

**2015 REPORT ON THE CHAPTER 71.09 RCW
INDIGENT DEFENSE REPRESENTATION PROGRAM
(SEXUALLY VIOLENT PREDATOR)**

**Washington State Office of Public Defense
December 2015**

Washington State Office of Public Defense
711 Capitol Way South, Suite 106
P O Box 40957
Olympia, WA 98504-0957

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The Office of Public Defense

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711 Capitol Way South, Suite 106
P.O. Box 40957
Olympia, Washington 98504-0957

Introduction

Chapter 71.09 RCW establishes the legal procedure to civilly commit and provide treatment for certain sex offenders who have completed criminal sentences and are determined by a court to be at high risk for re-offending. The statute also provides for progressively less-restrictive confinement based on demonstrated rehabilitation and reduced public safety risk levels. Attorneys and judges rely on these statutory standards, the input of specialized field experts, and the availability of community resources to inform decisions on respondents' progress in the civil commitment process.

In 2012, the Legislature directed the Office of Public Defense (OPD) to institute a statewide program ensuring the constitutional right to counsel for indigent respondents in these highly complex cases. As part of its duties to administer quality defense services, OPD provides oversight and training for attorneys who are contracted to effectively represent indigent clients in Chapter 71.09 RCW civil commitment matters, also known as sexually violent predator (SVP) cases.

This document was prepared in response to the statutory requirement that OPD report annually on program operations to the Legislature, the Governor, and the Chief Justice.¹ The report includes the time to trial for commitment proceedings; an update on activities in Chapter 71.09 RCW defense practice; and recommendations for policy changes appropriate for the improvement of SVP proceedings. This is OPD's third annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2015 (July 1, 2014 to June 30, 2015).²

¹ RCW 2.70.025(6)

² The first two 71.09 RCW Reports can be found at <http://opd.wa.gov/index.php/quicklink-report#CC-reports>

Program Administration at OPD

The group practice representation model, as described in OPD's 2011 Proposal to the Legislature³, has proven effective in delivering quality legal counsel and related defense services. OPD oversees contracts with 10 private and public law firms, totaling 23 attorney FTEs, to represent indigent respondents in Chapter 71.09 RCW proceedings throughout Washington State. Most of the OPD-contracted attorneys carry a full-time civil commitment caseload and specialize in these cases exclusively.

In addition to administering payments associated with indigent defense representation, OPD provides program oversight to maintain quality and monitor emerging issues. As part of its oversight, OPD's RCW 71.09 managing attorney routinely observes contract attorneys in courts throughout the state and meets with contractors prior to deciding whether to offer a contract renewal in order to discuss performance and any practice concerns. Ongoing communication allows the OPD managing attorney to recognize and rectify issues that may emerge, such as working with the court when a respondent wants to appear pro se or with standby counsel, responding to trial support requests, resolving ethical conflicts of interest related to an attorney's current or former representation of RCW 71.09 respondents, and so forth.

OPD's program oversight also identifies emerging issues for continuing legal education (CLE) seminars for the contract attorneys, whose law practice presents a unique combination of civil and criminal law. This past year OPD helped the contract attorneys arrange three CLEs targeted to RCW 71.09 defense issues.

During 2015, the contracted defense attorneys, with the assistance of OPD-contracted social workers, collaborated with the state Department of Corrections (DOC), Washington Association for the Treatment of Sexual Abusers (WATSA), the Special Commitment Center (SCC), and community stakeholders to address ongoing challenges associated with securing appropriate housing and support services for respondents who are progressing through treatment and are ready to transition out of confinement at the SCC. Policy recommendations to improve a respondent's transition into the community are discussed later in the report.

³ Prior to transferring defense duties, the Legislature directed OPD to develop a proposal to administer Chapter 71.09 RCW defense services. [2011 Proposal for the Administration of Defense Services for Indigent Persons Involved in Proceedings Under Chapter 71.09 RCW](#)

Update of Activities in RCW 71.09 Defense Practice

Commitment Trials

New Filings. During FY15, prosecutors⁴ filed 13 new petitions for civil commitment and these cases are currently in various stages of litigation and negotiation. As seen in Figure 1, new filings have remained relatively constant since 2012.⁵

Continuances. RCW 2.70.025(6)(b) requires OPD to report annually on the nature of commitment trial continuances. Trial courts granted 22 continuances in commitment cases set for trial during FY15, compared to 37 continuances in the previous fiscal year.

Table 1, below, identifies the counties in which continuances were granted in commitment cases and the requesting party. Nearly all continuances were agreed by the court and both parties, usually for purposes of negotiations and trial preparation. The duration of the continuances varied.

Figure 2

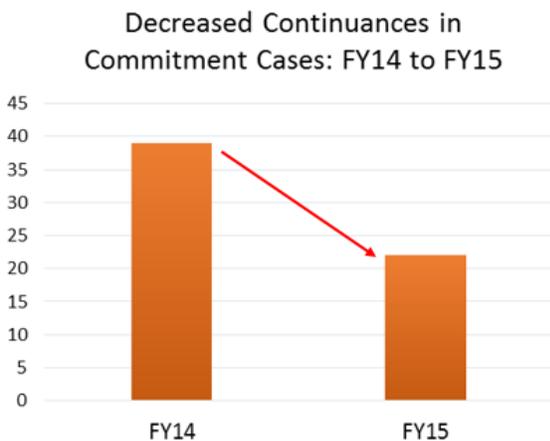


Figure 1

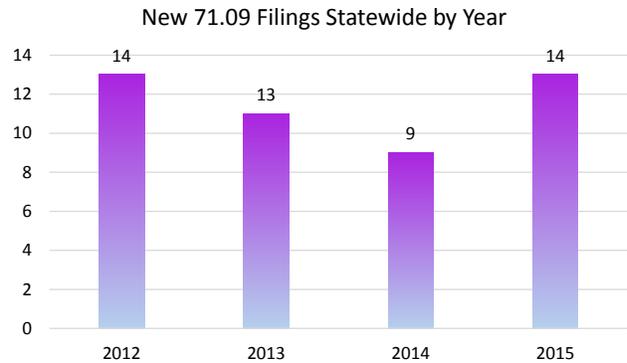


Table 1

Type of Continuance in FY15 by County

County	Agreed	Court	Unknown	Total
Benton			1	1
Clallam	1			1
Grant	1			1
Grays Harbor	1			1
King	11			11
Snohomish	1			1
Spokane	2			2
Walla Walla		1		1
Whatcom	1			1
Yakima	2			2
TOTAL	20	1	1	22

As seen in Table 1 and Figure 2, FY15 experienced a decrease in continuances statewide in commitment cases compared to FY14. Almost all of the continuances were agreed upon by both parties. One continuance was initiated by the court.

⁴ The King County prosecuting attorney files Chapter 71.09 RCW cases in King County. The Washington Attorney General files Chapter 71.09 RCW cases in all other counties.

⁵ The data used for Tables 1-2 and Figures 1-5 of this report are derived from JIS-SCOMIS and the DSHS-SCC monthly resident rosters.

Case Outcomes. The State and OPD-contracted attorneys completed 16 pending civil commitment proceedings during FY15 (Figure 3). Nine commitment cases were completed in the previous fiscal year. As illustrated in Figure 4, the completed cases in FY15 resulted in 11 commitments to the SCC (some through negotiation and stipulation, and some through trials), two jury verdicts finding against commitment, two hung juries, and one dismissal.

Figure 3

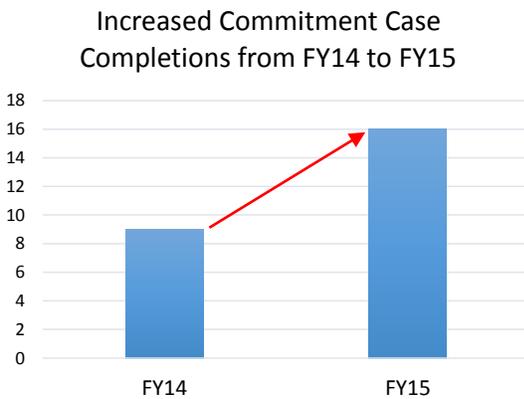
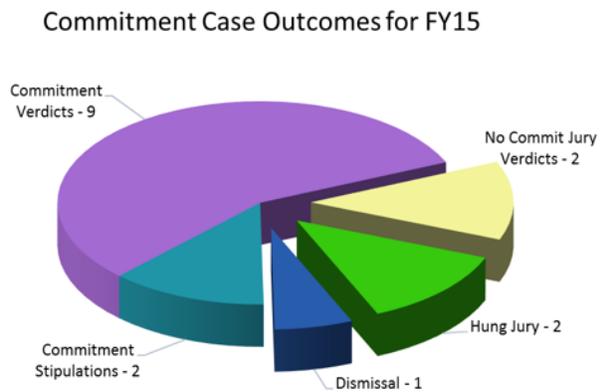


Figure 4



Annual Review and Post-Commitment Negotiation and Litigation

Each respondent is entitled to a formal review every year. Prior to review, the Department of Social and Health Services (DSHS) assesses whether the respondent continues to meet the definition of an SVP and must remain confined at the SCC. Alternatively, DSHS may find that a respondent still meets the definition of SVP, but has sufficiently progressed with treatment to be conditionally released on a “less restrictive alternative” (LRA). LRAs are designed to address a respondent’s rehabilitative needs, while also adequately protecting the community. In addition, regardless of DSHS’s annual review determination and recommendation, the individual respondent is permitted under RCW 71.09.090 to petition the court for release to an LRA or an unconditional discharge.

Less Restrictive Alternative. Under procedures identified in Chapter 71.09 RCW, extensive steps are required before a respondent can earn release to an LRA. Based on evidence presented, the court must first find either probable cause that

Conditions for LRAs

Courts impose conditions when respondents are approved for release from the SCC to a less restrictive alternative (LRA). These commonly include, among other requirements:

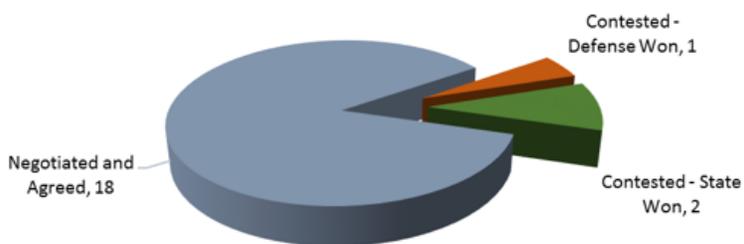
- DOC supervision; weekly reporting
- Electronic monitoring and chaperones
- Register as sex offender
- No travel without advance authorization
- Sex offender and other treatment
- Pre-approval for any work, school or volunteer activity
- A phone log of all calls made/received
- No contact with prior victims
- No contact with minors, felons, or persons with any sex crime conviction
- No firearms, alcohol/marijuana or controlled substances, or pornographic or sex themed materials
- Alcohol and drug testing
- Polygraph testing to assess compliance

the state failed to meet its burden to prove that the respondent meets the definition of an SVP, or, alternatively, that there is probable cause that the respondent’s “condition has so changed”⁶ that he or she no longer meets the definition of an SVP or that release to a less restrictive alternative would be appropriate.

Once a judge has determined that probable cause exists, the case moves into the LRA trial stage to determine whether the respondent meets the standards for an LRA.

Guided by expert evaluation and analysis for each respondent, the parties often are able to avoid trial and agree to conditions for an appropriate LRA that meets the respondent’s needs and ensures public safety. In FY15, courts approved 18 LRAs that were negotiated by the state and the defense. In addition, three contested LRA trials were held in FY15; the state won two and the defense prevailed in one. See Figure 5 below.

Figure 5
Agreed and Contested LRAs for FY15



Of 21 LRAs granted during FY15, approximately 85 percent were agreed by the parties.

Who Leaves the SCC?

Mr. P
Mr. P is a 29-year-old developmentally delayed man with significant cognitive limitations due to a medical condition at birth. Mr. P was detained at the SCC for two years pending a commitment trial. At trial a unanimous jury found he did not meet the definition of an SVP and declined to commit him. Mr. P currently lives in sober housing for sex offenders.

Mr. K
After completing an eight-year prison sentence, Mr. K was civilly committed at the SCC, where he spent nearly a decade participating in treatment and complying with all other program requirements. He was able to transition to an LRA at a Secure Community Transition Facility, and while there he participated in outpatient sex offender treatment, complied with community supervision requirements, and got a job. By agreement of the parties, he then was able to move to a community LRA subject to numerous court-approved conditions.

⁶ RCW 71.09.090(4)(a).

Unconditional Discharge. When the court decides a respondent is no longer a sexually violent predator under Chapter 71.09 RCW, he or she is released without conditions. A respondent requests the court to order unconditional discharge by petitioning the court for a show cause hearing. DSHS’ annual review results, along with other information, are evaluated by the court to determine whether probable cause exists to support further consideration of the respondent’s petition. If so, the court sets the matter for trial.

In the time leading up to trial or a negotiated agreement, both parties continue to engage experts for purposes of carefully evaluating the respondent’s eligibility for unconditional discharge. Experts’ reports play an indispensable role in the legal determination of whether respondents may appropriately be released from civil commitment.

Table 2

Fiscal Year	Total Cases Set For Unconditional Discharge Trial		Cases Resulting in Agreed Unconditional Discharge	Trials Resulting in Recommitment
FY14	5	→	3	2
FY15	10	→	8	2

In the majority of unconditional discharges, both sides reach agreement regarding the appropriateness of the release. In FY15, 10 respondents successfully petitioned for unconditional discharge trials after demonstrating probable cause. Of these, eight achieved unconditional discharge agreed upon by both parties. Two cases proceeded to trial, and the respondents were recommitted to the SCC. (See Table 2.)

In comparison, in FY 14, only five respondents were granted an opportunity to pursue unconditional discharge. Of those, three were granted unconditional discharge based on agreement with the State. Two proceeded to trial, resulting in recommitment.

Due process requires that respondents who are rehabilitated be granted unconditional discharge. When a respondent successfully progresses through a variety of services and can demonstrate

rehabilitation, the resulting discharge relieves taxpayers of the cost of detaining the respondent.

The Washington State Institute for Public Policy (WSIPP) has reported that detaining a person at the SCC costs \$151,700 per year.⁷

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⁷ WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SPECIAL COMMITMENT CENTER FOR SEXUALLY VIOLENT PREDATORS: POTENTIAL PATHS TOWARD LESS RESTRICTIVE ALTERNATIVES 33 (January 2013) available at http://www.wsipp.wa.gov/ReportFile/1118/Wsipp_Special-Commitment-Center-for-Sexually-Violent-Predators-Potential-Paths-toward-Less-Restrictive-Alternatives_Full-Report.pdf

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve SVP civil commitment proceedings.⁸ Based on a review of SVP policy discussions over the years as well as recent observations of the civil commitment process, OPD believes the following recommendations would enhance defense efficiencies during the process and improve the system's overall effectiveness.

- **Adopt and support the SCC's recommendations to improve the treatment and care of SCC respondents with special needs.**

The SCC has submitted a supplemental budget request to address issues identified by the SCC, defense attorneys and a number of other stakeholders. Of great concern is the lack of appropriate care and treatment for respondents with special needs⁹, extreme mental illness, and elderly and medically disabled respondents. During the last two years, the watchdog organization Disability Rights Washington (DRW) visited the SCC numerous times and met with respondents and state officials regarding the care and treatment of residents with disabilities and have prepared litigation.

The SCC is struggling to fill a large number of sex offender treatment staff vacancies, making it very difficult for the respondents to access treatment in accordance with legal requirements. Defense attorneys also are concerned about reductions and cancellations of weekly treatment groups.

- **Allow limited rental assistance for indigent respondents granted LRAs.**

Some respondents who are granted community LRA status face significant financial difficulties with the initial transition. In order to achieve a community LRA a respondent must show the court that, among other things, he has secured appropriate housing that meets strict public safety criteria. This usually involves paying a rental deposit to ensure the housing is available pending court approval. Lack of a rental deposit for an approved housing arrangement can derail LRA plans that have been developed over many months' work by the prosecution, defense and court.

RCW 9.94A.729 currently authorizes three-month rental vouchers for certain state prison inmates eligible for release. OPD recommends that similar short-term rental vouchers be authorized for indigent respondents granted community LRAs under Chapter 71.09 RCW.

⁸ RCW 2.70.025(6)(c).

⁹ Special needs include: closed head injuries, cognitive impairments, fetal alcohol syndrome, developmental disabilities, dementia, physical mobility impairments, limited English proficiency, and residents who are deaf and hearing impaired.