SENATE BILL REPORT
SB 5202

As Reported by Senate Committee On:
Human Services & Corrections, February 17, 2011

Title: An act relating to sexually violent predators.

Brief Description: Regarding sexually violent predators.

Sponsors: Senators Regala and Hargrove.

Brief History:
Committee Activity: Human Services & Corrections: 1/25/11, 2/17/11 [DPS].

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 5202 be substituted therefor, and the substitute bill do pass.

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

Staff: Shani Bauer (786-7468)

Background: Under the Community Protection Act of 1990, a sexually violent predator (SVP) may be civilly committed upon the expiration of that person's criminal sentence. An 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. 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, if so requested by the prosecuting attorney, may file a petition alleging that the person is an SVP.

In preparation for a trial as to whether the person is an SVP, the court must direct that the person be evaluated by a professional as to whether the person is an SVP. The court recently determined that a polygraph examination could not be compelled as part of this evaluation because the right to a polygraph is not specifically authorized by statute. (See *In re Hawkins, ** Wn.2d **, 238 P.3d 1175 (2010)*)

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

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indefinite period. Once a person is committed, DSHS must conduct annual reviews to determine whether the person's condition has so changed such that the person no longer meets the definition of an SVP; or conditional release to a less restrictive alternative (LRA) is in the best interest of the person and conditions can be imposed to protect the community. Even if DSHS's annual review does not result in a recommendation of any type of release, the person may nonetheless petition the court for conditional release or unconditional discharge.

If a committed person petitions for conditional release or unconditional discharge, the court must set a show cause hearing. The prosecuting agency must first show that the committed person continues to meet the definition of an SVP and that placement in an LRA is not appropriate. The committed person may then present evidence that he or she has so changed that he or she no longer meets commitment criteria or that conditional release to a less restrictive alternative is appropriate. If the court finds that the state has not met its prima facie case or that probable cause exists, the court must set a review hearing. In order to prevail, the state must once again prove beyond a reasonable doubt that the person meets the definition of a sexually violent predator or that conditional release is not appropriate. If the state does not meet its burden, the person must be released.

Up until 2004, the demonstration that the person had so changed focused on actual changes in the committed person due to health issues or success in treatment. However, in *In re Young*, *120 Wn. App. 753, 86 P.3d 810 (2004)*, Mr. Young argued that because he was over the age of 60, he was statistically unlikely to commit a new sex offense and, therefore, he had so changed that he or she no longer met the definition of a sexually violent predator. The court concluded that statistical evidence regarding a sex offender's lower likelihood to recidivate at an advanced age constituted sufficient probable cause entitling Mr. Young to a review hearing. The Legislature responded by passing legislation to clarify that demographic factors alone, such as age, were insufficient to constitute probable cause. In order to constitute probable cause, the person must show an identified physiological change or a change in the person's mental condition brought about by treatment.

In *In re McCuiston, 169 Wn.2d 633, 238 P.3d 1147 (2010)*, the court found that the Legislature did not have the constitutional authority to require a more stringent standard at a review hearing than is required at initial commitment and struck down the statutory limitation of factors the court may look at in determining probable cause. As the result of this decision and the lower threshold required to show probable cause and qualify for a review hearing, approximately 40 petitions for review hearings have been filed to date.

Washington's civil commitment law for SVPs includes many protections that are more aligned with criminal law than that of civil commitment. For example, current law requires a showing beyond a reasonable doubt by a unanimous jury in order to commit a person as an SVP. Civil commitment in general requires a burden of clear and convincing evidence and a jury verdict of ten to two. A significant number of states and the federal government under the Adam Walsh Act also apply these standards to civil commitment for SVPs.

Summary of Bill (Recommended Substitute): In conjunction with an evaluation of a person alleged to be an SVP, the judge must require the person to complete any or all of the following tests requested by the evaluator: a clinical interview; psychological testing;

plethysmograph testing; or a polygraph examination. The judge may order the person to complete any other procedures or tests relevant to the evaluation.

A person may retain, or if the person is indigent, the court may appoint, his or her own expert for evaluation only if the person participated in the most recent interview and evaluation completed by the department.

At a show cause hearing to determine whether a person is entitled to a review hearing, the state has the initial burden to prove a prima facie case that the person meets the definition of an SVP or release to an LRA is not appropriate; if the state meets its burden, the committed person must show by a preponderance of the evidence that his or her condition has so changed so as to justify conditional or unconditional release. Only documentary evidence may be submitted at the show cause hearing. If the state does not meet its prima facie burden or the committed person meets its burden by a preponderance of the evidence, the court must order a review hearing.

At a review hearing, the state has the burden to show by clear and convincing evidence that the person continues to meet the definition of an SVP and that conditional release to an LRA is not in the person's best interest or the public cannot be adequately protected. A jury verdict is reached at the initial commitment hearing and any review trial when ten of 12 jurors agree.

This act applies to all individuals committed or awaiting commitment under chapter 71.09 RCW either on, before, or after the effective date of this section, whether confined in a secure facility or on conditional release.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Substitute): The following provisions are removed:

- limiting court continuances for commitment trials to one year except for good cause;
- limiting the number of depositions that may be taken by either party;
- lowering the state's burden of proof at the initial commitment trial to clear and convincing evidence;
- allowing the fact-finder to consider treatment the person has refused to engage in;
- preventing the fact-finder from hearing evidence that the person may be committed for a recent overt act at a later date if they are not committed;
- changing the annual evaluation to a biennial evaluation; and
- shifting the burden of proof at a retrial hearing to the committed person if the committed person filed a petition without the authorization of DSHS.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Original Bill: PRO: This bill changes the procedures related to civil commitment. Other states have passed legislation based on

Washington's model, but have departed from the Washington criteria where it has simply become too expensive. Commitment is a civil process and therefore procedures do not need to rise to the level of a criminal trial. For example, the defense has brought in experts from Canada and New Zealand at a cost of $500 to $600 per hour. As a result, the defense bar outspends the prosecution by nearly 2:1. This bill will save costs by bringing the law into line with other civil commitment provisions.

In September, the Supreme Court reversed a provision that encouraged treatment. Since that time, treatment has gone down and approximately 30 cases have been ordered for trial. The bill requires an SVP to show by a preponderance of evidence at the show cause hearing in order to obtain a new trial. There are many cost savings provisions in this bill and they all make a great deal of sense. The Attorney General's office is not currently staffed for the number of cases that have been ordered. It is important that the SVP actually participate in the annual review. The evaluator's conclusions are diluted every year with less information and the SVP can simply wait it out until he will qualify for a new hearing. A polygraph will not necessarily be required in every case, but the statute would allow this to be required where the information is needed.

CON: The intent section which states that the annual review system creates the consequence of removing the incentive to treatment is simply not true. There is no evidence that this is happening. It is just the opposite. There is more incentive to participate in an annual review system rather than a biennial system. When you force an individual into testing or forensic interviews, you end up with invalid test results. We are in support of cutting costs and reducing litigation. The style of litigation of the prosecutor's office is often designed to ratchet up defense costs. For example, we will get extensive lists of witnesses that do not include contact information and a fraction of which may be eventually called at trial. This creates a circumstance where the defense must interview and/or depose all of these witnesses at extensive cost to the state. Both the defense and prosecution are very good at their job, but there is a culture of unconstitutionality on the part of some prosecutors' offices. The court has made it clear that RCW 71.09 is constitutional by a slim margin. The state has lost many of its most recent appeals and they are now seeking to have those findings reversed in the Legislature. Many of the things in this bill are a violation of the separation of powers. This bill is a radical rewriting of RCW 71.09 and many of these amendments will end up costing the state more money. It doesn't make sense to reduce the burden of proof when the prosecutors have admitted that they rarely lose these cases.

The superior court judges have issues with the provision that removes judicial discretion limits to order more than one continuance. Judges want to retain the ability to order a continuance based on fairness and judicial equity. Trial courts would like to maintain sound discretion when necessary because of the unavailability of the parties or the judicial calendar.

Persons Testifying: PRO: David Hackett, King County Prosecutor's Office; Brooke Burbank, Josh Choate, Sexually Violent Predator Unit, Attorney General's Office.

CON: Pete MacDonald, Laurie Morris, Washington Defenders Association; Eric Broman, WA Association of Criminal Defense Lawyers; Tom Parker, Superior Court Judges Association.