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HOUSE BILL 2133

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State of Washington                      62nd Legislature                      2011 2nd Special Session

By Representatives Darneille and Hunter; by request of Department of Social and Health Services

Read first time 11/30/11. Referred to Committee on Ways & Means.

1            AN ACT Relating to containment of costs associated with sexually  
2 violent predator commitment proceedings; amending RCW 71.09.110,  
3 71.09.040, 71.09.060, and 71.09.090; providing an effective date; and  
4 declaring an emergency.

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

6            **Sec. 1.** RCW 71.09.110 and 2010 1st sp.s. c 28 s 3 are each amended  
7 to read as follows:

8            (1) The department of social and health services shall be  
9 responsible for all costs relating to the evaluation and treatment of  
10 persons committed to their custody whether in a secure facility or  
11 under a less restrictive alternative under any provision of this  
12 chapter. The secretary shall adopt rules to contain costs relating to  
13 reimbursement for evaluation services.

14            (2) In all stages of the proceedings under this chapter, the  
15 department of social and health services shall be responsible only for  
16 the reimbursement of the cost of a single attorney for the respondent,  
17 a single prosecuting attorney, a single paralegal for the respondent,  
18 a single paralegal for the prosecution, a single investigator for the  
19 respondent, a single investigator for the prosecution, reimbursement

1 for transportation of the respondent to and from court proceedings, and  
2 for the cost of a single expert evaluation for the prosecution and a  
3 single expert evaluation for the respondent.

4 (3) In proceedings under RCW 71.09.050 and 71.09.060, the  
5 department of social and health services shall not be responsible for  
6 costs of the prosecution and of the defense that result from the delay  
7 of the case after the first continuance requested by either party  
8 granted by the court.

9 (4) The county in which a petition as provided for under RCW  
10 71.09.030 has been filed is responsible for all other costs of  
11 prosecution and defense.

12 (5) Reimbursement may be obtained by the department for the cost of  
13 care and treatment of persons committed to its custody whether in a  
14 secure facility or under a less restrictive alternative pursuant to RCW  
15 43.20B.330 through 43.20B.370.

16 (6) The secretary of social and health services shall adopt rules  
17 to contain costs relating to reimbursement for the costs of prosecution  
18 and defense under this chapter.

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

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

26 (2) Within seventy-two hours after a person is taken into custody  
27 pursuant to subsection (1) of this section, the court shall provide the  
28 person with notice of, and an opportunity to appear in person at, a  
29 hearing to contest probable cause as to whether the person is a  
30 sexually violent predator. In order to assist the person at the  
31 hearing, within twenty-four hours of service of the petition, the  
32 prosecuting agency shall provide to the person or his or her counsel a  
33 copy of all materials provided to the prosecuting agency by the  
34 referring agency pursuant to RCW 71.09.025, or obtained by the  
35 prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this  
36 hearing, the court shall (a) verify the person's identity, and (b)  
37 determine whether probable cause exists to believe that the person is

1 a sexually violent predator. At the probable cause hearing, the state  
2 may rely upon the petition and certification for determination of  
3 probable cause filed pursuant to RCW 71.09.030. The state may  
4 supplement this with additional documentary evidence or live testimony.  
5 The person may be held in total confinement at the county jail until  
6 the trial court renders a decision after the conclusion of the seventy-  
7 two hour probable cause hearing. The county shall be entitled to  
8 reimbursement for the cost of (~~housing and~~) transporting the person  
9 pursuant to rules adopted by the secretary.

10 (3) At the probable cause hearing, the person shall have the  
11 following rights in addition to the rights previously specified: (a)  
12 To be represented by counsel; (b) to present evidence on his or her  
13 behalf; (c) to cross-examine witnesses who testify against him or her;  
14 (d) to view and copy all petitions and reports in the court file. The  
15 court must permit a witness called by either party to testify by  
16 telephone. Because this is a special proceeding, discovery pursuant to  
17 the civil rules shall not occur until after the hearing has been held  
18 and the court has issued its decision.

19 (4) If the probable cause determination is made, the judge shall  
20 direct that the person be transferred to an appropriate facility for an  
21 evaluation as to whether the person is a sexually violent predator.  
22 The evaluation shall be conducted by a person deemed to be  
23 professionally qualified to conduct such an examination pursuant to  
24 rules developed by the department of social and health services. In  
25 adopting such rules, the department of social and health services shall  
26 consult with the department of health and the department of  
27 corrections. In no event shall the person be released from confinement  
28 prior to trial. A witness called by either party shall be permitted to  
29 testify by telephone.

30 **Sec. 3.** RCW 71.09.060 and 2009 c 409 s 6 are each amended to read  
31 as follows:

32 (1) The court or jury shall determine whether, beyond a reasonable  
33 doubt, the person is a sexually violent predator. In determining  
34 whether or not the person would be likely to engage in predatory acts  
35 of sexual violence if not confined in a secure facility, the fact  
36 finder may consider only placement conditions and voluntary treatment  
37 options that would exist for the person if unconditionally released

1 from detention on the sexually violent predator petition. The  
2 community protection program under RCW 71A.12.230 may not be considered  
3 as a placement condition or treatment option available to the person if  
4 unconditionally released from detention on a sexually violent predator  
5 petition. When the determination is made by a jury, the verdict must  
6 be unanimous.

7 If, on the date that the petition is filed, the person was living  
8 in the community after release from custody, the state must also prove  
9 beyond a reasonable doubt that the person had committed a recent overt  
10 act. If the state alleges that the prior sexually violent offense that  
11 forms the basis for the petition for commitment was an act that was  
12 sexually motivated as provided in RCW 71.09.020(~~(+15+)~~) (17)(c), the  
13 state must prove beyond a reasonable doubt that the alleged sexually  
14 violent act was sexually motivated as defined in RCW 9.94A.030.

15 If the court or jury determines that the person is a sexually  
16 violent predator, the person shall be committed to the custody of the  
17 department of social and health services for placement in a secure  
18 facility operated by the department of social and health services for  
19 control, care, and treatment until such time as: (a) The person's  
20 condition has so changed that the person no longer meets the definition  
21 of a sexually violent predator; or (b) conditional release to a less  
22 restrictive alternative as set forth in RCW 71.09.092 is in the best  
23 interest of the person and conditions can be imposed that would  
24 adequately protect the community.

25 If the court or unanimous jury decides that the state has not met  
26 its burden of proving that the person is a sexually violent predator,  
27 the court shall direct the person's release.

28 If the jury is unable to reach a unanimous verdict, the court shall  
29 declare a mistrial and set a retrial within forty-five days of the date  
30 of the mistrial unless the prosecuting agency earlier moves to dismiss  
31 the petition. The retrial may be continued upon the request of either  
32 party accompanied by a showing of good cause, or by the court on its  
33 own motion in the due administration of justice provided that the  
34 respondent will not be substantially prejudiced. In no event may the  
35 person be released from confinement prior to retrial or dismissal of  
36 the case.

37 (2) If the person charged with a sexually violent offense has been  
38 found incompetent to stand trial, and is about to be or has been

1 released pursuant to RCW 10.77.086(4), and his or her commitment is  
2 sought pursuant to subsection (1) of this section, the court shall  
3 first hear evidence and determine whether the person did commit the act  
4 or acts charged if the court did not enter a finding prior to dismissal  
5 under RCW 10.77.086(4) that the person committed the act or acts  
6 charged. The hearing on this issue must comply with all the procedures  
7 specified in this section. In addition, the rules of evidence  
8 applicable in criminal cases shall apply, and all constitutional rights  
9 available to defendants at criminal trials, other than the right not to  
10 be tried while incompetent, shall apply. After hearing evidence on  
11 this issue, the court shall make specific findings on whether the  
12 person did commit the act or acts charged, the extent to which the  
13 person's incompetence or developmental disability affected the outcome  
14 of the hearing, including its effect on the person's ability to consult  
15 with and assist counsel and to testify on his or her own behalf, the  
16 extent to which the evidence could be reconstructed without the  
17 assistance of the person, and the strength of the prosecution's case.  
18 If, after the conclusion of the hearing on this issue, the court finds,  
19 beyond a reasonable doubt, that the person did commit the act or acts  
20 charged, it shall enter a final order, appealable by the person, on  
21 that issue, and may proceed to consider whether the person should be  
22 committed pursuant to this section.

23 (3) Except as otherwise provided in this chapter, the state shall  
24 comply with RCW 10.77.220 while confining the person. During all court  
25 proceedings where the person is present, the person shall be detained  
26 in a secure facility. If the proceedings last more than one day, the  
27 person may be held in the county jail for the duration of the  
28 proceedings, except the person may be returned to the department's  
29 custody on weekends and court holidays if the court deems such a  
30 transfer feasible. The county shall be entitled to reimbursement for  
31 the cost of (~~housing and~~) transporting the person pursuant to rules  
32 adopted by the secretary. The department shall not place the person,  
33 even temporarily, in a facility on the grounds of any state mental  
34 facility or regional habilitation center because these institutions are  
35 insufficiently secure for this population.

36 (4) A court has jurisdiction to order a less restrictive  
37 alternative placement only after a hearing ordered pursuant to RCW

1 71.09.090 following initial commitment under this section and in accord  
2 with the provisions of this chapter.

3 **Sec. 4.** RCW 71.09.090 and 2010 1st sp.s. c 28 s 2 are each amended  
4 to read as follows:

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

17 (2)(a) Nothing contained in this chapter shall prohibit the person  
18 from otherwise petitioning the court for conditional release to a less  
19 restrictive alternative or unconditional discharge without the  
20 secretary's approval. The secretary shall provide the committed person  
21 with an annual written notice of the person's right to petition the  
22 court for conditional release to a less restrictive alternative or  
23 unconditional discharge over the secretary's objection. The notice  
24 shall contain a waiver of rights. The secretary shall file the notice  
25 and waiver form and the annual report with the court. If the person  
26 does not affirmatively waive the right to petition, the court shall set  
27 a show cause hearing to determine whether probable cause exists to  
28 warrant a hearing on whether the person's condition has so changed  
29 that: (i) He or she no longer meets the definition of a sexually  
30 violent predator; or (ii) conditional release to a proposed less  
31 restrictive alternative would be in the best interest of the person and  
32 conditions can be imposed that would adequately protect the community.

33 (b) The committed person shall have a right to have an attorney  
34 represent him or her at the show cause hearing, which may be conducted  
35 solely on the basis of affidavits or declarations, but the person is  
36 not entitled to be present at the show cause hearing. The department  
37 of social and health services is responsible only for reimbursement for

1 the cost of a single defense attorney at the show cause hearing. At  
2 the show cause hearing, the prosecuting attorney or attorney general  
3 shall present prima facie evidence establishing that the committed  
4 person continues to meet the definition of a sexually violent predator  
5 and that a less restrictive alternative is not in the best interest of  
6 the person and conditions cannot be imposed that adequately protect the  
7 community. The department of social and health services is responsible  
8 only for reimbursement for the cost of a single prosecuting attorney at  
9 the show cause hearing. In making this showing, the state may rely  
10 exclusively upon the annual report prepared pursuant to RCW 71.09.070.  
11 The committed person may present responsive affidavits or declarations  
12 to which the state may reply.

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

25 (d) If the court has not previously considered the issue of release  
26 to a less restrictive alternative, either through a trial on the merits  
27 or through the procedures set forth in RCW 71.09.094(1), the court  
28 shall consider whether release to a less restrictive alternative would  
29 be in the best interests of the person and conditions can be imposed  
30 that would adequately protect the community, without considering  
31 whether the person's condition has changed. The court may not find  
32 probable cause for a trial addressing less restrictive alternatives  
33 unless a proposed less restrictive alternative placement meeting the  
34 conditions of RCW 71.09.092 is presented to the court at the show cause  
35 hearing.

36 (3)(a) At the hearing resulting from subsection (1) or (2) of this  
37 section, the committed person shall be entitled to be present and to  
38 the benefit of all constitutional protections that were afforded to the

1 person at the initial commitment proceeding. The prosecuting agency  
2 shall represent the state and shall have a right to a jury trial and to  
3 have the committed person evaluated by experts chosen by the state.  
4 The department is responsible for the cost of one expert or  
5 professional person to conduct an evaluation on the prosecuting  
6 agency's behalf. The committed person shall also have the right to a  
7 jury trial and the right to have experts evaluate him or her on his or  
8 her behalf and the court shall appoint an expert if the person is  
9 indigent and requests an appointment. The department is responsible  
10 for the cost of one expert or professional person to conduct an  
11 evaluation on the committed person's behalf.

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

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

32 (d) If the issue at the hearing is whether the person should be  
33 conditionally released to a less restrictive alternative, the burden of  
34 proof at the hearing shall be upon the state to prove beyond a  
35 reasonable doubt that conditional release to any proposed less  
36 restrictive alternative either: (i) Is not in the best interest of the  
37 committed person; or (ii) does not include conditions that would



1 adequately protect the community. Evidence of the prior commitment  
2 trial and disposition is admissible.

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

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

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

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

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

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

35 NEW SECTION. **Sec. 5.** This act is necessary for the immediate  
36 preservation of the public peace, health, or safety, or support of the

1 state government and its existing public institutions, and takes effect  
2 February 1, 2012.

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