

*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.

**Amended Bill Compared to Substitute Bill:**

The amended bill reinstates the unanimous jury requirement.

It deletes the requirement of an in-person interview at the annual examination, and it deletes language providing that an expert may be appointed to an indigent SVP only if he or she participated in the most recent interview and evaluation completed by the DSHS.

The amended bill also restores current law regarding burdens of proof at review proceedings. It deletes language requiring that the SVP demonstrate by a preponderance of the evidence that his or her condition has so changed that he or she no longer meets the definition of a SVP or that a LRA is in his or her best interest. It also replaces the clear and convincing standard at the review proceeding with a reasonable doubt standard.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on March 23, 2011.

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

**Staff Summary of Public Testimony:**

(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 the Court decided *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 Special Commitment Center is neutral on the bill.

(Opposed) It is problematic to require judges to order a polygraph test. Psychologists from the Special Commitment Center 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.

**Persons Testifying:** (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 Signed In To Testify But Not Testifying:** None.