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Division II
State of Washington
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NO. 51826-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of Michael Canty

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CANTY,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT (RAP 10.1(h))

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I. INTRODUCTION

The State received permission from this Court to file this short supplemental brief in order to address an error in the State's analysis of *In re Detention of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001), which the Washington Supreme Court overruled, in part, in *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). In its previously filed Brief of Respondent, the State interpreted certain aspects of *Brooks* as surviving *Thorell* and represented that both cases were dispositive of the issue presented in this case. Upon a closer examination of *Brooks* and language that Canty identified in his reply brief, the State no longer believes that *Brooks* is controlling. Mindful of its duty of candor, and out of concern for integrity and accuracy, the State offers this supplemental brief for the limited purpose of amending its earlier position.

II. ARGUMENT

The State no longer contends that *Brooks* is dispositive of the issue presented here. The State previously argued that "well-settled case law confirms that a sexually violent predator is not entitled to an LRA [less restrictive alternative] prior to the first annual evaluation." Br. of Resp't at 11. In support of this argument, the State relied primarily on *Brooks* and *Thorell*. *Id.* at 11-15. The State asserted that the Supreme Court's construction of the sexually violent predator statute in both of those cases

is dispositive. *Id.* at 12. It stated further that “[i]n both cases, the Supreme Court interpreted the statute as precluding consideration of LRAs prior to a sexually violent predator’s first annual evaluation.” *Id.* at 12.

In making this representation about *Brooks*, the State relied on the following language from that decision:

In 1995 the Legislature amended the SVP statute by, among other things, allowing for consideration of LRAs only when the person confined as an SVP petitions for release in accordance with procedures set forth in RCW 71.09.090-.098. *See* Laws of 1995, ch. 216. Because the SVP statute provides for an *annual* report of the SVP’s condition to be the basis for granting release, the petitioning SVP had no basis on which to demonstrate fitness for release until such a report was provided to the court one full year after the SVP is committed. *See* RCW 71.09.070; Br. of Resp’t (State) in Franklin at 28 n. 6.

Brooks, 145 Wn.2d at 286-87 (footnote omitted). The State read this language, including reference to “procedures set forth in RCW 71.09.090-.098,” as interpreting RCW 71.09.090 as a whole. It did not read this language as limited to RCW 71.09.090(1).¹

The State also relied on the footnote immediately following that language, which states as follows:

¹ Canty asserts that *Brooks* cited RCW 71.09.090(1) to support the statement that a petitioning SVP “had no basis on which to demonstrate fitness for release until such a report was provided to the court one full year after the SVP is committed.” *See* Appellant’s Reply Br. at 3. This is incorrect. The Court cited RCW 71.09.070 and the Brief of Respondent to support this statement. *See Brooks*, 145 Wn.2d at 287. The Court only cited RCW 71.09.090(1) in the footnote following that sentence. *See id.* at 287 n. 2.

The State^[2] claims that the SVP may file a petition for release immediately following the SVP determination. Br. of Resp't (State) in Franklin at 28 n. 7. However, RCW 71.09.090(1)(a) and (b), as amended in 2001, which outlines the procedure for the immediate filing of the petition for release, depend upon the existence of the annual report. Laws of 2001, ch. 286, §9.

Brooks, 145 Wn.2d at 287 n. 2. The State read this footnote as rejecting the argument that a sexually violent predator may immediately petition for release.

In his reply brief, Canty identified other language in the *Brooks* opinion. Appellant's Reply Br. at 3-4 (citing *Brooks*, 145 Wn.2d at 291-92).

That language states as follows:

Under the present statute the SVP is considered for release based upon the evaluation of his condition contained in an annual report. Laws of 2001, ch. 286, §§ 8, 9 (RCW 71.09.070). The State construes this to mean that the first annual review is conducted one year after the SVP's commitment. Br. of Resp't (State) in Franklin at 28 n. 6. Nevertheless, RCW 71.09.090(2)(b) allows the committed person to petition on his own for release. Laws of 2001, ch. 286, § 9. According to the State, the committed person does not have to wait for the annual review, but may instead file his petition immediately following the SVP determination. Br. of Resp't (State) in Franklin at 28 & n. 7. Thus, the person committed as an SVP may either wait one year or may petition for consideration for release to an LRA after a period of time considerably shorter than one year.

² The State was represented by the King County Prosecuting Attorney's Office in *Brooks*.

Brooks, 145 Wn.2d at 291. Later, the decision also states, “After the trial the period of evaluation is usually one year unless the SVP files a petition for release, in which case the period may be substantially less than one year.” *Id.* at 292.

It is difficult to reconcile these passages. Specifically, it is unclear whether the Court rejected—or adopted—the argument that a sexually violent predator can petition for release immediately after commitment. Compare *Brooks*, 145 Wn.2d at 287 n. 2 (citing Br. of Resp’t (State) in Franklin at 28 n. 7) with *id.* at 291 (citing same). Nevertheless, after carefully reviewing the *Brooks* decision, and the language Canty relied on, the State no longer believes it is accurate to say that *Brooks* interpreted the sexually violent predator statute “as precluding consideration of LRAs prior to a sexually violent predator’s first annual evaluation.” See Br. of Resp’t at 12.

In any event, to the extent that *Brooks* held that a sexually violent predator *can* petition for release prior to the first annual evaluation, such a holding is directly inconsistent with *Thorell* and is thus overruled. In *Thorell*, our Supreme Court held that “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. The Court expressly stated that “[t]o the extent our holding here conflicts with *Brooks*,

that case is overruled.” *Id.* at 753. Thus, *Thorell* provides the more recent, controlling analysis.

III. CONCLUSION

The State concedes that *Brooks* is not dispositive of the issue presented here. Accordingly, this Court should rely on *Thorell* when resolving this issue.

RESPECTFULLY SUBMITTED this 1 day of October, 2019.

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NO. 51826-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

MICHAEL CANTY,

Petitioner

DECLARATION OF
SERVICE

I, Malia Anfinson, declare as follows:

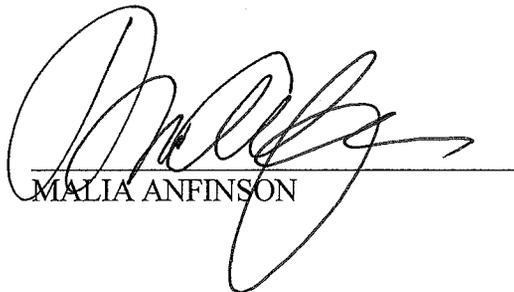
On this 18 day of October, 2019, I sent via electronic mail true and correct copy of Supplemental Brief of Respondent (RAP 10.1(h)) and

Declaration of Service, addressed as follows:

Jodi Backlund
Backlund & Mistry
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18 day of October, 2019, at Seattle, Washington.


MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

October 01, 2019 - 3:52 PM

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