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**HOUSE BILL 2271**

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**State of Washington 65th Legislature 2018 Regular Session**

**By** Representatives Muri, Kilduff, Fey, Sawyer, Klippert, Jinkins, Griffey, and Kraft; by request of Attorney General

AN ACT Relating to the processes for reviewing sexually violent predators committed under chapter 71.09 RCW; amending RCW 71.09.090; creating new sections; and declaring an emergency.

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

NEW SECTION. **Sec.**  (1) The legislature finds that the decision in *In re Det. of Marcum*, 189 Wn.2d 1 (2017) conflicts with the legislature's intent in RCW 71.09.090. The legislature's intent has always been that there are two independent issues at a postcommitment show cause hearing: Whether the individual continues to meet statutory criteria; and if so, whether conditional release to a less restrictive alternative placement is appropriate. Lack of proof of one issue should not affect the finding on the other issue. The supreme court's holding is not only a mistaken interpretation, but it will also lead to absurd results, where sexually violent predators could petition and receive a trial for unconditional release when they clearly do not qualify for it under chapter 71.09 RCW. The outcome places an unnecessary burden on the courts and risks releasing persons who are still sexually violent predators into the community.

(2) The legislature finds that the purpose of a show cause hearing under RCW 71.09.090 is to provide the court with an opportunity to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed as it relates either to the person's status as a sexually violent predator or to whether conditional release to a less restrictive alternative would be appropriate. If the court finds probable cause as to one or both of the issues, the court should set a hearing. However, as the dissent in *Marcum* correctly asserts, the statute also specifies that the court should not find probable cause if the state presents prima facie evidence to meet its burdens and the committed person does not meet his or her respective burdens. The legislature further finds that this safeguard was built into the statutory framework to prevent the outcome in *Marcum.*

(3) The intent of the statute is evident when evaluated in its entirety. The legislature intends that if the state produces prima facie evidence proving that a committed person is still a sexually violent predator, then the first prong of the state's burden is met, and an unconditional release trial may not be ordered unless the committed person produces evidence satisfying: RCW 71.09.090(4)(a); and RCW 71.09.090(4)(b) (i) or (ii). Further, the legislature intends that if the state produces prima facie evidence that a less restrictive alternative is not appropriate for the committed person, then the second prong of the state's burden is met, and a conditional release trial may not be ordered unless the committed person:

(a) Produces evidence satisfying: RCW 71.09.090(4)(a); and RCW 71.09.090(4)(b) (i) or (ii); and

(b) Presents the court with a proposed less restrictive alternative placement meeting the conditions under RCW 71.09.092.

(4) The legislature finds that the state's interest in avoiding costly and unnecessary trials is substantial. Therefore, the legislature intends to overturn the *Marcum* decision in favor of the original intent of the statute. The purpose of this act is curative and remedial, and it applies retroactively and prospectively to all petitions filed under chapter 71.09 RCW, regardless of when they were filed.

**Sec.**  RCW 71.09.090 and 2012 c 257 s 7 are each amended to read as follows:

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

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

(b)(i) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present at the show cause hearing. At the show cause hearing, the prosecuting agency shall present prima facie evidence establishing: (A) That the committed person continues to meet the definition of a sexually violent predator; and (B) that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community.

(ii)(A) If the state produces prima facie evidence that the committed person continues to be a sexually violent predator, then the state's burden under (b)(i)(A) of this subsection is met and an unconditional release trial may not be ordered unless the committed person produces evidence satisfying: Subsection (4)(a) of this section; and subsection (4)(b) (i) or (ii) of this section.

(B) If the state produces prima facie evidence that a less restrictive alternative is not appropriate for the committed person, then the state's burden under (b)(i)(B) of this subsection is met, and a conditional release trial may not be ordered unless the committed person:

(I) Produces evidence satisfying: Subsection (4)(a) of this section; and subsection (4)(b) (i) or (ii) of this section; and

(II) Presents the court with a specific placement satisfying the requirements of RCW 71.09.092.

(iii) In making ((~~this~~)) the showing required under (b)(i) of this subsection, the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070. The committed person may present responsive affidavits or declarations to which the state may reply.

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

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

(3)(a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting agency shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (i) A clinical interview; (ii) psychological testing; (iii) plethysmograph testing; and (iv) polygraph testing. The judge may order the person to complete any other procedures and tests relevant to the evaluation. The state is responsible for the costs of the evaluation. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

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

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

(d) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

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

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

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

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

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

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

(6) During any period of confinement pursuant to a criminal conviction, or for any period of detention awaiting trial on criminal charges, this section is suspended.

NEW SECTION. **Sec.**  This act is curative and remedial, and it applies retroactively and prospectively to all petitions filed under this chapter.

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

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

**--- END ---**