

**2016 REPORT ON THE CHAPTER 71.09 RCW
INDIGENT DEFENSE REPRESENTATION PROGRAM
(SEXUALLY VIOLENT PREDATOR)**

**Washington State Office of Public Defense
December 2016**

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Introduction

Chapter 71.09 RCW establishes the legal procedure to civilly commit and provide treatment for sex offenders who have completed criminal sentences and are determined by a court to be at high risk for re-offending. Attorneys and judges rely on statutory standards, the input of experts, and the availability of community resources to inform decisions on respondents' progress in the civil commitment process.

The Washington State Office of Public Defense (OPD) is responsible for ensuring the constitutional right to counsel for indigent respondents in these highly complex cases. Among its duties, OPD is required to report annually on program operations to the Legislature, the Governor, and the Chief Justice.¹ This is the fourth annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2016 (July 1, 2015 to June 30, 2016).² As required by statute, 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 to improve the civil commitment process.

Program Administration at OPD

OPD administers contracts with 10 private and public law firms, totaling 22.5 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, the agency employs one FTE managing attorney to authorize payments for RCW 71.09 defense services, monitor contract performance, and ensure quality. The OPD managing attorney also assists the court when a respondent wants to appear pro se or with standby counsel, responds to trial support requests, and screens for ethical conflicts of interest related to an attorney's current or former representation of RCW 71.09 respondents. Due to the vulnerability of some residents, the defense attorneys must handle issues of client competency and seek appropriate services, such as the appointment of a guardian ad litem. OPD works with courts and attorneys to ensure clients with diminished capacity are provided effective representation. The 71.09 program increasingly has been able to collaborate with other 71.09 stakeholders, including the Department of Social and Health

¹ RCW 2.70.025(6)

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

Services (DSHS) and the Department of Corrections (DOC), to improve care and treatment for the residents, maintain community safety, and achieve efficiencies for the state.³

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 sponsored three CLEs targeted to RCW 71.09 defense issues.

Update of Activities in RCW 71.09 Defense Practice

Defense Attorney Caseload Analysis

OPD is directed to review and analyze Chapter 71.09 RCW public defense caseload standards and recommend updates as appropriate. RCW 2.70.025(5). The current caseload standard, adopted in 2006 by the Washington Defender Association (WDA), established a maximum defense caseload of four initial commitment cases and eight post-commitment cases per full-time attorney.

In 2016 OPD established a case-weighting policy that refines the 2006 caseload standard to reflect systemic changes that have developed in the civil commitment process over the past 10 years. The policy recognizes workload differences associated with initial and post-commitment cases, as documented by an OPD time study that analyzed three years of defense attorney workload data.

Prior to developing the case-weighting policy, and in conformance with Standard 3.5 of the Supreme Court Standards for Indigent Defense, OPD conducted an attorney time study to assess and document the workload involved in representing respondents involved in civil commitment proceedings under Chapter 71.09 RCW. The OPD time study analyzed contract attorney records submitted during Fiscal Year 2013 through Fiscal Year 2015. For each case, contracted defense attorneys reported work hours in four categories: (1) communication with client; (2) research and litigation preparation; (3) travel; and (4) court time. The data demonstrated that, while there is significant post-commitment case activity, initial commitment cases generally demand more attorney time. OPD is now applying this policy in assigning cases to contract attorneys.

³ Until recently, DSHS paid the residents' medical care expenses. During FY 16, the OPD program social workers trained the SCC staff on how to apply for public health benefits, including Medicaid.

Commitment Trials

New Filings. During FY16, prosecutors⁴ filed seven new petitions⁵ for civil commitment and these cases are currently in various stages of litigation and negotiation. Figure 1.⁶

Continuances. RCW 2.70.025(6)(b) requires OPD to report on continuances. Trial courts granted 11 continuances in commitment cases set for trial during FY16, compared to 22 continuances in the previous fiscal year.

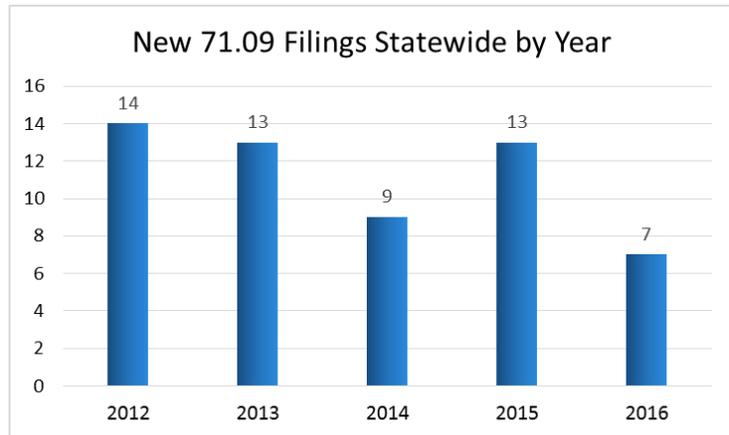
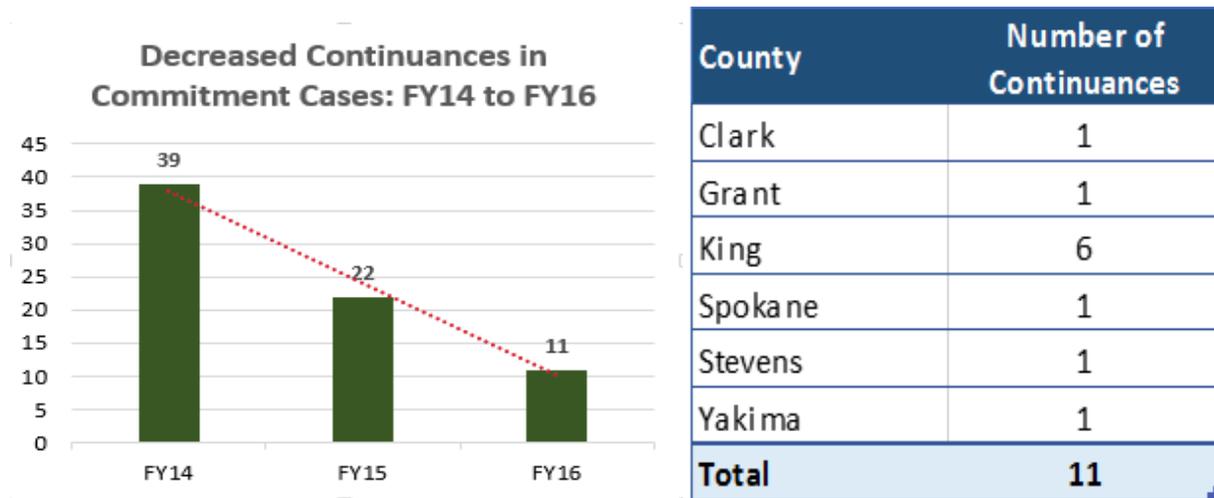


Figure 1

Table 1, below, identifies the counties in which continuances were granted in commitment cases. 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.



County	Number of Continuances
Clark	1
Grant	1
King	6
Spokane	1
Stevens	1
Yakima	1
Total	11

Table 1

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

⁵ In FY16 the AGO received 20 referrals for filing and the KCPAO received 12 referrals for filing.

⁶ The data used for Tables and Figures in this report are derived from JIS-SCOMIS and the DSHS-SCC monthly resident rosters.

Case Outcomes. Six initial civil commitment proceedings were completed during FY16. Sixteen commitment cases were completed the previous year. As illustrated in Table 2, the completed cases in FY16 resulted in four new commitments to the Special Commitment Center (one through stipulation, and the three through trials), one jury verdict finding against commitment, and one dismissal.

Outcome	Number
Verdict of Commitment	3
Stipulation to Commitment	1
Verdict of No Commitment	1
Dismissal of Commitment Petition	1

Table 2

Annual Review and Post-Commitment Negotiation and Litigation

Each respondent is entitled to an annual case review in which DSHS assesses whether the respondent continues to meet the definition of sexually violent predator (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 released under supervision to a “less restrictive alternative” (LRA). In addition, regardless of DSHS’s annual review 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. 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 FY16, courts approved 20 LRAs that were negotiated by the state and the defense. In addition, six contested LRA trials were held in FY16; the defense won four and the state prevailed in two.⁷ See Figure 2.

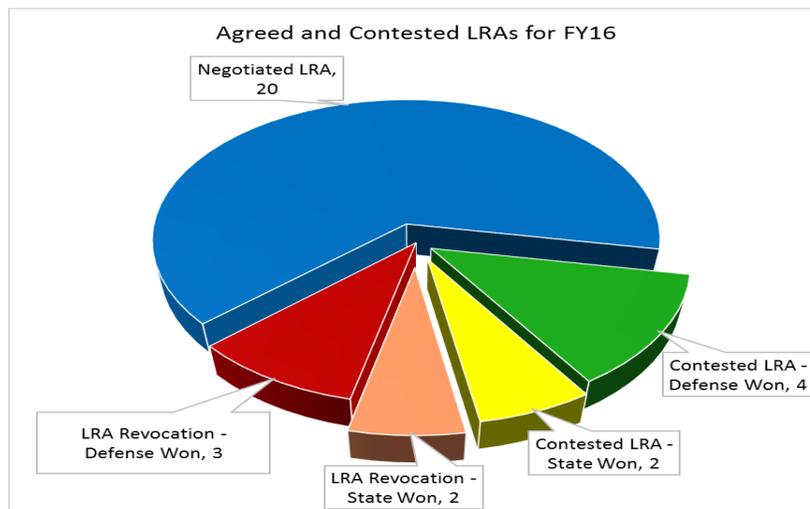


Figure 2

⁷ The respondent who lost his LRA trial in FY16 entered into an agreed LRA at the Pierce SCTF during FY16.

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.

Fiscal Year	Negotiated Unconditional Releases	Trials Resulting in Unconditional Release	Trials Resulting in Recommitment to the SCC
FY14	3	0	2
FY15	8	0	2
FY16	6	2	1

Table 3

The majority of unconditional discharges are agreed by the parties without trial. In FY16, nine respondents successfully petitioned for unconditional discharge trials after demonstrating probable cause. Of these, six achieved unconditional discharge agreed upon by both parties and two were discharged following a jury trial. One respondent was recommitted to the SCC following a trial.

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve SVP civil commitment proceedings. Based on policy discussions over the years as well as recent observations of the civil commitment process, OPD believes the following recommendations would improve the system’s overall effectiveness.

- Allow limited rental assistance for indigent respondents granted LRAs.**
 RCW 9.94A.729 authorizes three-month rental vouchers for some prison inmates upon release to the community. OPD recommends that similar short-term rental vouchers be authorized for SVP respondents granted community LRA status under Chapter 71.09 RCW. Currently, a lack of financial resources to pay a rental deposit for an approved housing arrangement can derail a respondent’s transition to an otherwise noncontroversial LRA.
- Sex Offender Policy Board recommendation to review and update Chapter 71.09 RCW.**
 OPD supports the SOPB recommendation⁸ to establish a panel of individuals with specific knowledge in the SVP arena (judges, prosecutors, defense attorneys, treatment providers, Community Corrections Officers, SCC staffers, DOC and DSHS administrators) to review RCW 71.09 in its entirety and identify appropriate updates to the statute.

⁸ Sex Offender Policy Board, General Recommendations for Sex Offender Management, October 2016, *available at* <http://www.ofm.wa.gov/sgc/sopb/publications.asp>.