98631-2

Supreme Court No. (to be set)
Court of Appeals No. 51826-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Detention of

Michael Canty

Appellant/Petitioner

Clark County Superior Court Cause No. 16-2-01450-3
The Honorable Judge Derek Vanderwood

PETITION FOR REVIEW

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Petitioner

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

WASHINGON STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

When Michael Canty petitioned for conditional release, the trial court refused to consider his petition. According to the trial judge, a petition for conditional release may not be considered within the year following initial commitment. The court concluded that it lacked authority to order a trial. But the civil commitment statute explicitly authorized Mr. Canty's petition. Nothing in the statute requires a patient to wait until after the first annual review. The trial court should have considered the petition.

DECISION BELOW AND ISSUE PRESENTED

Petitioner Michael Canty, the appellant below, asks the Court to review the Court of Appeals unpublished opinion entered on May 12, 2020.[1] This case presents a single issue: Following civil commitment, may a patient immediately seek conditional release to a less restrictive alternative?

STATEMENT OF THE CASE

Michael Canty was civilly committed in June of 2017. CP 289. In December of that year, he petitioned for conditional release to a less restrictive alternative (LRA) placement. CP 75, 143, 302.

Mr. Canty brought his petition under RCW 71.09.090(2)(d), which permits a patient to seek conditional release without showing any change in condition since commitment. CP 146, 306-307. In support of his LRA petition, Mr. Canty filed a treatment plan, a psychological evaluation, a

[1] A copy of the opinion is attached.

rental agreement,[2] GPS program details, and supporting declarations. CP 75-272.

At the show cause hearing on Mr. Canty's petition, the trial judge refused to consider Mr. Canty's request for a trial. RP 22-28; CP 290. The court found the petition premature because Mr. Canty sought conditional release before the anniversary of commitment. CP 290 (citing *In Re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003)).

In the trial judge's view, it is improper for "[a] petition to be brought forth immediately without a single annual review being completed." RP 26. The court also suggested that petitions such as Mr. Canty's "would create a potential significant burden on the Court judicial process." RP 26.

The court apparently feared that allowing Mr. Canty to proceed would mean that "a petition can be presented at any time and any number of times to the Court for consideration." RP 26. According to the trial judge, "not having any limitation would in theory allow a party to repetitively bring petitions numerous different times." RP 26.

In its written order, the court concluded that Mr. Canty "is not entitled to consideration of an LRA until after his first annual review." CP 290. The trial judge also concluded that the court "does not have authority to grant Respondent's requested trial as DSHS has not yet conducted his first annual review." CP 290.

[2] By the time the court held a show cause hearing on the petition, Mr. Canty's original housing was no longer available. He found new housing and submitted an updated petition. CP 273-275.

The Court of Appeals granted discretionary review and issued an unpublished opinion on May 12, 2020. The court dismissed the case as moot. Opinion, p. 1-2. The court found that it could not provide effective relief because Mr. Canty had been released to a less restrictive alternative placement while his appeal was pending. Opinion, p. 1-2.

The Court of Appeals also concluded that "the issue of whether an SVP can petition for release to an LRA [within the first year following commitment] has already been settled by our Supreme Court," and thus Mr. Canty "has not presented an issue of continuing and substantial public interest." Opinion, p. 2.

Mr. Canty seeks review of that decision.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Michael Canty sought conditional release six months after his civil commitment trial. His petition was authorized by statute. Nothing prevented the trial court from considering it. The trial court should have considered Mr. Canty's LRA proposal.

Although the appeal is moot, the Supreme Court should accept review. The availability of conditional release during the year following commitment is an issue of continuing and substantial public interest. The Supreme Court has never addressed this issue, and review is appropriate under RAP 13.4(b).

I. FOLLOWING CIVIL COMMITMENT, A PATIENT MAY IMMEDIATELY SEEK CONDITIONAL RELEASE; THE LAW DOES NOT IMPOSE A WAITING PERIOD.

Following commitment, a patient's first petition for conditional release need not rest on change through treatment. The statute does not impose a waiting period for filing this first petition. Mr. Canty should have been allowed to proceed with his first petition without waiting a full year following his initial commitment.

A. Mr. Canty's petition was authorized by RCW 71.09.090(2)(d), and nothing in the statute required him to wait a year before filing.

Following civil commitment, patients have one opportunity to seek conditional release without showing a change in condition.[3] RCW 71.09.090 (2)(d). If the trial court has not previously considered conditional release, it "*shall consider* whether release to a less restrictive alternative" is appropriate. RCW 71.09.090(2)(d) (emphasis added). The legislature has placed no limits on when the patient may pursue conditional release under this provision. RCW 71.09.090(2)(d).

The statute is plain on its face. It does not require a patient to delay filing a petition for conditional release.

When interpreting a statute, courts look first to the provision's plain meaning, "and assume the legislature meant what it says." *In re Det. of Sease*, 190 Wn.App. 29, 47, 357 P.3d 1088 (2015) *review granted* 184

[3] The provision under which Mr. Canty petitioned ameliorates the effects of RCW 71.09.060(4). That statute bars patients from pursuing a less restrictive alternative (LRA) at the initial commitment trial, even if they would otherwise be eligible for conditional release at the time of commitment. RCW 71.09.060(4).

Wn.2d 1019, 361 P.3d 746, *review dismissed as improvidently granted* 366 P.3d 438 (2016). Where the statute's plain language is unambiguous, it must be "given effect according to its plain meaning." *Id.*

The provision under which Mr. Canty petitioned directs that the court "shall consider" conditional release. RCW 71.09.090(2)(d). Mr. Canty was not required to show proof of progress in treatment, or to wait for the department to conduct the yearly evaluation required under RCW 71.09.070(1).

Nothing in the civil commitment scheme requires a patient to delay filing the first petition for conditional release. Because of this, Mr. Canty should have been allowed to file his first petition for conditional release any time after his commitment trial. He was not required to wait a year before his petition could be considered. RCW 71.09.090(2)(d).

B. RCW 71.09.060, which governs initial commitment trials, does not require a patient to delay their first attempt to obtain conditional release.

Although courts are barred from ordering conditional release at the initial commitment trial, nothing prohibits a patient from seeking conditional release following trial. The prohibition at the initial commitment stage stems from RCW 71.09.060(4). Under that statute, a trial court "has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section…"[4] RCW 71.09.060(4).

[4] The provision was enacted in response to a decision requiring consideration of LRAs at the initial commitment trial. RCW 71.09.015; *see In re Det. of Ross*, 102 Wn.App. 108, 6 P.3d

This statute does not require patients to wait a year after commitment before filing a petition. RCW 71.09.060(4). The only temporal restriction in RCW 71.09.060(4) permits conditional release "after a hearing ordered pursuant to RCW 71.09.090 following initial commitment." RCW 71.09.060(4).

The "hearing ordered pursuant to RCW 71.09.090" is the trial on the patient's conditional release petition.[5] RCW 71.09.090 sets forth the show-cause procedure that can lead to such a trial. If the court finds probable cause, "then the court shall set a hearing" on the issue of unconditional release, conditional release, or both. *See* RCW 71.09.090(c).

There are no restrictions on when such a show cause hearing can be held. RCW 71.09.090. Although the department is required to provide an annual report and annual written notice of the right to seek conditional release, the statute does not require the patient to wait until such notice and report are received.[6] RCW 71.09.090(2)(a).

As the statute makes clear, "[n]othing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative…" RCW 71.09.090. Courts

---

625 (2000), *rev'd sub nom. In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). In *Ross*, the Court of Appeals reversed a commitment order because the trial court excluded evidence of less restrictive alternative treatment options available to the patient. *Id.*, at 113-117.

[5] Instead of using the word "trial," RCW 71.09.090 refers to "show cause hearing[s]" and a "hearing" on the issue of conditional or unconditional release. This latter "hearing" is the trial.

[6] This is important, because the department often fails to meet its obligation to provide a timely report. *See In re Det. of Rushton*, 190 Wn.App. 358, 359 P.3d 935 (2015).

have noted that "[a]part from the annual review process, the confined person may independently petition the court for release at any time." *In re Meirhofer*, 175 Wn.App. 1049 (2013) (unpublished), *aff'd*, 182 Wn.2d 632, 343 P.3d 731 (2015); *see also In re Det. of Breedlove*, 187 Wn.App. 1029 (2015) (unpublished); *In re Det. of Robinson*, 185 Wn.App. 1002 (2014) (unpublished) ("Indeed, chapter 71.09 RCW allows an individual to petition for release at any time.")

Mr. Canty asserted his right to file such a petition. Because it was his initial conditional release petition, he was not required to show that his condition had changed since initial commitment. RCW 71.09.090(2)(d).

The provision governing Mr. Canty's petition directs that the trial court "shall consider" conditional release "without considering whether the person's condition has changed." RCW 71.09.090(2)(d). Thus, there is no need for the Department to evaluate the patient or to prepare a report on his or her condition.

The patient's condition is irrelevant to the determination. RCW 71.09.090(2)(d). Instead, the relevant factors are whether the person has proposed an appropriate plan, whether the plan is in the patient's best interests, and whether the community can be adequately protected. RCW 71.09.090(2)(d).

If the person proposes an "alternative placement meeting the conditions of RCW 71.09.092" at the show cause hearing, the only decision facing the court is whether there is probable cause for a trial. RCW 71.09.090(2)(d).

Here, Mr. Canty petitioned for conditional release and filed a proposal meeting the requirements of RCW 71.09.092. CP 75-272. He noted the case for a show cause hearing. CP 300. He was entitled to have the court consider his petition. RCW 71.09.090(2)(d).

The statute's plain meaning must be given effect. *Sease*, 190 Wn.App. at 47. The Supreme Court should reverse the trial court's decision and recognize a patient's right to independently seek conditional release without waiting for the Department to conduct a new evaluation and file a report. RCW 71.09.090(2)(d).

C. Petitions such as Mr. Canty's will not create a "potential significant burden" on the judiciary.

The trial judge apparently believed that considering Mr. Canty's petition would open the floodgates to successive petitions. The court feared "a potential significant burden on the Court judicial process," based on a wave of petitions "presented at any time and any number of times to the Court for consideration." RP 26. The court apparently believed that ruling in Mr. Canty's favor would "allow a party to repetitively bring petitions numerous different times." RP 26.

These concerns reflect a misunderstanding of the law governing conditional release. The statutory scheme permitting petitions within the first year following commitment does not impact a patient's ability to file subsequent petitions; any subsequent petitions must meet the "so changed" standard set forth in RCW 71.09.090.

Mr. Canty brought his petition under a provision that only applies "[i]f the court has not previously considered the issue of release to a less restrictive alternative." RCW 71.09.090 (2)(d). Once the initial petition for conditional release has been heard, a patient may not pursue a second conditional release petition under that provision.

Instead, future petitions require a showing that the patient has "so changed" that he qualifies for conditional release. RCW 71.09.090 (2)(c)(ii). To meet this standard, Mr. Canty will need to provide evidence of "[a]n identified physiological change" or "[a] change in [his] mental condition brought about through positive response to continuing participation in treatment." RCW 71.09.090(4).

This is a difficult standard to meet. *See, e.g., Sease*, 190 Wn.App. at 50. Contrary to the trial court's fear, a petition cannot be "presented at any time and any number of times;" nor can a patient "repetitively bring petitions numerous different times." RP 26.

Furthermore, any "potential [for a] significant burden" does not provide a basis to restrict the statutory right to petition for conditional release. In *Fletcher,* for example, the Supreme Court recognized a broad statutory right allowing insanity acquittees to petition for conditional release. *State v. Fletcher,* 190 Wn.2d 219, 228-234, 412 P.3d 285 (2018). The court also recognized an expansive right to counsel. *Id.* The *Fletcher* court did not even mention the burden this might create for courts and indigent defense programs. *Id.*

Finally, it is the legislature's prerogative to set additional limits.

For example, an insanity acquittee whose administrative application for conditional release is denied "may reapply after a period of six months from the date of denial."[7] RCW 10.77.150(5).

The legislature has not imposed any similar time constraints on the initial conditional release petition in proceedings under Chapter 71.09 RCW. Subsequent petitions require the passage of time; however, this limitation does not apply to the initial petition brought under RCW 71.09.090(2)(d). A person who is subject to the "so changed" standard must show a qualifying change "since the person's last commitment trial." RCW 71.09.090 (4)(a) and (b). This applies to every petition for unconditional release, and to all but the initial petition for conditional release. RCW 71.09.090(2) and (4).

Mr. Canty is not subject to the "so changed" standard. RCW 71.09.090 (2)(d). He is not seeking unconditional release and has not previously sought conditional release.

Instead, his petition falls under RCW 71.09.090 (2)(d). He is not required to allege any facts arising "since [his] last commitment trial." *Cf.* RCW 71.09.090 (4)(a) and (b). Nothing in Chapter 71.09 RCW required him to wait a year before seeking conditional release.

The trial court should have considered Mr. Canty's petition. The Supreme Court should accept review, reverse the trial court's decision, and recognize a patient's right to petition for conditional release at any

[7] *But see Fletcher,* 190 Wn.2d at 232 n. 11 (noting "current precedent" imposes a judicially created time bar for successive court petitions) (citing *State v. Kolocotronis,* 34 Wn.App. 613, 622-624, 663 P.2d 1360 (1983)).

time following the initial commitment order.

D. The Supreme Court has not barred patients from seeking conditional release during the year following initial commitment.

Citing *Thorell,* the Court of Appeals concluded that the Supreme Court "has already settled the relevant issue of law—whether the superior court can decide a petition for release to an LRA prior to the first annual review." Opinion, p. 3. But *Thorell* did not impose restrictions beyond those set by the legislature.

The *Thorell* court addressed the legislative prohibition against conditional release at the initial commitment trial.[8] The petitioners argued "that the statutory prohibition against considering LRAs during their commitment hearings… violate[d] their right to equal protection." *Thorell,* 149 Wn.2d at 748.

The Supreme Court found this "statutory prohibition" constitutional. *Id.,* at 751. The court "summarize[d] [its] conclusions in these consolidated cases [by making] three holdings." *Id.,* at 766. The second of these holdings was that "LRAs need not be considered at the initial hearing." *Id.,* at 766.

The court was not asked to determine if a petition for conditional release could be brought before the anniversary of commitment. It made no ruling on the subject. Any language in the opinion that may suggest

[8] The court addressed other issues as well, including a restriction on the kind of LRA that could be ordered at the commitment trial. *Id.,* at 721-722.

otherwise is *dicta*.[9]

Instead, the court's focus was on the availability of conditional release at the initial commitment trial. In discussing this issue, the *Thorell* court made free use of the word "annual," inventing phrases that do not exist in any part of Chapter 71.09 RCW. The court's repeated use of the word "annual" created the confusing leading to the Court of Appeals' decision in this case.

For example, the *Thorell* court used the phrase "annual LRA review," citing Laws of 2001, ch. 286, §7[10] and RCW 71.09.090. *Id.,* at 751. The former statute— RCW 71.09.060— does not include the word "annual," "year," or any other timeframe. *See* Laws of 2001, ch. 286, §7. The latter provision includes only the limited references to annual notice and the annual report discussed above. RCW 71.09.090.

Similarly, the *Thorell* court used the phrase "annual LRA petition provision," to refer to RCW 71.09.092 and RCW 71.09.096. But RCW 71.09.092 does not include the word "annual," "year," or any other timeframe. RCW 71.09.092. The other statute referenced by the court— RCW 71.09.096—requires reviews at least once every year *after* the patient has been conditionally released. RCW 71.09.096. Nothing in either provision restricts a patient's ability to petition for conditional release

[9] A statement is *dicta* "when it is not necessary to the court's decision in a case." *State v. Burch*, 197 Wn.App. 382, 403, 389 P.3d 685, 697 (2016). Dicta is not binding authority. *Id.*

[10] Amending RCW 71.09.060. Among other things, the amendment added the language limiting a court's authority to order an LRA until "after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section…" *See* Laws of 2001, ch. 286, §7(4); *see also* RCW 71.09.060(4).

during the first year of commitment.

Based on these untethered references to the word "annual," the *Thorell* court went on to say that patients "are not entitled to consideration of LRAs until their first annual review."[11] *Id.*, at 751. According to the court, this is "[b]ecause of [the] restriction on the trial court" imposed by RCW 71.09.060(4) and "the annual LRA review provision, RCW 71.09.090." *Id.*, at 751.

As noted, these statutes do not limit review hearings to one per year or require patients to delay their initial conditional release petitions.[12] Instead, they prohibit consideration of conditional release at the initial commitment trial, vest the court with jurisdiction to order conditional release after a trial, and outline the show cause procedure that leads to such a trial. RCW 71.09.060(4); RCW 71.09.090.

The court's casual use of the phrase "annual review" was apparently based on its assumption that the issue would not arise during the first year of commitment.[13] The court did not, and could not, amend RCW 71.09.090, which recognizes patients' right to petition for conditional review. RCW 71.09.090(2)(a).

A patient may bring such a petition whenever he or she can "propose[ ] a less restrictive alternative meeting the conditions of RCW

[11] *See also Thorell,* 149 Wn.2d at 752, 753, 757, 764. Even the dissent used the phrase "first annual review." *Thorell,* 149 Wn.2d at 775 (Alexander, C.J., dissenting).

[12] Indeed, a limitation on review hearings would undermine the legislature's directive to evaluate patients "*at least* once every year." RCW 71.09.070(1) (emphasis added).

[13] The court did not mention RCW 71.09.090(2)(d) or Laws of 2001, Ch. 286 §9, the provision under which Mr. Canty petitioned.

71.09.092." RCW 71.09.090 (2)(d).[14] The initial petition may be brought without any showing of a change in condition. RCW 71.09.090 (2)(d). Nothing in Chapter 71.09 RCW requires a patient to wait until the anniversary of commitment.

The *Thorell* court's passing comments on the subject are *dicta.* The court addressed equal protection arguments, it did not engage in statutory interpretation. None of the patients in *Thorell* filed LRA petitions seeking conditional release, and the court made no mention of RCW 71.09.090(2)(d), the provision applicable to Mr. Canty.

If *Thorell's* statements are not *dicta,* the Supreme Court should accept review and overrule the applicable portions of that case. To the extent *Thorell* limits a patient's ability to seek conditional release within the first year following commitment, it is both incorrect and harmful. *See State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) ("We will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful") (internal quotation marks and citations omitted).

It is incorrect because Chapter 71.09 RCW does not require a patient to wait a year before seeking conditional release. As outlined above, nothing in the statute imposes such a waiting period.

It is harmful because it forces patients who are eligible for conditional release to remain locked up at the SCC on McNeil Island. If *Thorell* imposes a waiting period on committed persons seeking conditional

[14] *See also* RCW 71.09.090 (2)(b)(ii)(B)(II).

release, it should be overruled.

Mr. Canty's proposal met the conditions outlined in RCW 71.09.090(2)(d). CP 75-275. He scheduled a show cause hearing, requiring the trial court to consider his petition. RCW 71.09.090(2)(d). The Supreme Court should reverse the trial court's decision and recognize a patient's right to bring a petition for conditional release prior to the anniversary of commitment.

II. THE SUPREME COURT SHOULD GRANT REVIEW EVEN THOUGH THIS CASE IS TECHNICALLY MOOT.

Courts do not generally consider cases that are technically moot. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). However, a reviewing court may decide a moot appeal if it poses a question of "continuing and substantial public interest." *Id.*

The Supreme Court "has consistently stated that the need to clarify the statutory scheme governing civil commitment is a matter of continuing and substantial public interest." *Matter of Det. of P.P.*, 6 Wn.App.2d 560, 566-567, 431 P.3d 550 (2018) (citing *In re Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 649, 374 P.3d 1123 (2016); *In re Det. of R.S.*, 124 Wn.2d 766, 770, 881 P.2d 972 (1994); *Matter of Det. of Swanson*, 115 Wn.2d 21, 24-25, 804 P.2d 1 (1990); *In re Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986); *In re Det. of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)).

Courts consider three factors in determining whether to review a

case that is technically moot. These include the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.[15] *Beaver*, 184 Wn.2d at 330-331.

Here, each factor favors review, even though Mr. Canty has passed the anniversary of commitment and obtained conditional release. The issue raised by Mr. Canty turns on the proper interpretation of RCW 71.09.060(4) and RCW 71.09.090 (2)(d). Cases "involving... interpretation of statutes are public in nature and provide guidance to future public officials." *Id.,* at 331; *see also P.P.*, 6 Wn.App.2d at 566-567.

The Court of Appeals recognized the public nature of the issue. Opinion, p. 3. However, the court erroneously concluded that no guidance is needed because the *Thorell* court "has already settled the relevant issue of law." Opinion, p. 3. The Court of Appeals also concluded that the issue "is not likely to recur because the superior courts have well-settled law from [the] Supreme Court on whether they have authority to order an LRA prior to the first annual review." Opinion, p. 5.

The Court of Appeals' conclusions are untenable.

First, the Supreme Court has not settled the issue raised here. The *Thorell* court could not have addressed Mr. Canty's argument language because none of the detainees in *Thorell* filed petitions seeking conditional release. *Thorell*, 149 Wn.2d at 748. Nor did the *Thorell* court even

[15] Courts "may also consider the level of adversity between the parties." *Beaver*, 184 Wn.2d at 331.

mention RCW 71.09.090(2)(d), the provision applicable to Mr. Canty. Furthermore, even if *Thorell* did provide some guidance, it should be overruled because it is both incorrect and harmful.

Second, contrary to the Court of Appeals' conclusion, the issue raised by Mr. Canty is likely to recur. Any patient who is eligible for conditional release at the time of commitment may wish to pursue a less restrictive alternative as soon as possible.

Indeed, nothing prevents a patient from submitting a petition immediately following commitment, assuming the proposed LRA meets the requirements of RCW 71.09.092. RCW 71.09.090 (2)(d). Thus, for example, a patient may stipulate to commitment with the understanding that conditional release will be considered after the commitment order is entered. Without an authoritative determination, cases will continue to present the issue raised here. Accordingly, the third factor also favors review. *Id.*

For all these reasons, the Supreme Court should address the issue even though it is technically moot. *Id.*

III. THE SUPREME COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4 (B)(4).

The Supreme Court will grant a petition for review if it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). This case presents such an issue.

Providing clarity regarding "the statutory scheme governing civil

commitment is a matter of… substantial public interest." *P.P.*, 6 Wn.App.2d at 566-567. The issue here has the potential to arise in every civil commitment case. The Supreme Court should determine if a committed person may petition for conditional release immediately following the initial commitment trial.

The court should accept review under RAP 13.4(b)(4).

CONCLUSION

Although the legislature has barred consideration of less restrictive alternatives at the initial commitment trial, it has afforded patients one opportunity to seek conditional release thereafter without showing a change in condition. RCW 71.09.090(2)(d).

Mr. Canty filed a petition that met the requirements of this statute. The trial court should have considered his petition. Nothing in Chapter 71.09 RCW requires a patient to wait until the anniversary of commitment to seek conditional release. Nor has the Supreme Court imposed any such requirement.

A trial court faced with a petition brought under RCW 71.09.090(2)(d) "shall consider whether release to a less restrictive alternative" is appropriate. RCW 71.09.090(2)(d). The court refused to do so in Mr. Canty's case.

The trial court's order must be reversed. The Supreme Court should grant review and recognize a patient's right to seek conditional release immediately following commitment.

Respectfully submitted June 5, 2020.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Michael Canty
716 S 17th St., Unit #6
Tacoma, WA 98405

and I sent an electronic copy to

Office of the Attorney General
seanw1@atg.wa.gov; kellyp@atg.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 5, 2020.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on May 12, 2020

Filed
Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: MICHAEL CANTY, Petitioner,	No. 51826-1-II UNPUBLISHED OPINION

LEE, C.J. — Michael Canty was civilly committed as a sexually violent predator (SVP). Canty appeals the superior court's order denying his petition for conditional release to a less restrictive alternative (LRA) because it was filed prior to Canty's first annual review. However, after this appeal was filed, Canty was released to an LRA. Because Canty has already received the relief requested, and our Supreme Court has already decided the issue of law presented here, Canty's appeal is moot. Accordingly, we dismiss Canty's appeal.

FACTS

In August 2016, the State petitioned to have Canty civilly committed as an SVP. In June 2017, the superior court entered an order committing him as an SVP.

In December 2017, Canty petitioned for conditional release to an LRA. Canty filed a proposed LRA plan with his petition. Canty also completed a psychological evaluation that recommended that he be conditionally released to an LRA. In March 2018, Canty filed an updated proposed LRA plan. The State requested that the superior court deny Canty's petition because the petition for an LRA was filed prior to Canty's first annual review.

The superior court concluded that it did not have statutory authority to grant Canty's petition until Canty's first annual review was completed. The superior court denied Canty's petition for release to an LRA.

In April 2018, Canty filed a notice of appeal to this court. In June 2018, while Canty's appeal was pending, Canty noted a show cause hearing for conditional release to an LRA. The superior court ordered a trial on Canty's June petition for conditional release to an LRA. Following the trial, the superior court granted Canty conditional release to an LRA.

Canty appeals the superior court's order denying his December 2017 petition for release to an LRA.

ANALYSIS

The State argues that Canty's appeal is moot because Canty has now been conditionally released to an LRA. Because Canty has already received the relief requested and the issue of whether an SVP can petition for release to an LRA has already been settled by our Supreme Court, Canty has not presented an issue of continuing and substantial public interest. Accordingly, we dismiss this case as moot. RAP 18.9(c) (appellate court will dismiss review of a case if it is moot).

When an appellant has already obtained the requested relief, an appeal is technically moot. *In re Det. of Nelson*, 2 Wn. App. 2d 621, 628, 411 P.3d 412, *review denied*, 190 Wn.2d 1029 (2018). However, we may review a case that is moot "'if it presents issues of continuing and substantial public interest.'" *Id.* (quoting *In re Marriage of Homer*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004)). In determining whether a case presents an issue of continuing and substantial public interest, this court considers (1) the public or private nature of the issue, (2) whether guidance to

public officers on the issue is desirable, and (3) the likelihood that the issue will recur. *State v. Cruz*, 189 Wn.2d 588, 598, 404 P.3d 70 (2017).

Here, this is a public issue because the civil commitment of SVPs is a government function that is meant to serve the legitimate state objectives of "providing treatment specific to SVPs and protecting society from the heightened risk of sexual violence they present." *In re Det. of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). Therefore, whether an SVP can petition for conditional release to an LRA is an issue of a public nature.

However, guidance on the issue is not necessary because our Supreme Court has already settled the relevant issue of law—whether the superior court can decide a petition for release to an LRA prior to the first annual review. Once our Supreme Court "has decided an issue of state law, that interpretation is binding on all lower courts" until it is overturned by our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

RCW 71.09.060(4) states, in relevant part, "A court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment." In *Thorell*, our Supreme Court stated,

> The [Sexually Violent Predator Act] SVPA restricts the court, however, from ordering an LRA prior to a hearing under the annual LRA review provision, RCW 71.09.090, following initial commitment. RCW 71.09.060(4). Because of this restriction on the trial court, those who meet the statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review.

149 Wn.2d at 751. This is the Supreme Court's express statement of the law regarding whether the trial court is permitted to consider and order an LRA under chapter 71.09 RCW. Because the

Supreme Court's statement of the law is clear, we consider it binding until the Supreme Court overturns it. *Gore*, 101 Wn.2d at 487.

Canty argues that the Supreme Court's statement in *Thorell* is dicta and is not binding on this court. "A statement is dicta when it is not necessary to the court's decision in a case." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013). "Dicta is not binding authority." *Id.*

In *Thorell*, the Supreme Court addressed whether chapter 71.09 RCW, relating to sexually violent predators, violated equal protection "because it prohibits consideration of LRAs at the initial commitment trial when chapter 71.05 RCW [governing involuntary commitment for mental illness] does allow consideration of LRAs at initial commitment." 149 Wn.2d at 751. In determining whether equal protection was violated, the Supreme Court had to define how consideration of LRAs are treated under both chapter 71.09 RCW and chapter 71.05 RCW. *Id.* Thus, the Supreme Court's statement as to whether the SVPA statute allows a court to order an LRA was necessary to the issue that was being decided because the Supreme Court was defining the law it was going to rely on in order to perform its analysis. *Id*. Therefore, the Supreme Court's statement is not dicta and is binding on this court.

Canty also argues that the Supreme Court in *Thorell* did not engage in statutory interpretation and its statement is undermined by its "free use" of the word annual. Br. of Appellant at 13. However, those are arguments that are more properly directed to the Supreme Court as reasons why the statement in *Thorell* should be overturned. *See In re Pers. Restraint of Yates*, 183 Wn.2d 572, 577, 353 P.3d 1283 (2015) ("'[The Supreme Court] will not overturn prior precedent unless there has been 'a clear showing that an established rule is incorrect and

harmful.'") (internal quotation marks omitted) (quoting *W.G. Clark Constr. Co. v. Pac Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). Therefore, while Canty's arguments may persuade the Supreme Court to overturn its statement in *Thorell*, we have no authority to do so. *Gore*, 101 Wn.2d at 487.

We accept our Supreme Court's statement of the law and because the issue of law presented here has been settled by our Supreme Court, additional guidance from this court is unnecessary. Furthermore, because this issue of law has been settled, it is not likely to recur because the superior courts have well-settled law from our Supreme Court on whether they have authority to order an LRA prior to the first annual review. Therefore, Canty has not raised an issue of continuing and substantial public interest, and his appeal is moot. Accordingly, we dismiss Canty's appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Sutton, J.

BACKLUND & MISTRY

June 05, 2020 - 7:46 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51826-1
Appellate Court Case Title:	In re the Detention of: Michael Canty
Superior Court Case Number:	16-2-01450-3

The following documents have been uploaded:

- 518261_Petition_for_Review_20200605074514D2261737_1449.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 518261 In re the Detention of Michael Canty Petition for Review with Opinion.pdf

A copy of the uploaded files will be sent to:

- crjsvpef@ATG.WA.GOV
- kelly.paradis@atg.wa.gov
- sean.waite@atg.wa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20200605074514D2261737