

# HOUSE BILL REPORT

## HB 2271

---

**As Passed House:**  
March 6, 2018

**Title:** An act relating to the processes for reviewing sexually violent predators committed under chapter 71.09 RCW.

**Brief Description:** Concerning the processes for reviewing sexually violent predators committed under chapter 71.09 RCW.

**Sponsors:** Representatives Muri, Kilduff, Fey, Sawyer, Klippert, Jenkins, Griffey and Kraft; by request of Attorney General.

**Brief History:**

**Committee Activity:**

Public Safety: 1/8/18, 1/18/18 [DP].

**Floor Activity:**

Passed House: 3/6/18, 98-0.

**Brief Summary of Bill**

- Specifies certain review standards for the court to evaluate whether to order evidentiary trials for unconditional or conditional release of persons committed as sexually violent predators.

---

### HOUSE COMMITTEE ON PUBLIC SAFETY

**Majority Report:** Do pass. Signed by 11 members: Representatives Goodman, Chair; Pellicciotti, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Appleton, Chapman, Griffey, Holy, Orwall, Pettigrew and Van Werven.

**Staff:** Kelly Leonard (786-7147).

**Background:**

*Sexually Violent Predators.* 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

---

*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.*

disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

A prosecutor may petition for indefinite civil commitment of an SVP when he or she is about to be released from a state correctional facility, among other circumstances. The filing of such a petition triggers a probable cause determination followed by a full evidentiary trial. At the trial, the burden is on the state to prove beyond a reasonable doubt that the person is an SVP. If the person requests a 12-person jury, the jury must be unanimous. If the person is found to be an 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 on McNeil Island.

*Annual Examinations and Review Proceedings.* On an annual basis, the DSHS must conduct an examination of a committed person's mental condition to determine whether the person continues to meet the definition of an 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 DSHS may authorize the person to petition the court for a full trial to consider either unconditional release into the community or conditional release to an LRA.

A committed person may also petition the court for unconditional or conditional 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 trial.

At the show cause hearing, the state bears the burden to present prima facie evidence that the committed person continues to meet the definition of an SVP and that conditional release to an LRA would be inappropriate. The court must order an evidentiary hearing if the state fails to meet its burdens, or, alternatively, if the committed person establishes probable cause to believe his or her condition has so changed that he or she no longer meets the definition of an SVP, warranting unconditional release, or that conditional release to an LRA would be appropriate. However, a trial may not be ordered unless there is current evidence from a licensed professional that: (a) 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 (b) treatment has brought about a positive change in mental condition. Further, when a person seeks conditional release to an LRA, the court may not find probable cause unless the committed person proposes an LRA placement plan meeting current statutory requirements.

*In Re. Det. of Marcum.* In August of 2017, the Washington Supreme Court issued *In Re Det. of Marcum*, 189 Wn.2d 1, 2017, determining that the state must meet both burdens regardless of the type of release sought by the committed person, including that the committed person continues to meet the definition of an SVP and that conditional release to an LRA would be inappropriate. If the state fails to make this two-pronged showing, the court must order a trial on the issue of unconditional release, conditional release, or both.

### **Summary of Bill:**

*Intent.* An intent section is included specifying the Legislature's intent to overturn *In Re. Det. of Marcum*. The intent of the statute has been that there are two independent issues at a post-commitment show cause hearing: whether the individual continues to meet statutory criteria; and if so, whether conditional release to an LRA is appropriate. Lack of proof of one issue does not affect the finding on the other issue. The *Marcum* holding is not only a mistaken interpretation, but it will lead to absurd results, where SVPs could petition and receive a trial for unconditional release when they clearly do not qualify for it.

*Show Cause Hearing.* If the state produces prima facie evidence that the committed person continues to be an SVP, then the state's burden under the statute is met, and an unconditional release trial may not be ordered unless the committed person:

- produces evidence demonstrating probable cause exists to believe his or her condition has so changed that he or she no longer meets the definition of an SVP or that release to an LRA would be in the person's best interest and conditions would adequately protect the community; and
- produces evidence demonstrating that 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 treatment has brought about a positive change in mental condition.

If the state produces prima facie evidence that an LRA is not appropriate for the committed person, then the state's burden under the statute is met, and a conditional release trial may not be ordered unless the committed person:

- produces evidence demonstrating probable cause exists to believe his or her condition has so changed that he or she no longer meets the definition of an SVP or that release to an LRA would be in the person's best interest and conditions would adequately protect the community;
- produces evidence demonstrating that 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 treatment has brought about a positive change in mental condition; and
- presents a proposed LRA placement plan meeting current statutory requirements.

*Application.* The bill is curative and remedial, and it applies retroactively and prospectively to all petitions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:**

(In support) The bill is overturning *In Re. Det. of Marcum* (2017), in which the court reinterpreted a statute in a manner that will result in several unnecessary and costly trials. The decision will generate significant costs to the taxpayers and create public safety

concerns. The bill essentially reestablishes the current statutory intent and follows the dissent in the case.

If the person is not an SVP, there is no need for an LRA, and the person should be unconditionally released. Alternatively, if a person is an SVP, then the only question before the court should be whether or not conditional release to an LRA is suitable. *Marcum* has created a landscape where someone who is an SVP could receive a trial on unconditional release. This is costly and unnecessary. There is sufficient due process built into the scheme already. Every alleged SVP receives an initial trial where the state must meet significant evidentiary burdens, and every SVP is reviewed every year. He or she is allowed to petition the court at any time. There is no need for additional process. The bill does not infringe on the rights of committed persons, and the courts have repeatedly upheld the system as constitutional.

There would be a serious fiscal impact for not passing the bill. *Marcum* would create 25 to 100 trials every year in which the state will relitigate the same issues over and over again. If the bill passes, there is a neutral impact, as it would return the system to the way it operated before the court's decision.

The serious impact of *Marcum* and the urgency of this bill cannot be overemphasized. Sexually violent predators have committed egregious sex offenses, and they have been determined to need unique, and long-term treatment for rehabilitation. The process should focus on treatment and conditional release with appropriate restrictions to keep the SVP and the community safe.

(Opposed) The civil commitment process for SVPs should include the strongest possible due process requirements. It is bad policy to keep persons locked up when an LRA is available to them. Commitment is supposed to end when a person can be released safely.

The bill attempts to overturn *Marcum*, which involved a person who was committed for several years, participated in all available treatment, and was exercising his rights to a review of his status. The bill claims it is restoring the statute, but the Legislature does not get to determine what constitutes adequate due process. *Marcum* simply reaffirms the state's burden of proof, and the case will not hurt public safety. Prolonged and unnecessary incarceration is more expensive than trials.

**Persons Testifying:** (In support) Representative Muri, prime sponsor; Representative Kilduff; Brooke Burbank and Yasmin Trudeau, Office of the Attorney General; and Briahna Murray, City of Lakewood.

(Opposed) Elisabeth Smith, American Civil Liberties Union of Washington.

**Persons Signed In To Testify But Not Testifying:** None.