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SENATE BILL 5202

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State of Washington

62nd Legislature

2011 Regular Session

By Senators Regala and Hargrove

Read first time 01/18/11. Referred to Committee on Human Services & Corrections.

1 AN ACT Relating to sexually violent predators; amending RCW  
2 71.09.040, 71.09.050, 71.09.060, 71.09.070, 71.09.090, 71.09.094, and  
3 71.09.098; adding new sections to chapter 71.09 RCW; creating new  
4 sections; and declaring an emergency.

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

6 NEW SECTION. **Sec. 1.** The purposes of civil commitment under  
7 chapter 71.09 RCW are to protect the public against dangerous sex  
8 offenders who are mentally ill and to provide the treatment necessary  
9 to ameliorate their mental conditions. The legislature finds that the  
10 current annual review system has created the unintended consequence of  
11 removing the incentive for committed persons to participate in  
12 successful treatment in favor of passive aging and continuous  
13 litigation. To promote public safety, the legislature finds that once  
14 it has been established that a person is a sexually violent predator,  
15 a subsequent trial on the issue of whether the person continues to meet  
16 the sexually violent predator definition should not be held unless  
17 there is sufficient evidence, specific to the individual, that  
18 demonstrates a change in the person's condition since his or her last  
19 civil commitment trial proceeding. To this end, it is imperative that

1 experts and fact finders have available meaningful and current evidence  
2 about a person's mental state and recidivism risk. A person who is  
3 committed should therefore be required to participate in comprehensive  
4 periodic evaluations that include routinely relied on evidence  
5 including clinical interviews, psychological testing, plethysmograph  
6 testing, and polygraph testing, as well as other relevant information.  
7 The legislature clarifies that it intends, and has always intended,  
8 that courts have the ability to order such procedures and tests when  
9 requested by experts in sexually violent predator cases.

10 To further refocus attention on the effective utilization of  
11 treatment services by civilly committed sexually violent predators, the  
12 legislature intends to bring the civil commitment laws under chapter  
13 71.09 RCW further in line with other civil commitment laws in  
14 Washington, including the commitment of the mentally ill under chapter  
15 71.05 RCW and the commitment of the criminally insane under chapter  
16 10.77 RCW. Although many differences between these civil commitment  
17 schemes are necessary to address the unique challenges presented by  
18 each civil commitment population, the extra-constitutional, criminal  
19 law rights provided in chapter 71.09 RCW cause the state of Washington  
20 to incur unnecessary litigation costs and diminish the compelling  
21 public purposes that underlie chapter 71.09 RCW.

22 **Sec. 2.** RCW 71.09.040 and 2009 c 409 s 4 are each amended to read  
23 as follows:

24 (1) Upon the filing of a petition under RCW 71.09.030, the judge  
25 shall determine whether probable cause exists to believe that the  
26 person named in the petition is a sexually violent predator. If such  
27 determination is made the judge shall direct that the person be taken  
28 into custody.

29 (2)(a) Within seventy-two hours after a person is taken into  
30 custody pursuant to subsection (1) of this section, the court shall  
31 provide the person with notice of, and an opportunity to appear in  
32 person at, a hearing to contest probable cause as to whether the person  
33 is a sexually violent predator.

34 (b) In order to assist the person at the hearing, within twenty-  
35 four hours of service of the petition, the prosecuting agency shall  
36 provide to the person or his or her counsel a copy of all materials

1 provided to the prosecuting agency by the referring agency pursuant to  
2 RCW 71.09.025, or obtained by the prosecuting agency pursuant to RCW  
3 71.09.025(1) (c) and (d).

4 (c) At ~~((this))~~ the hearing, the court shall ~~((a))~~ (i) verify the  
5 person's identity, and ~~((b))~~ (ii) determine whether probable cause  
6 exists to believe that the person is a sexually violent predator. ~~((At~~  
7 ~~the probable cause hearing,))~~

8 (d) The state may rely upon the petition and certification for  
9 determination of probable cause filed pursuant to RCW 71.09.030. The  
10 state may supplement this with additional documentary evidence or live  
11 testimony.

12 (e) The person may be held in total confinement at the county jail  
13 until the trial court renders a decision after the conclusion of the  
14 seventy-two hour probable cause hearing. The county shall be entitled  
15 to reimbursement for the cost of housing and transporting the person  
16 pursuant to rules adopted by the ~~((secretary))~~ department.

17 (3) At the probable cause hearing, the person shall have the  
18 following rights in addition to the rights previously specified: (a)  
19 To be represented by counsel; (b) to present evidence on his or her  
20 behalf; (c) to cross-examine witnesses who testify against him or her;  
21 and (d) to view and copy all petitions and reports in the court file.  
22 The court must permit a witness called by either party to testify by  
23 telephone. ~~((Because this))~~

24 (4) The probable cause hearing is a special proceeding~~((7))~~ and  
25 therefore discovery pursuant to section 4 of this act or the civil  
26 rules shall not occur until after the hearing has been held and the  
27 court has issued its decision.

28 ~~((4))~~ (5)(a) If the probable cause determination is made, the  
29 judge shall direct that the person be transferred to an appropriate  
30 facility for an evaluation as to whether the person is a sexually  
31 violent predator. The evaluation shall be conducted by a person deemed  
32 to be professionally qualified, pursuant to rules developed by the  
33 department, to conduct such an examination ~~((pursuant to rules~~  
34 ~~developed by the department of social and health services))~~.

35 (b) The judge shall require the person to complete any or all of  
36 the following procedures or tests if requested by the evaluator: (i)  
37 A clinical interview; (ii) psychological testing; (iii) plethysmograph

1 testing; and (iv) polygraph testing. The judge may order the person to  
2 complete any other procedures and tests relevant to the evaluation.

3 (c) The evaluation shall be completed regardless of whether a  
4 previous evaluation was performed before filing the petition for civil  
5 commitment.

6 (d) The evaluation shall be conducted pursuant to rules developed  
7 by the department of social and health services. In adopting ((such))  
8 rules pursuant to this section, the department ((of social and health  
9 services)) shall consult with the department of health and the  
10 department of corrections.

11 (e) In no event shall the person be released from confinement prior  
12 to trial. ((A witness called by either party shall be permitted to  
13 testify by telephone.))

14 **Sec. 3.** RCW 71.09.050 and 2010 1st sp.s. c 28 s 1 are each amended  
15 to read as follows:

16 (1) Within forty-five days after the completion of any hearing held  
17 pursuant to RCW 71.09.040, the court shall conduct a trial to determine  
18 whether the person is a sexually violent predator. The trial date may  
19 be continued one time for up to twelve months upon the request of  
20 either party and a showing of good cause, or by the court on its own  
21 motion in the due administration of justice, and when the respondent  
22 will not be substantially prejudiced. The court shall not grant any  
23 further continuances of the trial date unless the requesting party  
24 demonstrates, and the court finds, the existence of extraordinary  
25 circumstances that justify the continuance.

26 (2) The department is responsible for the cost of one expert or  
27 professional person to conduct an evaluation on the prosecuting  
28 agency's behalf. At all stages of the proceedings under this chapter,  
29 any person subject to this chapter shall be entitled to the assistance  
30 of counsel, and if the person is indigent, the court shall appoint  
31 counsel to assist him or her. The person shall be confined in a secure  
32 facility for the duration of the trial.

33 ~~((+2))~~ (3) Whenever any person is subjected to an evaluation under  
34 this chapter, the department is responsible for the cost of one expert  
35 or professional person to conduct an evaluation on the person's behalf.  
36 When the person wishes to be evaluated by a qualified expert or  
37 professional person of his or her own choice, the expert or

1 professional person must be permitted to have reasonable access to the  
2 person for the purpose of such evaluation, as well as to all relevant  
3 medical and psychological records and reports. In the case of a person  
4 who is indigent, the court shall, upon the person's request, assist the  
5 person in obtaining an expert or professional person to perform an  
6 evaluation or participate in the trial on the person's behalf. Nothing  
7 in this chapter precludes the person from paying for additional expert  
8 services at his or her own expense.

9 ~~((+3+))~~ (4) The person, the prosecuting agency, or the judge shall  
10 have the right to demand that the trial be before a twelve-person jury.  
11 If no demand is made, the trial shall be before the court.

12 NEW SECTION. **Sec. 4.** A new section is added to chapter 71.09 RCW  
13 to read as follows:

14 (1) Unless otherwise specified in this chapter, this section shall  
15 govern pretrial discovery for any trial proceeding under RCW 71.09.060  
16 and 71.09.090(3), as well as any hearing held under RCW 71.09.098.  
17 Civil discovery rules apply except when inconsistent with the special  
18 proceeding established by this chapter.

19 (2) The prosecuting agency and a person who is the subject of a  
20 sexually violent predator petition shall have a continuing obligation  
21 to disclose all materials, not privileged, which are relevant to the  
22 questions before the court, or reasonably calculated to lead to  
23 relevant evidence. Where a privilege is claimed allowing nondisclosure  
24 of materials, the party asserting the privilege shall provide a  
25 privilege log. The prosecuting agency and the person shall certify  
26 compliance with this provision.

27 (3) Where any expert witness is to provide testimony in a  
28 proceeding under this chapter, the party presenting the testimony shall  
29 provide a report from the testifying expert summarizing the expert's  
30 opinions.

31 (4) A party may take no more than ten depositions, with each  
32 deposition limited to one day of seven hours; provided, that each party  
33 may conduct one deposition that shall be limited to two days of seven  
34 hours per day. All depositions of expert witnesses, state agency  
35 personnel, and victims of sexual assault shall take place by telephone.  
36 Nothing in this section shall preclude a party from interviewing

1 witnesses outside the deposition process with the consent of the  
2 witness.

3 (5) The state shall disclose the general facts supporting its  
4 allegation that the person is a sexually violent predator in a  
5 prosecutor's statement filed with the petition for civil commitment.  
6 The person shall disclose any intended voluntary treatment options in  
7 the community offered pursuant to RCW 71.09.060, including any proposed  
8 housing, no later than forty days prior to trial, or one hundred twenty  
9 days if the trial is continued under subsection (2) of this section.

10 (6) If the person is petitioning the court for release to a less  
11 restrictive alternative as provided in RCW 71.09.090, the person shall  
12 disclose any proposed less restrictive alternative at the show cause  
13 hearing.

14 (7) Civil discovery rules relating to interrogatories and requests  
15 for admission are inconsistent with the special proceeding established  
16 under this chapter and do not apply to proceedings under this chapter.

17 (8) Any party or state agency served with discovery requests in  
18 violation of this section need not respond to those requests or move  
19 for a protective order. Any party or person served with a notice of  
20 deposition in violation of this section need not attend the deposition  
21 or move for a protective order.

22 **Sec. 5.** RCW 71.09.060 and 2009 c 409 s 6 are each amended to read  
23 as follows:

24 (1)(a) The court or jury shall determine whether(~~(, beyond a~~  
25 ~~reasonable doubt,)) the state has proven by clear and convincing  
26 evidence that the person is a sexually violent predator.~~

27 (b) When the determination is made by a jury, a verdict is reached  
28 when ten of twelve jurors agree.

29 (2)(a) In determining whether or not the person would be likely to  
30 engage in predatory acts of sexual violence if not confined in a secure  
31 facility, the fact finder may consider (~~only placement conditions and~~  
32 ~~voluntary treatment options that would exist for the person if~~  
33 ~~unconditionally released from detention on the sexually violent~~  
34 ~~predator petition)) all relevant evidence admitted by the trial court.~~

35 (b) In evaluating the person's mental condition and risk to  
36 reoffend, the fact finder may consider any prior or existing sex  
37 offender treatment efforts that the person has engaged in, or refused

1 to engage in, prior to trial. The finder of fact may not consider the  
2 prospect of a future recent overt act filing in lieu of civil  
3 commitment because such evidence is overly speculative and places an  
4 undue burden on public safety.

5 (c) In evaluating the person's risk to reoffend, the fact finder  
6 shall consider only placement conditions and voluntary treatment  
7 options that would exist for the person if unconditionally released  
8 from detention on the sexually violent predator petition. The  
9 community protection program under RCW 71A.12.230 may not be considered  
10 as a placement condition or treatment option available to the person if  
11 unconditionally released from detention on a sexually violent predator  
12 petition. (~~When the determination is made by a jury, the verdict must~~  
13 ~~be unanimous.~~)

14 (d) If, on the date that the petition is filed, the person was  
15 living in the community after release from custody, the state must also  
16 prove (~~beyond a reasonable doubt~~) by clear and convincing evidence  
17 that the person had committed a recent overt act. If the state alleges  
18 that the prior sexually violent offense that forms the basis for the  
19 petition for commitment was an act that was sexually motivated as  
20 provided in RCW 71.09.020(~~(+15+)) (17)(c), the state must prove~~  
21 (~~beyond a reasonable doubt~~) by clear and convincing evidence that the  
22 alleged sexually violent act was sexually motivated as defined in RCW  
23 9.94A.030.

24 (3)(a) If the court or jury determines that the person is a  
25 sexually violent predator, the person shall be committed to the custody  
26 of the department of social and health services for placement in a  
27 secure facility operated by the department of social and health  
28 services for control, care, and treatment until such time as: (a) The  
29 person's condition has so changed that the person no longer meets the  
30 definition of a sexually violent predator; or (b) conditional release  
31 to a less restrictive alternative as set forth in RCW 71.09.092 is in  
32 the best interest of the person and conditions can be imposed that  
33 would adequately protect the community.

34 (b) If the court or (~~unanimous~~) jury decides that the state has  
35 not met its burden of proving that the person is a sexually violent  
36 predator, the court shall direct the person's release.

37 (c) If the jury is unable to reach a (~~unanimous~~) verdict, the  
38 court shall declare a mistrial and set a retrial within forty-five days

1 of the date of the mistrial unless the prosecuting agency earlier moves  
2 to dismiss the petition. The retrial may be continued one time upon  
3 the request of either party for up to four months when accompanied by  
4 a showing of good cause, or by the court on its own motion in the due  
5 administration of justice provided that the respondent will not be  
6 substantially prejudiced. In no event may the person be released from  
7 confinement prior to retrial or dismissal of the case.

8 ((+2)) (4)(a) If the person charged with a sexually violent  
9 offense has been found incompetent to stand trial, and is about to be  
10 or has been released pursuant to RCW 10.77.086(4), and his or her  
11 commitment is sought pursuant to (~~subsection (1) of~~) this section,  
12 the court shall first hear evidence and determine whether the person  
13 did commit the act or acts charged if the court did not enter a finding  
14 prior to dismissal under RCW 10.77.086(4) that the person committed the  
15 act or acts charged.

16 (b) The hearing on this issue must comply with all the procedures  
17 specified in this section. In addition, the rules of evidence  
18 applicable in criminal cases shall apply, and all constitutional rights  
19 available to defendants at criminal trials, other than the right not to  
20 be tried while incompetent, shall apply.

21 (c) After hearing evidence (~~(on this issue)~~), the court shall make  
22 specific findings on whether the person did commit the act or acts  
23 charged, the extent to which the person's incompetence or developmental  
24 disability affected the outcome of the hearing, including its effect on  
25 the person's ability to consult with and assist counsel and to testify  
26 on his or her own behalf, the extent to which the evidence could be  
27 reconstructed without the assistance of the person, and the strength of  
28 the prosecution's case.

29 (d) If (~~(, after the conclusion of the hearing on this issue,)~~) the  
30 court finds, beyond a reasonable doubt, that the person did commit the  
31 act or acts charged, it shall enter a final order, appealable by the  
32 person(~~(,)~~) on that issue, and may proceed to consider whether the  
33 person should be committed pursuant to this section.

34 ((+3)) (5) Except as otherwise provided in this chapter, the state  
35 shall comply with RCW 10.77.220 while confining the person. During all  
36 court proceedings where the person is present, the person shall be  
37 detained in a secure facility. If the proceedings last more than one  
38 day, the person may be held in the county jail for the duration of the



1 proceedings, except the person may be returned to the department's  
2 custody on weekends and court holidays if the court deems such a  
3 transfer feasible. The county shall be entitled to reimbursement for  
4 the cost of housing and transporting the person pursuant to rules  
5 adopted by the secretary. The department shall not place the person,  
6 even temporarily, in a facility on the grounds of any state mental  
7 facility or regional habilitation center because these institutions are  
8 insufficiently secure for this population.

9 ~~((4))~~ (6) A court has jurisdiction to order a less restrictive  
10 alternative placement only after a hearing ordered pursuant to RCW  
11 71.09.090 following initial commitment under this section and in accord  
12 with the provisions of this chapter.

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

15 (1) Each person committed under this chapter shall have a current  
16 examination of his or her mental condition made by the department ~~((of~~  
17 ~~social and health services))~~ at least once every two years. ~~((The~~  
18 ~~annual report shall))~~

19 (2) The examination shall include an in-person interview of the  
20 committed person by the evaluator.

21 (3) The evaluator shall prepare a report that includes  
22 consideration of whether:

23 (a) The committed person currently meets the definition of a  
24 sexually violent predator ~~((and whether))~~;

25 (b) Conditional release to a less restrictive alternative is in the  
26 best interest of the person and;

27 (c) Conditions can be imposed that would adequately protect the  
28 community.

29 (4) The department ~~((of social and health services))~~ shall file  
30 ~~((this periodic))~~ the report with the court that committed the person  
31 under this chapter. The report shall be in the form of a declaration  
32 or certification in compliance with the requirements of RCW 9A.72.085  
33 and shall be prepared by a professionally qualified person as defined  
34 by rules adopted by the secretary. A copy of the report shall be  
35 served on the prosecuting agency involved in the initial commitment and  
36 upon the committed person and his or her counsel.

1       (5) Provided that the committed person participated in the most  
2 recent interview and evaluation completed by the department, the  
3 committed person may retain, or if he or she is indigent and so  
4 requests, the court may appoint a qualified expert or a professional  
5 person to examine him or her, and such expert or professional person  
6 shall have access to all records concerning the person.

7       (6) The committed person shall provide proof of compliance with  
8 this section to the court when requesting appointment of an expert or  
9 professional person.

10       **Sec. 7.** RCW 71.09.090 and 2010 1st sp.s. c 28 s 2 are each amended  
11 to read as follows:

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

24       (2)(a) Nothing contained in this chapter shall prohibit the person  
25 from otherwise petitioning the court for conditional release to a less  
26 restrictive alternative or unconditional discharge without the  
27 secretary's approval. The secretary shall provide the committed person  
28 with (~~an annual~~) written notice every two years of the person's right  
29 to petition the court for conditional release to a less restrictive  
30 alternative or unconditional discharge over the secretary's objection.  
31 The notice shall contain a waiver of rights. The secretary shall file  
32 the notice and waiver form and the (~~annual~~) report prepared pursuant  
33 to RCW 71.09.070 with the court. If the person does not affirmatively  
34 waive the right to petition, the court shall set a show cause hearing  
35 to determine whether probable cause exists to warrant a hearing on  
36 whether the person's condition has so changed that: (i) He or she no  
37 longer meets the definition of a sexually violent predator; or (ii)

1 conditional release to a proposed less restrictive alternative would be  
2 in the best interest of the person and conditions can be imposed that  
3 would adequately protect the community.

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

17 (c) If the prosecuting agency meets its foregoing prima facie  
18 burden, the committed person shall then bear the burden to show, by a  
19 preponderance of the evidence, that his or her condition has so changed  
20 since entry of the most recent commitment order that he or she no  
21 longer meets the definition of a sexually violent predator, or that a  
22 proposed less restrictive alternative is in his or her best interest  
23 and includes conditions that can be imposed that adequately protect the  
24 community. The prosecuting agency may reply. Absent a finding of good  
25 cause by the trial court, only documentary evidence may be submitted to  
26 the court at the show cause hearing. The court shall not consider  
27 release to a less restrictive alternative unless a proposal meeting the  
28 conditions of RCW 71.09.092 is presented to the court at the show cause  
29 hearing.

30 (d) If the court at the show cause hearing determines that either:  
31 (i) The (~~(state)~~) prosecuting agency has failed to present prima facie  
32 evidence that the committed person continues to meet the definition of  
33 a sexually violent predator and that no proposed less restrictive  
34 alternative is in the best interest of the person and conditions cannot  
35 be imposed that would adequately protect the community; or (ii)  
36 (~~(probable cause exists to believe)~~) there is a preponderance of  
37 evidence that the person's condition has so changed that: (A) The  
38 person no longer meets the definition of a sexually violent predator;

1 or (B) release to a proposed less restrictive alternative would be in  
2 the best interest of the person and conditions can be imposed that  
3 would adequately protect the community, then the court shall set a  
4 hearing on either or both issues. The court shall set this hearing  
5 within ninety days of its show cause decision.

6 ~~((d))~~ (e) If the court has not previously considered the issue of  
7 release to a less restrictive alternative, either through a trial on  
8 the merits or through the procedures set forth in RCW 71.09.094(1), the  
9 court shall consider whether release to a less restrictive alternative  
10 would be in the best interests of the person and conditions can be  
11 imposed that would adequately protect the community, without  
12 considering whether the person's condition has changed. ~~((The court~~  
13 ~~may not find probable cause for a trial addressing less restrictive~~  
14 ~~alternatives unless a proposed less restrictive alternative placement~~  
15 ~~meeting the conditions of RCW 71.09.092 is presented to the court at~~  
16 ~~the show cause hearing.))~~

17 (f) The show cause hearing is a special proceeding and therefore  
18 discovery pursuant to section 4 of this act or the civil rules shall  
19 not occur absent a finding of good cause by the trial court.

20 (3)(a) At the hearing resulting from subsection (1) or (2) of this  
21 section, the committed person shall be entitled to be present and to  
22 the benefit of all constitutional protections that were afforded to the  
23 person at the initial commitment proceeding. The prosecuting agency  
24 shall represent the state and shall have a right to a jury trial and to  
25 have the committed person evaluated by experts chosen by the state.  
26 The department is responsible for the cost of one expert or  
27 professional person to conduct an evaluation on the prosecuting  
28 agency's behalf. The committed person shall also have the right to a  
29 jury trial and the right to have experts evaluate him or her on his or  
30 her behalf and the court shall appoint an expert if the person is  
31 indigent and requests an appointment. Evaluations pursuant to this  
32 section shall be subject to all requirements specified in RCW  
33 71.09.040.

34 (b) Whenever any person is subjected to an evaluation under (a) of  
35 this subsection, the department is responsible for the cost of one  
36 expert or professional person conducting an evaluation on the person's  
37 behalf. When the person wishes to be evaluated by a qualified expert  
38 or professional person of his or her own choice, such expert or

1 professional person must be permitted to have reasonable access to the  
2 person for the purpose of such evaluation, as well as to all relevant  
3 medical and psychological records and reports. In the case of a person  
4 who is indigent, the court shall, upon the person's request, assist the  
5 person in obtaining an expert or professional person to perform an  
6 evaluation or participate in the hearing on the person's behalf.  
7 Nothing in this chapter precludes the person from paying for additional  
8 expert services at his or her own expense.

9 (c) If the issue at the hearing is whether the person should be  
10 unconditionally discharged, the burden of proof shall be upon the  
11 ~~((state to prove beyond a reasonable doubt that the committed person's  
12 condition remains such that the person continues to))~~ committed person  
13 to prove by a preponderance of the evidence that the person's condition  
14 has so changed such that the person no longer meets the definition of  
15 a sexually violent predator. Evidence of the prior commitment trial  
16 and disposition is admissible. The recommitment proceeding shall  
17 otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

18 (d) If the issue at the hearing is whether the person should be  
19 conditionally released to a less restrictive alternative and the  
20 secretary has authorized the petition for conditional discharge under  
21 this section, the burden of proof at the hearing shall be upon the  
22 ~~((state))~~ prosecuting agency to prove ~~((beyond a reasonable doubt))~~ by  
23 clear and convincing evidence that conditional release to any proposed  
24 less restrictive alternative either:

25 (i) Is not in the best interest of the committed person; or

26 (ii) Does not include conditions that would adequately protect the  
27 community. ~~((Evidence of the prior commitment trial and disposition is~~  
28 ~~admissible.))~~

29 (e) If the issue at the hearing is whether the person should be  
30 conditionally released to a less restrictive alternative and the  
31 secretary has not authorized the petition for conditional discharge  
32 under this section, the burden of proof at the hearing shall be upon  
33 the committed person to prove by a preponderance of the evidence that  
34 conditional release to any proposed less restrictive alternative both:

35 (i) Is in the best interest of the committed person; and

36 (ii) Includes conditions that would adequately protect the  
37 community.

1        (f) Evidence of the prior commitment trial and disposition is  
2 admissible in any proceeding under this subsection. The proceeding  
3 shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

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

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

18        (i) An identified physiological change to the person, such as  
19 paralysis, stroke, or dementia, that renders the committed person  
20 unable to commit a sexually violent act and this change is permanent;  
21 or

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

27        (c) For purposes of this section, a change in a single demographic  
28 factor, without more, does not establish (~~(probable cause)~~) sufficient  
29 evidence for a new trial proceeding under subsection (3) of this  
30 section. As used in this section, a single demographic factor  
31 includes, but is not limited to, a change in the chronological age,  
32 marital status, or gender of the committed person.

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

36        **Sec. 8.** RCW 71.09.094 and 2001 c 286 s 11 are each amended to read  
37 as follows:

1 (1) Upon the conclusion of the evidence in a hearing held pursuant  
2 to RCW 71.09.090 or through summary judgment proceedings prior to such  
3 a hearing, if the court finds that there is no legally sufficient  
4 evidentiary basis for a reasonable jury to find that the conditions set  
5 forth in RCW 71.09.092 have been met, the court shall grant a motion by  
6 the state for a judgment as a matter of law on the issue of conditional  
7 release to a less restrictive alternative.

8 (2) Whenever the issue of conditional release to a proposed less  
9 restrictive alternative is submitted to the jury with the  
10 recommendation of the secretary under RCW 71.09.090(1), the court shall  
11 instruct the jury to return a verdict in substantially the following  
12 form: Has the state proved (~~beyond a reasonable doubt~~) by clear and  
13 convincing evidence that either: (a) The proposed less restrictive  
14 alternative is not in the best interests of respondent; or (b) the  
15 proposed less restrictive alternative does not include conditions that  
16 would adequately protect the community? Answer: Yes or No.

17 (3) Whenever the issue of conditional release to a proposed less  
18 restrictive alternative is submitted to the jury without the  
19 recommendation of the secretary under RCW 71.09.090(1), the court shall  
20 instruct the jury to return a verdict in substantially the following  
21 form: Has the respondent proved by a preponderance of the evidence  
22 that both: (a) The proposed less restrictive alternative is in the  
23 best interest of the committed person; and (b) the proposed less  
24 restrictive alternative includes conditions that would adequately  
25 protect the community? Answer: Yes or No.

26 (4) Whenever the issue of unconditional release is submitted to the  
27 jury, the court shall instruct the jury to return a verdict in  
28 substantially the following form: Has the respondent proved by a  
29 preponderance of the evidence that his or her condition has so changed  
30 such that he or she is no longer a sexually violent predator? Answer:  
31 Yes or No.

32 **Sec. 9.** RCW 71.09.098 and 2009 c 409 s 11 are each amended to read  
33 as follows:

34 (1) Any service provider submitting reports pursuant to RCW  
35 71.09.096(6), the supervising community corrections officer, the  
36 prosecuting agency, or the secretary's designee may petition the court  
37 for an immediate hearing for the purpose of revoking or modifying the

1 terms of the person's conditional release to a less restrictive  
2 alternative if the petitioner believes the released person: (a)  
3 Violated or is in violation of the terms and conditions of the court's  
4 conditional release order; or (b) is in need of additional care,  
5 monitoring, supervision, or treatment.

6 (2) The community corrections officer or the secretary's designee  
7 may restrict the person's movement in the community until the petition  
8 is determined by the court. The person may be taken into custody if:

9 (a) The supervising community corrections officer, the secretary's  
10 designee, or a law enforcement officer reasonably believes the person  
11 has violated or is in violation of the court's conditional release  
12 order; or

13 (b) The supervising community corrections officer or the  
14 secretary's designee reasonably believes that the person is in need of  
15 additional care, monitoring, supervision, or treatment because the  
16 person presents a danger to himself or herself or others if his or her  
17 conditional release under the conditions imposed by the court's release  
18 order continues.

19 (3)(a) Persons taken into custody pursuant to subsection (2) of  
20 this section shall:

21 (i) Not be released until such time as a hearing is held to  
22 determine whether to revoke or modify the person's conditional release  
23 order and the court has issued its decision; and

24 (ii) Be held in the county jail, at a secure community transition  
25 facility, or at the total confinement facility, at the discretion of  
26 the secretary's designee.

27 (b) The court shall be notified before the close of the next  
28 judicial day that the person has been taken into custody and shall  
29 promptly schedule a hearing.

30 (4) Before any hearing to revoke or modify the person's conditional  
31 release order, both the prosecuting agency and the released person  
32 shall have the right to request an immediate (~~mental examination~~)  
33 evaluation of the released person. If the conditionally released  
34 person is indigent, the court shall, upon request, assist him or her in  
35 obtaining a qualified expert or professional person to conduct the  
36 (~~examination~~) evaluation. Evaluations pursuant to this section shall  
37 be subject to all requirements specified in RCW 71.09.040.



1 (5) At any hearing to revoke or modify the conditional release  
2 order:

3 (a) The prosecuting agency shall represent the state, including  
4 determining whether to proceed with revocation or modification of the  
5 conditional release order;

6 (b) Hearsay evidence is admissible if the court finds that it is  
7 otherwise reliable; and

8 (c) The state shall bear the burden of proving by a preponderance  
9 of the evidence that the person has violated or is in violation of the  
10 court's conditional release order or that the person is in need of  
11 additional care, monitoring, supervision, or treatment.

12 (6)(a) If the court determines that the state has met its burden  
13 referenced in subsection (5)(c) of this section, and the issue before  
14 the court is revocation of the court's conditional release order, the  
15 court shall consider the evidence presented by the parties and the  
16 following factors relevant to whether continuing the person's  
17 conditional release is in the person's best interests or adequate to  
18 protect the community:

19 (i) The nature of the condition that was violated by the person or  
20 that the person was in violation of in the context of the person's  
21 criminal history and underlying mental conditions;

22 (ii) The degree to which the violation was intentional or grossly  
23 negligent;

24 (iii) The ability and willingness of the released person to  
25 strictly comply with the conditional release order;

26 (iv) The degree of progress made by the person in community-based  
27 treatment; and

28 (v) The risk to the public or particular persons if the conditional  
29 release continues under the conditional release order that was  
30 violated.

31 (b) Any factor alone, or in combination, shall support the court's  
32 determination to revoke the conditional release order.

33 (7) If the court determines the state has met its burden referenced  
34 in subsection (5)(c) of this section, and the issue before the court is  
35 modification of the court's conditional release order, the court shall  
36 modify the conditional release order by adding conditions if the court  
37 determines that the person is in need of additional care, monitoring,  
38 supervision, or treatment. The court has authority to modify its

1 conditional release order by substituting a new treatment provider,  
2 requiring new housing for the person, or imposing such additional  
3 supervision conditions as the court deems appropriate.

4 (8) A person whose conditional release has been revoked shall be  
5 remanded to the custody of the secretary for control, care, and  
6 treatment in a total confinement facility as designated in RCW  
7 71.09.060(1). The person is thereafter eligible for conditional  
8 release only in accord with the provisions of RCW 71.09.090 and related  
9 statutes.

10 NEW SECTION. **Sec. 10.** A new section is added to chapter 71.09 RCW  
11 to read as follows:

12 The provisions of this chapter shall be liberally construed to  
13 serve the remedial purposes of the chapter, including protection of the  
14 public from sexually violent predators and the provision of treatment  
15 for sexually violent predators.

16 NEW SECTION. **Sec. 11.** This act applies to all individuals  
17 currently committed or awaiting commitment under chapter 71.09 RCW  
18 either on, before, or after the effective date of this section, whether  
19 confined in a secure facility or on conditional release.

20 NEW SECTION. **Sec. 12.** If any provision of this act or its  
21 application to any person or circumstance is held invalid, the  
22 remainder of the act or the application of the provision to other  
23 persons or circumstances is not affected.

24 NEW SECTION. **Sec. 13.** This act is necessary for the immediate  
25 preservation of the public peace, health, or safety, or support of the  
26 state government and its existing public institutions, and takes effect  
27 immediately.

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