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SENATE BILL 6217

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State of Washington

65th Legislature

2018 Regular Session

By Senators Dhingra, O'Ban, and Darneille; by request of Attorney General

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

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

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

20 (2) The legislature finds that the purpose of a show cause  
21 hearing under RCW 71.09.090 is to provide the court with an

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

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

24 (a) Produces evidence satisfying: RCW 71.09.090(4)(a); and RCW  
25 71.09.090(4)(b) (i) or (ii); and

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

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

35 **Sec. 2.** RCW 71.09.090 and 2012 c 257 s 7 are each amended to  
36 read as follows:

37 (1) If the secretary determines that the person's condition has  
38 so changed that either: (a) The person no longer meets the definition  
39 of a sexually violent predator; or (b) conditional release to a less

1 restrictive alternative is in the best interest of the person and  
2 conditions can be imposed that adequately protect the community, the  
3 secretary shall authorize the person to petition the court for  
4 conditional release to a less restrictive alternative or  
5 unconditional discharge. The petition shall be filed with the court  
6 and served upon the prosecuting agency responsible for the initial  
7 commitment. The court, upon receipt of the petition for conditional  
8 release to a less restrictive alternative or unconditional discharge,  
9 shall within forty-five days order a hearing.

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

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

37 (ii)(A) If the state produces prima facie evidence that the  
38 committed person continues to be a sexually violent predator, then  
39 the state's burden under (b)(i)(A) of this subsection is met and an  
40 unconditional release trial may not be ordered unless the committed

1 person produces evidence satisfying: Subsection (4)(a) of this  
2 section; and subsection (4)(b) (i) or (ii) of this section.

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

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

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

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

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

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

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

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

33           (c) If the issue at the hearing is whether the person should be  
34 unconditionally discharged, the burden of proof shall be upon the  
35 state to prove beyond a reasonable doubt that the committed person's  
36 condition remains such that the person continues to meet the  
37 definition of a sexually violent predator. Evidence of the prior  
38 commitment trial and disposition is admissible. The recommitment  
39 proceeding shall otherwise proceed as set forth in RCW 71.09.050 and  
40 71.09.060.

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

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

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

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

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

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

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

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

4 NEW SECTION. **Sec. 3.** This act is curative and remedial, and it  
5 applies retroactively and prospectively to all petitions filed under  
6 this chapter.

7 NEW SECTION. **Sec. 4.** If any provision of this act or its  
8 application to any person or circumstance is held invalid, the  
9 remainder of the act or the application of the provision to other  
10 persons or circumstances is not affected.

11 NEW SECTION. **Sec. 5.** This act is necessary for the immediate  
12 preservation of the public peace, health, or safety, or support of  
13 the state government and its existing public institutions, and takes  
14 effect immediately.

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