

SSB 5202 - H COMM AMD

By Committee on Public Safety & Emergency Preparedness

ADOPTED 04/11/2011

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature should act cautiously when
4 constitutional jurisprudence is in doubt. The supreme court's decision
5 to reconsider its ruling in *In re Detention of McCuistion*, 169 Wn.2d
6 633 (2010), concerning the 2005 legislative amendments to chapter 71.09
7 RCW leave uncertainty about whether its previous policy decisions will
8 be upheld or struck down. The legislature encourages the courts to
9 stay McCuistion-related proceedings until the supreme court reconsiders
10 the constitutionality of its 2005 amendments, rather than waste vital
11 trial court and appellate resources.

12 In contrast, the supreme court in *In re Detention of Hawkins*, 169
13 Wn.2d 796 (2010), expressly invited the legislature to decide whether
14 a polygraph test may be used at the evaluation to determine whether a
15 person is a sexually violent predator. The legislature hereby responds
16 to that invitation but only to the degree that the court finds such
17 information would be useful to the judicial process.

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

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

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

1 **(b)** In order to assist the person at the hearing, within twenty-
2 four hours of service of the petition, the prosecuting agency shall
3 provide to the person or his or her counsel a copy of all materials
4 provided to the prosecuting agency by the referring agency pursuant to
5 RCW 71.09.025, or obtained by the prosecuting agency pursuant to RCW
6 71.09.025(1) (c) and (d).

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

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

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

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

27 **(4)** The probable cause hearing is a special proceeding~~((7))~~ and
28 therefore discovery pursuant to the civil rules shall not occur until
29 after the hearing has been held and the court has issued its decision.

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

37 **(b)** The evaluation may be ordered regardless of whether a previous

1 evaluation was performed before filing the petition for civil
2 commitment.

3 (c) The evaluation shall be conducted pursuant to rules developed
4 by the department. In adopting (~~such~~) rules pursuant to this
5 section, the department (~~of social and health services~~) shall consult
6 with the department of health and the department of corrections.

7 (d) In no event shall the person be released from confinement prior
8 to trial. A witness called by either party shall be permitted to
9 testify by telephone.

10 (6) The judge may require the person to complete any or all of the
11 following procedures or tests if requested by the evaluator: (a) A
12 clinical interview; (b) psychological testing; (c) plethysmograph
13 testing; and (d) polygraph testing. The judge may order the person to
14 complete any other procedures and tests relevant to the evaluation.

15 **Sec. 3.** 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 prepared pursuant to RCW

1 71.09.070 with the court. If the person does not affirmatively waive
2 the right to petition, the court shall set a show cause hearing to
3 determine whether probable cause exists to warrant a hearing on whether
4 the person's condition has so changed that: (i) He or she no longer
5 meets the definition of a sexually violent predator; or (ii)
6 conditional release to a proposed less restrictive alternative would be
7 in the best interest of the person and conditions can be imposed that
8 would adequately protect the community.

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

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

35 (d) If the court has not previously considered the issue of release
36 to a less restrictive alternative, either through a trial on the merits
37 or through the procedures set forth in RCW 71.09.094(1), the court
38 shall consider whether release to a less restrictive alternative would

1 be in the best interests of the person and conditions can be imposed
2 that would adequately protect the community, without considering
3 whether the person's condition has changed. The court may not find
4 probable cause for a trial addressing less restrictive alternatives
5 unless a proposed less restrictive alternative placement meeting the
6 conditions of RCW 71.09.092 is presented to the court at the show cause
7 hearing.

8 (3)(a) At the hearing resulting from subsection (1) or (2) of this
9 section, the committed person shall be entitled to be present and to
10 the benefit of all constitutional protections that were afforded to the
11 person at the initial commitment proceeding. The prosecuting agency
12 shall represent the state and shall have a right to a jury trial and to
13 have the committed person evaluated by experts chosen by the state.
14 The department is responsible for the cost of one expert or
15 professional person to conduct an evaluation on the prosecuting
16 agency's behalf. The committed person shall also have the right to a
17 jury trial and the right to have experts evaluate him or her on his or
18 her behalf and the court shall appoint an expert if the person is
19 indigent and requests an appointment. Evaluations pursuant to this
20 section shall be subject to all requirements specified in RCW
21 71.09.040.

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

35 (c) If the issue at the hearing is whether the person should be
36 unconditionally discharged, the burden of proof shall be upon the
37 ((state)) prosecuting agency to prove beyond a reasonable doubt that
38 the committed person's condition remains such that the person continues

1 to meet the definition of a sexually violent predator. Evidence of the
2 prior commitment trial and disposition is admissible. The recommitment
3 proceeding shall otherwise proceed as set forth in RCW 71.09.050 and
4 71.09.060.

5 (d) If the issue at the hearing is whether the person should be
6 conditionally released to a less restrictive alternative, the burden of
7 proof at the hearing shall be upon the ((state)) prosecuting agency to
8 prove beyond a reasonable doubt that conditional release to any
9 proposed less restrictive alternative either:

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

11 (ii) Does not include conditions that would adequately protect the
12 community.

13 (e) Evidence of the prior commitment trial and disposition is
14 admissible in any proceeding under this subsection.

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

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

29 (i) An identified physiological change to the person, such as
30 paralysis, stroke, or dementia, that renders the committed person
31 unable to commit a sexually violent act and this change is permanent;
32 or

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

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

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

10 NEW SECTION. **Sec. 4.** This act applies to all individuals
11 currently committed or awaiting commitment under chapter 71.09 RCW
12 either on, before, or after the effective date of this section, whether
13 confined in a secure facility or on conditional release.

14 NEW SECTION. **Sec. 5.** If any provision of this act or its
15 application to any person or circumstance is held invalid, the
16 remainder of the act or the application of the provision to other
17 persons or circumstances is not affected.

18 NEW SECTION. **Sec. 6.** This act is necessary for the immediate
19 preservation of the public peace, health, or safety, or support of the
20 state government and its existing public institutions, and takes effect
21 immediately."

22 Correct the title.

EFFECT: Replaces the substitute bill with the following:

(1) Declares legislative intent to proceed cautiously while In re
Detention of McCuistion is under reconsideration but to respond to In
re Detention of Hawkins by permitting polygraph tests.

(2) Permits (rather than requires) the judge to order the person to
undergo polygraph testing, a clinical interview, psychological testing,
and plethysmograph testing if requested by the evaluator. Provides
that the evaluation may (rather than shall) be ordered regardless of
whether an evaluation was performed prior to filing the commitment
petition.

(3) Modifies the standard at the show cause hearing to require that

probable cause exist to believe the person's condition has so changed since the person's last commitment trial.

(4) Provides that the act takes effect immediately.

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