

# FINAL BILL REPORT

## SSB 5718

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Synopsis as Enacted

**Brief Description:** Concerning the commitment of sexually violent predators.

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Regala, Stevens, Holmquist, Hobbs, Carrell and Hatfield; by request of Attorney General).

**Senate Committee on Human Services & Corrections**  
**House Committee on Public Safety & Emergency Preparedness**

**Background:** Under the Community Protection Act of 1990, a sexually violent predator may be civilly committed upon the expiration of that person's criminal sentence. A sexually violent predator (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. Crimes that constitute a sexually violent offense are enumerated in the statute and may include a federal or out-of-state offense if the crime would be a sexually violent offense under the laws of this state. The term "predatory" is defined to mean acts directed towards strangers or individuals with whom a relationship has been established for the primary purpose of victimization.

An agency with jurisdiction to release a person serving a term of confinement must refer a person to the prosecuting agency when it appears that a person may meet the criteria of an SVP. A releasing agency will be the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services (DSHS), but referrals are generally generated through the End of Sentence Review Committee (ESRC). The referring agency is required to provide "all relevant information" about that person to the prosecuting agency. The ESRC is given broad authority to access relevant records, but many times does not have the time or the resources to gather all relevant documents.

If the person is not confined when the petition for civil commitment is filed but the person committed a sexually violent offense at some time previously, the likelihood that the person will engage in these acts if not confined must be evidenced by a "recent overt act." 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 (AGO), if so requested by the prosecuting attorney, may file a petition alleging that the person is an SVP.

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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.*

Once a petition is filed, the person may be taken into custody. A probable cause hearing must be held within 72 hours. If the judge determines that probable cause exists to believe that the person is an SVP, the person is provided an opportunity to contest this determination at a probable cause hearing. If the probable cause determination is confirmed, the person is evaluated and the case is set for trial. The court or a unanimous jury must determine whether, beyond a reasonable doubt, the person is an SVP. If this burden is not met, the court must direct the person's release.

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 indefinite period. Once a person is so committed, DSHS must conduct annual reviews to determine whether (1) the detainee's condition has "so changed" such that the detainee no longer meets the definition of an SVP; or (2) conditional release to a less restrictive alternative (LRA) is in the best interest of the detainee and conditions can be imposed to protect the community. The review is filed with the court and served on both the prosecutor and the detainee. Even if DSHS' annual review does not result in a recommendation of any type of release, the detainee may nonetheless petition annually for conditional release or unconditional discharge.

If a detainee petitions for conditional release or unconditional discharge, the court must set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person still meets the definition of an SVP or if a less restrict alternative would be in the best interest of the person. If the court finds probable cause exists, the court must set a hearing. If the person no longer meets the definition of an SVP, the person must be released. The SVP or the state may propose a conditional release to an LRA. A state-endorsed plan will be a graduated release plan that entails the SVP moving to a Secure Community Transition Facility. A Secure Community Transition Facility is a facility that provides greater freedom to the SVP and is designed to allow the SVP to gradually transition back to the community while continuing treatment. If an SVP submits his or her own less restrictive alternative, the plan must meet specific statutory criteria.

Recent Caselaw. *In re Detention of Martin*, 163 Wn.2d 501 (2008). Martin was convicted in Clark County of burglary in the second degree with sexual motivation and indecent exposure, neither of which are sexually violent offenses under Washington law. Martin did, however, have a conviction in Oregon for kidnapping and sexual abuse, both of which qualify as sexually violent offenses. For out-of-state convictions, it has been the practice of the AGO to file civil commitment proceedings in Thurston County at the request of the Thurston County Prosecutor's Office. Martin appealed on the claim that the Thurston County Prosecutor's Office did not have the authority to file the commitment action as he was never convicted or charged with an offense in Thurston County. The court agreed with Martin and dismissed the petition against him for civil commitment.

*In re Detention of Post*, 145 Wn.App 728 (2008). Post was convicted of two counts of rape in 1974 and one count of rape in the first degree in 1988. The day before Post was scheduled to be released, the state filed a petition requesting that he be committed as an SVP. Post participated in sex offender treatment while incarcerated and also completed phases one and two of the six-phase treatment program at the Special Commitment Center (SCC) while

awaiting trial. Post presented evidence of a voluntary community-based treatment program in which he could participate, if released from custody, so as to lessen the likelihood that he would reoffend. In response, the state presented evidence concerning the SCC's treatment program that would be available to Post only if he was committed as an SVP. The state also presented evidence of potential less restrictive alternatives to confinement that might also be ultimately available to Post, but only if he were first committed as an SVP.

On appeal, the court determined that the trial court erred in admitting evidence as to the potential LRA and content of the SCC treatment program. It found that the evidence was not relevant to the issue before the jury as to whether Post was an SVP and was highly and unfairly prejudicial to Post. The court relied, in part, on the fact that the Legislature did not choose to provide the state with the authority to present evidence of treatment programs or opportunities that would be available to the respondent only if he were committed as an SVP, or conditions of release that could be imposed on him after such a committal.

*In re Detention of Harris*, 141 Wn.App 673 (2007). Harris argued at trial that he should be allowed to present evidence that he was at a lower risk of reoffense because the state could file an SVP petition against him at any time after release (if he committed an overt act). The court denied his request. The appellate court affirmed, stating that Harris could only present evidence concerning conditions that would actually exist if he was released from custody.

**Summary: Prosecuting Agency.** Prosecuting agency is defined as the prosecuting attorney of the county where the person was convicted or charged or the AGO if requested by the prosecuting attorney.

The prosecuting agency is given the same authority to obtain relevant records as that provided to ESRC. The prosecuting agency is also authorized to use the inquiry judge procedures to obtain subpoenas for relevant out-of-state records, so that it may obtain relevant records prior to filing an SVP petition.

The provisions regarding who has the authority to file an SVP petition are clarified to specify that a petition may be filed in:

- any county in Washington where the person was charged or convicted with a predicate offense (sexually violent offense);
- a county where the person committed a "recent overt act;"
- any Washington county where the person has been convicted of a sex offense when the person's predicate offense is from out of state; or
- any county where the person has been convicted of a crime (re: *Martin*) if the person has no prior sex offense convictions in Washington.

When the AGO is acting as the prosecuting agency, the court clerk must charge the AGO the same fees that would be levied against the local prosecuting attorney.

**Evidentiary Provisions Pre-Commitment.** Formal discovery (e.g. depositions) is not available until after the probable cause hearing and the court makes the determination that the matter will be set for trial. Within 24 hours of filing a petition, the state must give the defense a complete copy of all of the materials provided to the state by the referring agency as well as any material gathered by the state during the course of the pre-filing investigation.

The detainee may be held in the county jail until the conclusion of the probable cause hearing.

Less Restrictive Alternative. The court may not order an LRA trial at the annual review hearing unless the proposed LRA submitted by the SVP meets all of the statutory requirements. The SVP's proposed housing for the LRA must be in the state of Washington. A person released to an LRA is subject to GPS monitoring.

The process for revoking an LRA is clarified:

- Revocation of an LRA and modification of an LRA are treated separately.
- The determination of whether to take an SVP on an LRA into custody pending a revocation/modification is the responsibility of the supervising community corrections officer, SCC personnel, or law enforcement.
- The prosecuting agency has the authority to represent the state at the revocation/modification hearing.
- The factors to be considered by the court in a revocation hearing are listed.

Other Provisions. Personality disorder is defined, using the definition from the Diagnostic and Statistical Manual of Mental Disorders. Evidence of a personality disorder must be supported by the testimony of a licensed professional.

A person may be required to be housed at the local jail for any hearing that lasts more than one day without the need to transport the person back and forth each day from McNeil Island. The person may be returned to the SCC for weekends and holidays. Counties are eligible for reimbursement and transport costs.

In the event the court finds a person does not or no longer meets commitment criteria, the state may hold the person for 24 hours prior to release.

The SCC must provide to SVP prosecutors copies of all reports made by the SCC to law enforcement that involve an SCC resident as a suspect, witness, or victim.

This act applies retroactively to all persons currently committed or awaiting commitment. If any provision of the act is held invalid, the remainder of the act is not affected.

**Votes on Final Passage:**

Senate	46	1	
House	97	0	(House amended)
Senate	49	0	(Senate concurred)

**Effective:** May 7, 2009