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NO. 51826-1

**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.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In June 2017, a unanimous jury found beyond a reasonable doubt that Michael Canty is a sexually violent predator, and the trial court entered an order committing him to the custody of the Department of Social and Health Services at the Special Commitment Center for control, care, and treatment. Just six months after the jury's verdict—and prior to the Department's first annual evaluation of Canty's mental condition—Canty petitioned for conditional release to a less restrictive alternative (“LRA”) in the community.

The trial court correctly denied Canty's conditional release petition as premature. Sixteen years ago, the Washington Supreme Court confirmed that individuals committed as sexually violent predators “are not entitled to consideration of LRAs until their first annual review.” *In re Det. of Thorell*, 149 Wn.2d 724, 751, 72 P.3d 708 (2003). That decision is well-settled and has been relied upon by lower courts for years. There is no reason for this Court to upend settled law on this issue.

Sexually violent predators pose particular dangers to the public and their treatment needs are unique and long-term. For this reason, the legislature intended for such individuals to receive intensive inpatient treatment before transitioning into the community. Accordingly, the statutory scheme precludes sexually violent predators from petitioning for

conditional release prior to their first annual evaluation. Permitting sexually violent predators to petition for conditional release *immediately* following their initial commitment trial would be contrary to the statute and would directly undermine the legislature's sound policy considerations.

Lastly, the issue presented in this case is moot. During the pendency of this appeal, the Department completed Canty's first annual evaluation, and Canty exercised his right to petition for conditional release. Canty subsequently obtained a conditional release trial, and the trial court granted conditional release. For all of these reasons, this Court should either dismiss this appeal as moot, or it should affirm.

II. RESTATEMENT OF THE ISSUES

- A. **Where the trial court has granted Canty's conditional release to an LRA, and the issue presented in this case is well-settled, should this Court dismiss this appeal as moot?**
- B. **Where Canty petitioned for conditional release just six months after his initial commitment, and the Department had not yet conducted his first annual evaluation, did the trial court correctly conclude that Canty's petition for conditional release was premature?**

III. RESTATEMENT OF THE CASE

A. Canty's Sexual Offense History

Canty is a 41-year-old man with a long history of sexual violence against strangers. In June 1996, police arrested Canty for attempted murder in California. CP 24, 318, 371. The victim had known Canty for about two weeks.

CP 24, 319. He invited Canty into his apartment for some food, and Canty made sexual advances. CP 24, 319, 371. When the victim rejected those advances, Canty stabbed him in the neck with a knife and threatened to kill him. CP 24, 319, 371. Because the victim did not want to pursue the matter, no charges were filed. CP 24, 319, 371.

Less than one month after his arrest for attempted murder, Canty attacked a woman who was watering flowers in her yard. CP 24-25, 319, 371. He grabbed her by her hair, pushed her to the ground, straddled her, covered her mouth with his hand, and pushed his erect penis against her back. CP 25, 319, 371. He then pulled her up by her hair and rubbed his penis while gesturing at her house. CP 25, 319, 371. The woman thought Canty was going to rape her. CP 25, 371. As they walked toward the house, she was able to escape. CP 25, 320, 371. Following a trial, a jury convicted Canty of sexual battery, attempted kidnapping for sexual purposes, and false imprisonment. CP 25. A trial court sentenced him to 18 months in prison. CP 25.

While on parole, Canty exposed his penis to a woman while he was doing work in her home. CP 372. Canty then threatened to kill the woman after she told him to leave. CP 372. This offense was treated as a parole violation, and Canty returned to prison for one year. CP 372, 26. After his release, police arrested Canty for sexually assaulting two 17-year-old girls in a public library. CP 26, 320. Canty approached the girls and grabbed their buttocks. CP 26, 320, 372. One girl told police that Canty appeared to be touching his

groin area and trying to stimulate himself after touching her. CP 26, 320, 372. This, too, was treated as a parole violation, and Canty returned to prison. CP 27, 320.

Shortly after his release from prison in 2001, Canty pushed his way into a woman's apartment after he knocked on the door and asked for a glass of water. CP 21-22, 321, 373. Canty was looking for a vulnerable victim, and this woman had muscular dystrophy. CP 23, 321, 373. Canty grabbed her by the neck, covered her mouth, and threatened to break her neck if she struggled or screamed. CP 22, 321. He pushed her onto a futon, straddled her, and tried to force his penis into her mouth. CP 22, 321, 373. When she turned her head, he masturbated until he ejaculated on her face. CP 22, 321, 373. Canty agreed to leave after the victim gave him \$15. CP 22, 321, 373. Following a trial, a jury convicted Canty of indecent liberties with forcible compulsion, burglary in the first degree with sexual motivation, and robbery in the second degree. CP 21, 372. The trial court sentenced him to 15 years in prison. CP 21.

While in prison, Canty received 80 infractions. CP 37, 323. Fifty-eight were categorized as "serious" and 22 were categorized as "general." CP 37. Several of Canty's infractions relate to verbally or physically assaultive behavior, including punching other inmates. CP 38, 323-24, 375. Six of Canty's infractions relate to inappropriate sexual behavior, including indecent exposure, sexual acts, and sexual harassment. CP 38-39, 323-24, 374-75. While in prison, Canty acknowledged that he posed a threat to society. CP 65.

In 2013, Canty was briefly admitted to the Sex Offender Treatment Program at Airway Heights but was discharged after just six days because he became “fixated” on a female officer. CP 45, 64, 376. Canty was subsequently denied admission to a second sex offender treatment program because he had a “keep separate” order from an inmate in that program with whom he had a prior sexual relationship. CP 45, 64, 376. The second program decided not to make an exception for Canty because he “did not provide evidence of being adequately motivated to engage positively within the treatment environment,” he demonstrated “concerning patterns,” and he had a “history of manipulating the system and creating chaos and instability around him.” CP 45, 65.

B. Sexually Violent Predator Civil Commitment Proceedings

Prior to Canty’s release from prison, the State petitioned to civilly commit him as a sexually violent predator.¹ CP 1-66. The State supported its petition with a psychological evaluation by Dr. Christopher North, Ph.D. CP 5-7, 18-66. Dr. North diagnosed Canty with Other Specified Personality Disorder (Antisocial and Narcissistic Features) and concluded that Canty poses a high risk of sexual re-offense. CP 51, 65.

¹ A “sexually violent predator” is defined as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18).

The case proceeded to a jury trial in June 2017. *See* CP 169. At the conclusion of the trial, a jury unanimously found beyond a reasonable doubt that Canty is a sexually violent predator. CP 169.

On June 21, 2017 the trial court entered an order committing Canty to the custody of the Department of Social and Health Services at the Special Commitment Center for control, care, and treatment. CP 74. Under RCW 71.09.070, the Department is required to conduct an evaluation of Canty's mental condition at least once every year. The evaluator must consider whether Canty continues to meet sexually violent predator criteria, whether conditional release to an LRA² is in his best interests, and whether conditions can be imposed that would adequately protect the community. RCW 71.09.070(2).

Just six months after his initial commitment trial and prior to the Department's first evaluation, Canty petitioned the trial court for a conditional release trial and proposed an LRA plan. CP 75-201. Three months later, Canty submitted a revised LRA plan. CP 202-75. The State opposed Canty's petition as premature because the Department had not yet conducted Canty's first annual evaluation. CP 276-78.

² The sexually violent predator statute defines a "less restrictive alternative" as "court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092." RCW 71.09.020(6).

The trial court held a hearing on Canty's conditional release petition in March 2018. *See* RP 1-30. After hearing argument from the parties, the trial court agreed that Canty's petition for a conditional release trial was premature. *See* RP 27. Relying on several provisions in the sexually violent predator statute as well as on the Supreme Court's decision in *In re Detention of Thorell*, 149 Wn.2d 724, 751, 72 P.3d 708 (2003), the trial court concluded that Canty was not entitled to petition for conditional release until his first annual evaluation. *See* RP 22-28; CP 289-91. Accordingly, it entered an order denying Canty's petition for a conditional release trial. CP 291.

Canty subsequently moved for discretionary review in this Court. CP 292-96. While that motion was pending, in June 2018, the Department completed Canty's first annual evaluation. CP 412-51. The evaluator concluded that Canty continued to meet the definition of a sexually violent predator, that conditional release to an LRA was not in his best interests, and that conditions could not be imposed that would adequately protect the community. CP 444. The evaluator did "not recommend that the court consider a less restrictive placement for [Canty] at this time." CP 444. The Department provided this annual evaluation to Canty along with a written notice informing him of his right to petition for release and a waiver of rights form giving him the option to waive the right to petition. CP 414.

Canty elected to exercise his right to petition for conditional release. CP 414. He requested a show cause hearing and proposed an LRA plan. CP 414, 300-403. In support of his petition, he provided a psychological evaluation from Dr. Christopher Fisher, PsyD, who concluded that the LRA was in Canty's best interests and that conditions could be imposed that would adequately protect the community. CP 314-15.

The trial court held a show cause hearing on Canty's petition in August 2018. CP 300, 460. It concluded that the Department's annual evaluation provided prima facie evidence that Canty continues to meet the definition of a sexually violent predator, that an LRA is not in his best interests, and that conditions could not be imposed that would adequately protect the community. CP 462-63. But it concluded that Canty had demonstrated probable cause for a conditional release trial. CP 463. Accordingly, it ordered a conditional release trial to commence in October 2018. CP 464.

Based on these developments, Commissioner Schmidt denied Canty's motion for discretionary review, reasoning that Canty's motion was moot and there was no need for an authoritative determination on this issue. Ruling Denying Review at 4-5. Thereafter, Canty moved to modify the Commissioner's ruling. While Canty's motion to modify was pending, the trial court held Canty's conditional release trial and concluded that the State

had not proven beyond a reasonable doubt that the proposed LRA was not in Canty's best interests. CP 470. In December 2018, the trial court entered an order granting Canty's release to an LRA. CP 471.

In April 2019, this Court granted Canty's motion to modify and converted the motion for discretionary review into a notice of appeal.

IV. ARGUMENT

The issue presented in this case is moot because the trial court granted Canty's conditional release to an LRA over six months ago. *See* CP 471. Further, the issue is not one of continuing and substantial public interest. Accordingly, this Court need not consider the merits of this appeal, and it should dismiss this case as moot.

If this Court chooses to consider the merits, it should affirm because the trial court properly denied Canty's petition for conditional release. Canty's petition was premature because the Department had not yet conducted his first annual evaluation. Well-settled case law and the sexually violent predator statute confirm that a sexually violent predator is not entitled to an LRA prior to the first annual evaluation. This Court should reject Canty's assertion that a sexually violent predator "may *immediately* seek release following civil commitment." App. Op. Br. at 4 (emphasis added). Such an interpretation of the statute it is directly contrary to

controlling case law, the sexually violent predator statutory scheme, and legislative intent.

A. This Matter Is Moot Because the Trial Court Has Granted Canty's Conditional Release to an LRA

As a threshold matter, this Court should decline to consider the merits of this appeal because this case is moot and does not present an issue of continuing and substantial public interest.

“As a general rule, [courts] do not consider cases that are moot or present only abstract questions.” *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). “A case is technically moot if the court can no longer provide effective relief.” *Id.* (quoting *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)). Courts have discretion to decide a moot appeal if it involves an issue of “continuing and substantial public interest.” *Id.* To determine whether a case presents such an issue, courts consider three factors: (1) “the public or private nature of the question presented,” (2) “the desirability of an authoritative determination for the future guidance of public officers,” and (3) “the likelihood of future recurrence of the question.” *Id.* at 330-31 (internal quotation marks omitted) (quoting *Hunley*, 175 Wn.2d at 907).

Here, it is undisputed that Canty has obtained the relief he seeks in this appeal. *See* App. Op. Br. at 16. Indeed, in December 2018, the trial

court granted Canty's conditional release to an LRA. CP 471. Accordingly, there is no relief that this Court can provide.

Further, this case does not present an issue of continuing and substantial public interest. As discussed in the next section, the Washington Supreme Court has repeatedly interpreted the sexually violent predator statute as precluding consideration of LRAs prior to the sexually violent predator's first annual evaluation. Those cases are dispositive, and lower courts have relied on them for over sixteen years. Accordingly, because authoritative decisions on this issue already exist, there is no need for further guidance from this Court.

B. Well-Settled Case Law Confirms That a Sexually Violent Predator Is Not Entitled To an LRA Prior To the First Annual Evaluation

1. The Washington Supreme Court's construction of the sexually violent predator statute in *Brooks and Thorell* is dispositive

The Washington Supreme Court has repeatedly interpreted the sexually violent predator statute as precluding consideration of LRAs prior to the sexually violent predator's first annual evaluation. The Supreme Court first reached that conclusion in *In re Detention of Brooks*, 145 Wn.2d 275, 287, 36 P.3d 1034 (2001), *overruled on other grounds by Thorell*, 149 Wn.2d at 724. The Supreme Court then reached the same conclusion in

Thorell, 145 Wn.2d at 751. The Supreme Court's construction of the statutory scheme in those cases is dispositive.

In both *Brooks* and *Thorell*, the Supreme Court considered whether the sexually violent predator statute violates equal protection because it prohibits consideration of LRAs at the initial commitment trial, while the Involuntary Treatment Act allows for consideration of LRAs at civil commitment trials under that chapter. *Brooks*, 145 Wn.2d at 286-93; *Thorell*, 149 Wn.2d at 745-53.

But in order to properly analyze that issue, the Supreme Court had to understand *when* the sexually violent predator statute permitted consideration of LRAs. Accordingly, the Supreme Court conducted a thorough review of the statutory scheme and the legislative intent behind statutory amendments regarding LRAs. *See Brooks*, 145 Wn.2d at 282-88; *Thorell*, 149 Wn.2d at 745-52. In both cases, the Supreme Court interpreted the statute as precluding consideration of LRAs prior to a sexually violent predator's first annual evaluation. The Supreme Court's construction of the statutory scheme in those cases is controlling.

In *Brooks*, the Supreme Court construed 1995 amendments to the statute as allowing for consideration of LRAs "only when the person confined as an SVP petitions for release in accordance with the procedures set forth in RCW 71.09.090-.098." *Brooks*, 145 Wn.2d at 287. It further

explained that “[b]ecause 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.*” *Id.* (second emphasis added). Notably, the Supreme Court expressly rejected an argument that a sexually violent predator can petition for release “immediately following the SVP determination.” *Id.* at 287 n. 2. It explained that the statutory provisions outlining the procedure for the filing a petition for release “depend upon the existence of the annual report.” *Id.*

More recently, in *Thorell*, the Supreme Court construed 2001 amendments to the statute as, among other things, “prevent[ing] courts from ordering LRAs prior to the annual LRA review petition.” *Thorell*, 149 Wn.2d at 747. It recognized that a new provision in the statute, RCW 71.09.060(4), “restricts the court . . . from ordering an LRA prior to a hearing under the annual LRA review provision, RCW 71.09.090, following initial commitment.” *Id.* at 751. It then explained, “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.*” *Id.* (emphasis added).

The Court also explained the sound policy reasons behind the legislature’s decision to “delay[] the consideration of appropriate LRAs for

SVPs until their first annual review.” *Thorell*, 149 Wn.2d at 752. As the Court noted, “the legislature found that SVPs are highly likely to engage in repeat acts of predatory sexual violence” and pose particular dangers to the public. *Id.* at 749, 750. Consequently, their treatment needs are unique and long term. *Id.* Moreover, “[s]uccessful treatment and evaluation for LRAs . . . depends on openly discussing and understanding one’s past violent sexual behavior and the desire to commit acts of sexual violence in the future.” *Id.* at 752. This requires intensive inpatient treatment. *Id.* It is only after commitment that this intensive inpatient treatment occurs and that “the appropriateness of LRAs can accurately be evaluated.” *Id.*

Canty argues that *Thorell* “did not impose restrictions beyond those set by the legislature” and “did not, and could not, amend RCW 71.09.090.” App. Op. Br. at 12, 15. The State agrees and does not suggest otherwise. Indeed, the legislature imposed these restrictions when it amended the statute in 1995 and 2001, before the Supreme Court decided *Brooks* and *Thorell*. The Supreme Court fully analyzed the statutory scheme in light of those amendments, considered legislative intent, and relied *on the statute* to conclude that sexually violent predators are “not entitled to consideration of LRAs until their first annual review.” *Thorell*, 149 Wn.2d at 751 (emphasis added). Thus, the Supreme Court’s conclusion is simply an interpretation of statutory prohibitions.

Canty also argues that the language quoted earlier from *Thorell* is *dicta* because the Supreme Court was not asked to determine whether a sexually violent predator could petition for conditional release before the first annual evaluation. App. Op. Br. at 13, 15. This argument is unconvincing. Statements are *dicta* if they “do not relate to an issue before the court and are unnecessary to decide the case.” *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009). Notably, both *Brooks* and *Thorell* directly addressed *when* sexually violent predators are entitled to consideration of LRAs under the sexually violent predator statute. And the Supreme Court interpreted the statute in order to resolve the equal protection claim, even though the precise issue was different from the one presented here. Consequently, the Supreme Court’s construction of the statutory scheme is not *dicta*. Further, once the Supreme Court has decided an issue of state law, “that interpretation is binding on all lower courts until it is overruled by [the Supreme Court].” *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Thus, the statutory construction from *Brooks* and *Thorell* controls here.

2. Lower courts have consistently relied on *Thorell* and have reaffirmed its holding and controlling authority

Since *Thorell* was decided sixteen years ago, courts have consistently relied on its holding and have confirmed that sexually violent

predators are not entitled to consideration of LRAs until their first annual evaluation.

For example, in *State v. Hoisington*, this Court held that the trial court properly excluded LRA evidence at a sexually violent predator's initial commitment trial. 123 Wn. App. 138, 144-45, 94 P.3d 318 (2004). It cited *Thorell* for the proposition that "LRAs cannot be considered until the first annual review after commitment." *Id.* at 145. Similarly, in *In re Detention of Halgren*, this Court recognized that "[t]he current rule under *Thorell* is that '...those who meet the statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review'" 124 Wn. App. 206, 225, 98 P.3d 1206 (2004) (quoting *Thorell*, 149 Wn.2d at 751).

In addition, this Court has expressly rejected Canty's argument that a sexually violent predator may obtain a conditional release trial immediately following civil commitment. This issue arose in *In re Detention of Skinner*, 122 Wn. App. 620, 632, 94 P.3d 981 (2004), where this Court concluded that the trial court erred in holding an LRA trial immediately following a sexually violent predator's commitment trial. In doing so, it expressly relied on *Thorell* and reasoned:

The supreme court in *Thorell* stated that RCW 71.09 "restricts the court ... from ordering in LRA prior to a hearing under the annual review provision, RCW 71.09.090,

following initial commitment,” and that “those who meet the statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review.” A trial court’s authority is limited to that found in the statute, and the court’s failure to follow the statute renders the court’s action void. Because RCW 71.09.090 is mandatory, the trial court was precluded from holding an LRA trial immediately following the commitment trial.

Skinner, 122 Wn. App. at 632 (internal citations omitted) (quoting *Thorell*, 149 Wn.2d at 751).

These decisions confirm that the issue presented in this case is well-settled and that any new authoritative decision here is unnecessary because *Thorell* provides sufficient authority on this issue. Additionally, these decisions reaffirm *Thorell*’s interpretation of the statutory scheme and expressly reject Canty’s argument that a sexually violent predator may immediately seek release.

C. The Statutory Scheme Further Confirms That a Sexually Violent Predator Is Not Entitled To an LRA Prior To the First Annual Evaluation

A close review of the statutory scheme further confirms that a sexually violent predator is not entitled to an LRA prior to the first annual evaluation. Under the statutory scheme, a trial court cannot order an LRA until after holding a conditional release trial. And a sexually violent predator cannot petition for a conditional release trial before the first annual evaluation. Thus, the statutory scheme makes clear that the Legislature

intended to prevent courts from ordering LRAs prior to the sexually violent predator's first annual evaluation.

A court's purpose in interpreting a statute is to carry out the legislature's intent. *State v. Gray*, 189 Wn.2d 334, 340, 402 P.3d 254 (2017). The clearest indication of intent is the language enacted by the legislature. *Id.* Thus, "if the meaning of a statute is plain on its face, we give effect to that plain meaning." *Id.* (quoting *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). Rather than reading statutes in isolation, courts ascertain the plain meaning by taking into account the context of the entire act as well as other related statutes. *Id.* "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other." *US West Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997).

A court "may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately." *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

1. The trial court cannot order an LRA until after a conditional release trial

The sexually violent predator statute expressly limits the trial court's authority to order conditional release to an LRA. The relevant statute, RCW 71.09.060(4), provides: "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 under this section and in accord with the provisions of this chapter." (Emphasis added.)

As Canty acknowledges, the word "hearing" in RCW 71.09.060(4) refers to a conditional release trial. *See* App. Op. Br. at 6. Thus, under the plain language of this statute, a trial court cannot order an LRA placement until it holds a conditional release trial pursuant to the procedures outlined RCW 71.09.090. *See also Thorell*, 149 Wn.2d at 751. Those procedures are addressed next.

2. A sexually violent predator cannot petition for a conditional release trial under RCW 71.09.090 before the first annual evaluation

RCW 71.09.090 outlines the procedures for petitioning for conditional release. It is the companion statute to RCW 71.09.070, which requires the Department to evaluate the person's mental condition "at least once every year." RCW 71.09.090 outlines two alternative ways to obtain a trial on a petition for conditional release. But a sexually violent predator

cannot petition for conditional release under the statute before the first annual evaluation.

The first way to obtain a conditional release trial under RCW 71.09.090 is through the procedures outlined in subsection (1). Under that subsection, the Department initiates the release process by authorizing the committed person to petition for release. Because the Secretary did not authorize Canty to petition for conditional release, that process is not implicated in this case.

The second way to obtain a conditional release trial under RCW 71.09.090 is through the procedures outlined in subsection (2)(a), which states in relevant part:

Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative . . . without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing

Under this subsection, the committed person initiates the release process without the secretary's approval by exercising their right to petition for release. The case then proceeds to a show cause hearing to determine if

there is probable cause to warrant a conditional release trial. If the court determines at the show cause hearing that there is probable cause, it must set a conditional release trial. RCW 71.09.090(2)(c).³

The process outlined in subsection (2)(a) does not permit a sexually violent predator to petition for conditional release before an annual evaluation. To obtain a conditional release trial, the person must first go through the show cause process. A show cause hearing is set if the person elects to exercise the right to petition for release rather than affirmatively waive that right. RCW 71.09.090(2)(a); *see also* CP 414. The committed person makes this election on the waiver of rights form, which is provided along with an annual written notice of the right to petition for conditional release. RCW 71.09.090(2)(a); *see also* CP 414.⁴ The secretary files “the notice and waiver form *and the annual report* with the court.” RCW 71.09.090(2)(a) (emphasis added). Because the secretary submits the

³ There are two ways for the trial court to determine if probable cause exists for a trial: (1) by deficiency of proof submitted by the State, or (2) by sufficiency of proof submitted by the committed person. RCW 71.09.090(2)(c); *In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002).

⁴ The waiver of rights form provided to Canty confirms that he can exercise his right to petition for release only after an annual evaluation. Prior to asking Canty to elect whether to waive his right to petition for release or to exercise that right, the form contained the following statement: “Pursuant to RCW 71.09.070, the Department of Social and Health Services (DSHS) must annually evaluate your mental condition, including whether you continue to meet the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in your best interest and conditions could be imposed that would adequately protect the community. **You will be provided with a current copy of your annual evaluation to review prior to signing this document.** Copies of the report and this notice will then be served on the prosecuting agency and filed with the court that committed you to the Special Commitment Center.” CP 414 (emphasis in original).

waiver of rights form to the court along with the annual evaluation, and because the waiver of rights form dictates whether a show cause hearing occurs, the show cause hearing must occur after the annual evaluation.

Other statutory provisions further support the conclusion that the process outlined in subsection (2)(a) depends on the completion of an annual evaluation. For one, subsection (2)(a) must be read in harmony with RCW 71.09.090(2)(b)(iii), a related provision. That provision provides that “the state may rely exclusively on the annual report prepared pursuant to RCW 71.09.070” at the show cause hearing. If the show cause hearing could occur prior to the annual evaluation, as Canty suggests, the State would not have the annual evaluation upon which to rely. This would render RCW 71.09.090(2)(b)(iii) useless, and it would require the State to obtain an additional expert in order to satisfy its burden at the show cause hearing. In order to give meaning to this provision, a show cause hearing under subsection (2)(a) must occur after an annual evaluation is completed.

Additionally, RCW 71.09.070(6) further supports this conclusion. Under that statute, a committed person may annually retain, or the court may appoint, a qualified expert or professional person to examine the person. RCW 71.09.070(6)(a). Canty availed himself of this statutory right, as he retained an expert and submitted a psychological evaluation with his petition for an LRA. CP 151-201. Canty’s expert concluded that Canty’s

proposed LRA was in his best interests and adequately protects the community. CP 146-47, 188. But under the same statute, “Any report prepared by the expert or professional person and any expert testimony on the committed person’s behalf is not admissible in a proceeding pursuant to RCW 71.09.090, *unless the committed person participated in the most recent interview and evaluation completed by the department.*” RCW 71.09.090(6)(b) (emphasis added). Thus, because Canty had not yet participated in an annual evaluation, this report would not be admissible in a proceeding under RCW 71.09.090. This also indicates that proceedings under RCW 71.09.090 occur only after the Department has completed an annual evaluation.

Overall, the procedures outlined in RCW 71.09.090, as well as related statutory provisions, indicate that the legislature intended to permit conditional release trials only after the Department has completed an annual evaluation.

Canty argues that there are “no restrictions” on when a show cause hearing under RCW 71.09.090 can be held. App. Op. Br. at 7. He claims that the “only timeframe” set forth in the statute is the one that requires the Department to submit the annual written notice along with the annual report. *Id.* But this argument fails because the legislature imposed restrictions on the timing of show cause hearings by virtue of the procedures outlined in

RCW 71.09.090(2)(a). Moreover, if RCW 71.09.090(2)(a) allowed show cause hearings at any time, there would be no reason for it to reference the annual evaluation and the annual written notice. Canty's interpretation of the statute essentially asks this Court to ignore a majority of the language of RCW 71.09.090(2)(a), improperly rendering that language meaningless or superfluous. *See Roggenkamp*, 153 Wn.2d at 624.

Canty also argues that sexually violent predators need to be able to petition for release independently from the annual evaluation process because "the Department often fails to meet its obligation to provide a timely report." App. Op. Br. at 7. But this Court has held that a sexually violent predator will obtain a show cause hearing as a remedy in the event of an untimely annual evaluation. *In re Det. of Rushton*, 190 Wn. App. 358, 376-77, 359 P.3d 935 (2015). Thus, a sexually violent predator is not deprived of a show cause hearing in such circumstances.

Lastly, Canty relies on statutory language and unpublished cases to assert that a sexually violent predator can petition for release independently from the annual review process. App. Op. Br. at 7-8. Specifically, he points to the language from subsection (2)(a) stating that "[n]othing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative . . . without the secretary's approval." App. Op. Br. at 7 (quoting RCW 71.09.090(2)(a)).

And he points to three unpublished decisions from this Court for the proposition that sexually violent predators can petition for release “at any time” apart from the annual review process. *Id.* at 7-8 (citing *In re Meirhofer*, 175 Wn. App. 1049 (2013) (unpublished); *In re Det. of Breedlove*, 187 Wn. App. 1029 (2015) (unpublished); *In re Det. of Robinson*, 185 Wn. App. 1002 (2014) (unpublished)).

But the statutory language cited by Canty does not mean that sexually violent predators can petition for release independently from the annual review process. It merely means that they can *still* petition for release even when the Secretary declines to authorize the petition. *See In re Det. of Ambers*, 160 Wn. 2d 543, 548, 158 P.3d 1144 (2007) (“If the secretary does not recommend release or an LRA, the committed person may still petition the court”); *In re Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999) (“Even if the secretary fails to authorize a petition, the committed person may still petition the superior court for release”). RCW 71.09.090(2)(a) does not include the words “at any time,” and courts “may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately.” *Chester*, 133 Wn.2d at 21.

The unpublished decisions cited by Canty do not compel a different conclusion. None of those decisions interpreted the language of subsection

(2)(a). Moreover, other decisions have summarized RCW 71.09.090(2)(a) as allowing a sexually violent predator to petition only as part of the annual review process. *E.g.*, *In re Nelson*, 2 Wn. App. 621, 623, 411 P.3d 412 (2018) (“A committed person may petition the court *once a year* for conditional release to a less restrictive alternative or unconditional release”) (emphasis added); *In re Det. of Sease*, 190 Wn. App. 29, 42, 357 P.3d 1088 (2015) (“a detainee may petition the trial court for a full or conditional release *annually*”) (emphasis added); *In re Det. of Ward*, 125 Wn. App. 381, 385, 104 P.3d 747 (2005) (“a committed person may petition the court *annually* for conditional release or unconditional discharge”) (emphasis added); *In re Det. of Mitchell*, 160 Wn. App. 669, 672 n. 3, 249 P.3d 662 (2011) (“If the committed individual does not affirmatively waive his right to petition for release *as part of the annual review*, the trial court must hold a show cause hearing regarding the commitment) (emphasis added); *McGaffee v. State*, 200 Wn. App. 1019 (2017) (unpublished)⁵ (“Once an individual has been involuntarily committed . . . they have the right, *on an annual basis*, to petition for conditional release”) (emphasis added); *In re Det. of Cannon*, 192 Wn. App. 1006 (2016) (unpublished)

⁵ Unpublished decisions are cited in accordance with GR 14.1.

(“*Following the annual review*, [an SVP] has the right to petition the court for release”) (emphasis added).

Finally, as the trial court recognized, concluding that sexually violent predators could petition for release “at any time” would mean in theory that sexually violent predators could file petitions for release “at any time and any number of times,” which would “create a significant burden on the Court judicial process.” RP 26.

3. RCW 71.09.090(2)(d) does not authorize a sexually violent predator to bypass the show cause process or “immediately” petition for conditional release

Canty claims that because he filed his petition under RCW 71.09.090(2)(d), there was no restriction on when he could file it. *See App. Op. Br.* at 4-5. But RCW 71.09.090(2)(d) does not authorize a sexually violent predator to bypass the show cause process in subsection (2) or immediately petition for conditional release.

RCW 71.09.090(2)(d) states in relevant part:

If the Court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in RCW 71.09.094(1), the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without addressing whether the person’s condition has so changed. . . .

Nothing in this provision indicates that a sexually violent predator can petition for conditional release outside of the show cause process. Rather, this subsection merely dictates that the trial court apply a different standard at the show cause hearing when it has not previously considered the issue of release to an LRA. *In re Det. of Rude*, 188 Wn. App. 1007 (2015) (unpublished) (the standard set forth in subsection (2)(d) “applies to the show cause hearing” and “merely allows a court to grant a trial without the normal showing that the committed person’s condition has changed”).

Canty argues that subsection (2)(d) “ameliorates the effects of RCW 71.09.060(4).” App. Op. Br. at 4. This argument fails. To conclude that subsection (2)(d) allows a sexually violent predator to petition for conditional release *immediately* following commitment would nullify RCW 71.09.060(4) altogether and would essentially create a bifurcated commitment proceeding. This is not what the legislature intended, as evidenced by the RCW 71.09.060’s references to the proceedings outlined in RCW 71.09.090.

In short, a petition brought under this RCW 71.09.090(2)(d) is subject to the same show cause process discussed earlier, which occurs after the Department has completed an annual evaluation.

V. CONCLUSION

This case is moot and does not present an issue of continuing and substantial public interest. More importantly, the trial court properly denied Canty's petition for conditional release because his petition was premature. Well-settled case law and the sexually violent predator statute confirm that sexually violent predators are not entitled to LRAs prior to the first annual evaluation. Moreover, allowing sexually violent predators to petition for conditional release immediately after commitment would be directly contrary to case law, the statutory scheme, and legislative intent. For all of these reasons, this Court should either dismiss this appeal as moot, or it should affirm.

RESPECTFULLY SUBMITTED this 30 day of July, 2019.

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NO. 51826-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

MICHAEL CANTY,

Appellant.

DECLARATION OF
SERVICE

I, Malia Anfinson, declare as follows:

On July 30, 2019, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent, 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 30 day of July, 2019, at Seattle, Washington.


MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

July 30, 2019 - 12:41 PM

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