

HOUSE BILL REPORT

HB 1059

As Passed Legislature

Title: An act relating to sexually violent predators.

Brief Description: Concerning sexually violent predators.

Sponsors: Representatives Fagan, Goodman, Hayes, Moscoso, Takko, Tarleton, Orwall, Nealey, Klippert, Pettigrew, Gregerson, Haler, Fitzgibbon, Stanford and Farrell; by request of Attorney General.

Brief History:

Committee Activity:

Public Safety: 1/20/15, 2/6/15 [DP];

Appropriations: 2/24/15, 2/26/15 [DP].

Floor Activity:

Passed House: 3/6/15, 93-5.

Senate Amended.

Passed Senate: 4/13/15, 46-0.

House Concurred.

Passed House: 4/20/15, 87-6.

Passed Legislature.

Brief Summary of Bill

- Excludes evidence from an expert on a committed sexually violent predator's (SVP) behalf if the committed SVP does not participate in the Department of Social and Health Services' most recent annual review interview and evaluation.
- Suspends the annual examination requirement while the committed SVP is awaiting trial for unconditional release; if a person is recommitted, the next annual examination must be done within one year of the recommitment order.
- Defines "treatment" to be the sex offender specific treatment program at the Special Commitment Center or a course of sex offender treatment by a certified provider.
- Requires a court, prior to authorizing release of a SVP to a less restrictive alternative, to consider release to the person's county of commitment.

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.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: Do pass. Signed by 7 members: Representatives Goodman, Chair; Orwall, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Griffey, Pettigrew and Wilson.

Minority Report: Do not pass. Signed by 1 member: Representative Appleton.

Staff: Cassie Jones (786-7303).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 31 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Chandler, Ranking Minority Member; Parker, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Carlyle, Cody, Condotta, Dent, Dunshee, Fagan, Haler, Hansen, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, MacEwen, Magendanz, Pettigrew, Sawyer, Schmick, Senn, Springer, Stokesbary, Sullivan, Tharinger, Van Werven and Walkinshaw.

Minority Report: Do not pass. Signed by 2 members: Representatives G. Hunt and Taylor.

Staff: James Kettel (786-7123).

Background:

Sexually Violent Predator Commitment Proceedings. A sexually violent predator (SVP) is a person who has been convicted of, found not guilty by reason of insanity of, or found to be incompetent to stand trial for 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.

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 to determine whether the person is a SVP.

At the trial, the burden is on the state to prove beyond a reasonable doubt that the person is a SVP. If the person requests a 12-person jury, the jury must be unanimous in their decision. If the person is found to be a SVP, he or she 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) on McNeil Island.

Annual Examinations. Every year, the DSHS shall conduct an examination of each committed person's mental condition and prepare a report as to 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 committed person can retain, or have appointed, if indigent, an evaluator to conduct an examination.

Review Proceedings. If the DSHS determines after the annual examination 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 a full trial to consider 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 committed person does not waive the right, the court must set a show cause hearing to determine if probable cause exists to warrant a hearing on whether the person's condition has so changed.

If, at the hearing, the committed person demonstrates probable cause to believe that his or her 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, the court will order a full trial, at which the burden is on the state. However, a trial may not be ordered unless there is current evidence from a licensed professional that: (1) the committed person has undergone a permanent physiological change, such as paralysis, stroke, or dementia, which renders him or her unable to commit a sexually violent act; or (2) treatment has brought about change in mental condition such that the person meets the standard for conditional release to a LRA or unconditional release.

Less Restrictive Alternative Release. Before releasing a person to a LRA, the court must make these additional findings:

- the person will be treated by a qualified treatment provider;
- the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the Superintendent of the SCC;
- housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the Superintendent of the SCC if the person leaves the housing to which he or she has been assigned without authorization;
- the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and
- the person will be under the supervision of the Department of Corrections and is willing to comply with supervision.

Summary of Bill:

Annual Examinations. The DSHS, at the request of the committed person, must allow a record of the annual review interview to be preserved by audio recording and must make the recording available to the committed person. The evaluator must indicate in the report whether the committed person participated in the interview and examination.

In a proceeding to determine whether a committed person will be released to a LRA or unconditionally discharged, any reports and testimony by an expert on behalf of the committed person is excluded if the committed person did not participate in the most recent interview and evaluation completed by the DSHS.

The annual review requirement is suspended while a committed person is awaiting trial for unconditional release. If the person is recommitted, the next annual review must be done within one year of the recommitment order.

Review Proceedings. A trial for conditional or unconditional release may not be ordered unless there is current evidence from a licensed professional that: (1) the committed person has undergone a permanent physiological change, such as paralysis, stroke, or dementia, which renders him or her unable to commit a sexually violent act; or (2) sex offender specific treatment has brought about change in mental condition such that the person meets the standard for conditional release to a LRA or unconditional release.

Less Restrictive Alternative Release. Prior to authorizing release of a sexually violent predator to a less restrictive alternative, the court is required to consider release to the person's county of commitment. A person's county of commitment is the county of the court which ordered the person's commitment. It is appropriate to release a person to the person's county of commitment unless the court determines that return to the county of commitment would be inappropriate considering the following factors:

- any court-issued protection orders;
- victim safety concerns;
- the availability of appropriate treatment or facilities that would adequately protect the community;
- negative influences on the person; or
- the location of family or other persons or organizations offering support.

When the DSHS or the court assists in developing a placement of a person, effort must be made to avoid disproportionate effect on a single county. If the person is not released to his or her county of commitment, the DSHS must provide written notice and an explanation to the law and justice council of the county of placement.

Appropriation: None.

Fiscal Note: Available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 1 and 2, relating to exclusion of evidence from an expert on behalf of a sexually violent predator, suspension of the annual examination requirement, and the definition of "treatment" to be sex offender specific treatment, which contain an emergency clause and takes effect on July 1, 2015.

Staff Summary of Public Testimony (Public Safety):

(In support) This bill is important to a lot of families and victims. The bill should get thorough review and approval. There has been an effort to work with those who oppose the

bill. There was a case where a woman was raped by a man, a career criminal, who was later convicted for the crime. The man was later committed to McNeil Island and the victims thought it was over. The whole time he was in the SCC he never participated in any treatment. These people cannot be cured. The man was released and now lives 50 miles from his victim. His other victims are afraid to see him. Criminals have all the rights, they get free attorneys, and they can refuse treatment. The victims get nothing but pain and live in fear forever. Victims cannot afford lawyers for civil suits and they are afraid of offenders that are released. These offenders should have to go to treatment and be evaluated prior to release.

Sexually violent predators have been released because the sections of this bill are not in the law. Experts can be hired to evaluate SVPs they have never met face to face. A single trial can cost \$250,000. The safety of the public is impacted by the release of SVPs. Sexually violent predators are allowed to get out without effective treatment or evaluation.

Sexually violent predators impose great costs on victims and their families. This bill represents a reasonable compromise—proper due process rights for the SVPs balanced with an appropriate volume of litigation and incentives for participation in treatment.

Sexual abuser specific treatment promotes public safety. The Legislature meant treatment in the statute to be sex offender specific treatment. In 2005 SVPs were getting new trials every year claiming that they did not meet the criteria. The law was amended to require participation in treatment. Defense experts have said that behavior control is treatment; part of the treatment milieu. Regarding frivolous litigation, there are expensive experts who claim that this treatment milieu causes a change in circumstance. They lose every one of these motions, but they are appealed over and over. By the time this litigation is complete, it is time for the next annual review. Prosecutors are being papered to death by frivolous appeals. This bill will help end that practice.

(Opposed) There are concerns regarding the facility and the effectiveness of treatment at the SCC. The particular issue in the bill is defining treatment. There is concern that committed individuals cannot access treatment due to a disability for which they are not receiving accommodation.

The committee should reject this bill or refer the issue to the Sex Offender Policy Board. The statute allows a person to have a new trial if the person has changed through treatment or their physical condition has changed. The case mentioned earlier was a physical change case and would not have been affected by the changes in this bill. Courts should be the ones to decide if a person has changed through treatment. This bill will lead to a federal injunction or be found unconstitutional. In the case mentioned previously, the individual was evaluated by the state and the defense. At the end, the state agreed to dismiss the case. The statute needs to allow meaningful paths to exit or it is not constitutional.

It is not proper to require a person to meet with a state evaluator prior to having their own expert. There is a long history of negative interactions between staff and the residents at the SCC. The state evaluator is perceived as an arm of the state trying to keep them in confinement. The definition of treatment is too narrow. There are a number of treatment modalities to treat sex offenders. A specific sex offender treatment program is not always

necessary. Individuals who no longer meet the criteria can continue to be warehoused with these changes in the bill.

The residents' ability to challenge the review is what makes the statute constitutional. If the ability to challenge it is taken away, the statute will become unconstitutional and it will be challenged. Tax payers will not save any money. The entire facility is a treatment program. The entire environment is a treatment milieu. There should be a workgroup to make the law better.

Staff Summary of Public Testimony (Appropriations):

(In support) The committee has heard this issue before. The primary purpose of this bill is to protect the public. Current law insults the victims and insults the taxpayers. It is important to save money, and it is also important to protect the public. This bill reduces the likelihood that a dangerous predator will be released into the community prematurely. Residents of the Special Commitment Center (SCC) will benefit from additional participation in treatment and annual reviews. The bill is supported by prosecutors, sheriffs, victim advocates, police chiefs, and forensic psychologists who work with this population. Frivolous litigation has been expanding over the last few years. There have been defense evaluations stating that a person has changed, even though that person has not participated in a single day of sex offender treatment. A court will hold a hearing and the person will lose. The person will then appeal the decision all the way to the state Supreme Court. A year will go by and the next evaluation will be completed. All of the litigation results in nothing and is a complete waste. There are concerns that this bill is unconstitutional. The requirement for the state to complete an evaluation every year is constitutional. The Legislature has provided an additional avenue for committed sex offenders to obtain a release trial, which is over and above the constitutional requirement. The sex offender receives an expert every year at public expense and can present an evaluation to the court asking for a new trial. The state Supreme Court has said that a committed person's statutory right to show his or her condition has changed provides a safeguard that goes beyond the requirement of substantive due process. This bill reels in abusive processes. The sex offender cannot refuse to meet with an evaluator for the state, but then decide to cooperate with his or her own evaluator. Currently, in King County, there are 61 sexually violent predators who are committed to the SCC. Every year, prosecutors in King County receive notification that sexually violent predators have changed from participation in a counselor assisted self-help (CASH) program. Other individuals claim to have been rehabilitated from barriers to treatment programs. Programs like CASH and barriers to treatment offer value to residents, but they are not sex offender treatment.

(Opposed) The problem with this bill is that it predicates the exercise of a constitutional right on someone being cooperative. This is a civil process, but the liberty of these individuals has been denied. Constitutional concerns need to be addressed here. This bill is inviting a federal lawsuit, a return to federal oversight, and all of the costs associated with federal oversight. Proponents talk about how residents do not cooperate with treatment. Some people cannot cooperate with treatment. Some people at the SCC have language barriers, traumatic brain injury, or a developmental disability. There are a number of reasons why a one-size-fits-all treatment is not appropriate for individuals at the SCC. This bill would penalize these individuals and their due process. If this bill passes, then several million

dollars will need to be added to the budget to pay for the defense of a federal lawsuit that will stretch over multiple years. There will also be a need to pay for the federal oversight that will come in the wake of that lawsuit.

Persons Testifying (Public Safety): (In support) Representative Fagan, prime sponsor; Sharon and Charles Clizer; and Darwin Roberts and Malcom Ross, Office of the Attorney General.

(Opposed) David Lord, Disability Rights Washington; Lin-Marie Nacht, King County Department of Public Defense and Washington Defender Association; Paul Spizman, Washington Association for the Treatment of Sexual Abusers; Virginia Faller, King County Department of Public Defense; and Tomas Madrigal.

Persons Testifying (Appropriations): (In support) Representative Fagan, prime sponsor; Mike Webb and Malcolm Ross, Office of the Attorney General; and Alison Bogar, King County Procecutor's Office.

(Opposed) Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

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

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