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**SUBSTITUTE HOUSE BILL 2148**

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**State of Washington                      62nd Legislature                      2011 2nd Special Session**

**By** House Ways & Means (originally sponsored by Representatives Darneille and Hunter; by request of Department of Social and Health Services)

READ FIRST TIME 12/13/11.

1            AN ACT Relating to suspending annual examinations and show cause  
2 hearings for sexually violent predators convicted of a criminal offense  
3 or awaiting trial on criminal charges; amending RCW 71.09.070 and  
4 71.09.090; and declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            **Sec. 1.** RCW 71.09.070 and 2001 c 286 s 8 are each amended to read  
7 as follows:

8            (1) Each person committed under this chapter shall have a current  
9 examination of his or her mental condition made by the department of  
10 social and health services at least once every year. The annual report  
11 shall include consideration of whether the committed person currently  
12 meets the definition of a sexually violent predator and whether  
13 conditional release to a less restrictive alternative is in the best  
14 interest of the person and conditions can be imposed that would  
15 adequately protect the community. The department of social and health  
16 services shall file this periodic report with the court that committed  
17 the person under this chapter. The report shall be in the form of a  
18 declaration or certification in compliance with the requirements of RCW  
19 9A.72.085 and shall be prepared by a professionally qualified person as

1 defined by rules adopted by the secretary. A copy of the report shall  
2 be served on the prosecuting agency involved in the initial commitment  
3 and upon the committed person and his or her counsel. The committed  
4 person may retain, or if he or she is indigent and so requests, the  
5 court may appoint a qualified expert or a professional person to  
6 examine him or her, and such expert or professional person shall have  
7 access to all records concerning the person.

8 (2) During any period of confinement pursuant to a criminal  
9 conviction, or for any period of detention awaiting trial on criminal  
10 charges, this section is suspended. Upon the return of the person  
11 committed under this chapter to the custody of the department, the  
12 department shall initiate an examination of the person's mental  
13 condition. The examination must comply with the requirements of  
14 subsection (1) of this section.

15 **Sec. 2.** RCW 71.09.090 and 2010 1st sp.s. c 28 s 2 are each amended  
16 to read as follows:

17 (1) If the secretary determines that the person's condition has so  
18 changed that either: (a) The person no longer meets the definition of  
19 a sexually violent predator; or (b) conditional release to a less  
20 restrictive alternative is in the best interest of the person and  
21 conditions can be imposed that adequately protect the community, the  
22 secretary shall authorize the person to petition the court for  
23 conditional release to a less restrictive alternative or unconditional  
24 discharge. The petition shall be filed with the court and served upon  
25 the prosecuting agency responsible for the initial commitment. The  
26 court, upon receipt of the petition for conditional release to a less  
27 restrictive alternative or unconditional discharge, shall within forty-  
28 five days order a hearing.

29 (2)(a) Nothing contained in this chapter shall prohibit the person  
30 from otherwise petitioning the court for conditional release to a less  
31 restrictive alternative or unconditional discharge without the  
32 secretary's approval. The secretary shall provide the committed person  
33 with an annual written notice of the person's right to petition the  
34 court for conditional release to a less restrictive alternative or  
35 unconditional discharge over the secretary's objection. The notice  
36 shall contain a waiver of rights. The secretary shall file the notice  
37 and waiver form and the annual report with the court. If the person

1 does not affirmatively waive the right to petition, the court shall set  
2 a show cause hearing to determine whether probable cause exists to  
3 warrant a hearing on whether the person's condition has so changed  
4 that: (i) He or she no longer meets the definition of a sexually  
5 violent predator; or (ii) conditional release to a proposed less  
6 restrictive alternative would be in the best interest of the person and  
7 conditions can be imposed that would adequately protect the community.

8 (b) The committed person shall have a right to have an attorney  
9 represent him or her at the show cause hearing, which may be conducted  
10 solely on the basis of affidavits or declarations, but the person is  
11 not entitled to be present at the show cause hearing. At the show  
12 cause hearing, the prosecuting attorney or attorney general shall  
13 present prima facie evidence establishing that the committed person  
14 continues to meet the definition of a sexually violent predator and  
15 that a less restrictive alternative is not in the best interest of the  
16 person and conditions cannot be imposed that adequately protect the  
17 community. In making this showing, the state may rely exclusively upon  
18 the annual report prepared pursuant to RCW 71.09.070. The committed  
19 person may present responsive affidavits or declarations to which the  
20 state may reply.

21 (c) If the court at the show cause hearing determines that either:  
22 (i) The state has failed to present prima facie evidence that the  
23 committed person continues to meet the definition of a sexually violent  
24 predator and that no proposed less restrictive alternative is in the  
25 best interest of the person and conditions cannot be imposed that would  
26 adequately protect the community; or (ii) probable cause exists to  
27 believe that the person's condition has so changed that: (A) The  
28 person no longer meets the definition of a sexually violent predator;  
29 or (B) release to a proposed less restrictive alternative would be in  
30 the best interest of the person and conditions can be imposed that  
31 would adequately protect the community, then the court shall set a  
32 hearing on either or both issues.

33 (d) If the court has not previously considered the issue of release  
34 to a less restrictive alternative, either through a trial on the merits  
35 or through the procedures set forth in RCW 71.09.094(1), the court  
36 shall consider whether release to a less restrictive alternative would  
37 be in the best interests of the person and conditions can be imposed  
38 that would adequately protect the community, without considering

1 whether the person's condition has changed. The court may not find  
2 probable cause for a trial addressing less restrictive alternatives  
3 unless a proposed less restrictive alternative placement meeting the  
4 conditions of RCW 71.09.092 is presented to the court at the show cause  
5 hearing.

6 (3)(a) At the hearing resulting from subsection (1) or (2) of this  
7 section, the committed person shall be entitled to be present and to  
8 the benefit of all constitutional protections that were afforded to the  
9 person at the initial commitment proceeding. The prosecuting agency  
10 shall represent the state and shall have a right to a jury trial and to  
11 have the committed person evaluated by experts chosen by the state.  
12 The department is responsible for the cost of one expert or  
13 professional person to conduct an evaluation on the prosecuting  
14 agency's behalf. The committed person shall also have the right to a  
15 jury trial and the right to have experts evaluate him or her on his or  
16 her behalf and the court shall appoint an expert if the person is  
17 indigent and requests an appointment.

18 (b) Whenever any person is subjected to an evaluation under (a) of  
19 this subsection, the department is responsible for the cost of one  
20 expert or professional person conducting an evaluation on the person's  
21 behalf. When the person wishes to be evaluated by a qualified expert  
22 or professional person of his or her own choice, such expert or  
23 professional person must be permitted to have reasonable access to the  
24 person for the purpose of such evaluation, as well as to all relevant  
25 medical and psychological records and reports. In the case of a person  
26 who is indigent, the court shall, upon the person's request, assist the  
27 person in obtaining an expert or professional person to perform an  
28 evaluation or participate in the hearing on the person's behalf.  
29 Nothing in this chapter precludes the person from paying for additional  
30 expert services at his or her own expense.

31 (c) If the issue at the hearing is whether the person should be  
32 unconditionally discharged, the burden of proof shall be upon the state  
33 to prove beyond a reasonable doubt that the committed person's  
34 condition remains such that the person continues to meet the definition  
35 of a sexually violent predator. Evidence of the prior commitment trial  
36 and disposition is admissible. The recommitment proceeding shall  
37 otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

1 (d) If the issue at the hearing is whether the person should be  
2 conditionally released to a less restrictive alternative, the burden of  
3 proof at the hearing shall be upon the state to prove beyond a  
4 reasonable doubt that conditional release to any proposed less  
5 restrictive alternative either: (i) Is not in the best interest of the  
6 committed person; or (ii) does not include conditions that would  
7 adequately protect the community. Evidence of the prior commitment  
8 trial and disposition is admissible.

9 (4)(a) Probable cause exists to believe that a person's condition  
10 has "so changed," under subsection (2) of this section, only when  
11 evidence exists, since the person's last commitment trial, or less  
12 restrictive alternative revocation proceeding, of a substantial change  
13 in the person's physical or mental condition such that the person  
14 either no longer meets the definition of a sexually violent predator or  
15 that a conditional release to a less restrictive alternative is in the  
16 person's best interest and conditions can be imposed to adequately  
17 protect the community.

18 (b) A new trial proceeding under subsection (3) of this section may  
19 be ordered, or a trial proceeding may be held, only when there is  
20 current evidence from a licensed professional of one of the following  
21 and the evidence presents a change in condition since the person's last  
22 commitment trial proceeding:

23 (i) An identified physiological change to the person, such as  
24 paralysis, stroke, or dementia, that renders the committed person  
25 unable to commit a sexually violent act and this change is permanent;  
26 or

27 (ii) A change in the person's mental condition brought about  
28 through positive response to continuing participation in treatment  
29 which indicates that the person meets the standard for conditional  
30 release to a less restrictive alternative or that the person would be  
31 safe to be at large if unconditionally released from commitment.

32 (c) For purposes of this section, a change in a single demographic  
33 factor, without more, does not establish probable cause for a new trial  
34 proceeding under subsection (3) of this section. As used in this  
35 section, a single demographic factor includes, but is not limited to,  
36 a change in the chronological age, marital status, or gender of the  
37 committed person.

1           (5) The jurisdiction of the court over a person civilly committed  
2 pursuant to this chapter continues until such time as the person is  
3 unconditionally discharged.

4           (6) During any period of confinement pursuant to a criminal  
5 conviction, or for any period of detention awaiting trial on criminal  
6 charges, this section is suspended.

7           NEW SECTION.   **Sec. 3.** This act is necessary for the immediate  
8 preservation of the public peace, health, or safety, or support of the  
9 state government and its existing public institutions, and takes effect  
10 immediately.

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