No. 46760-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re the Detention of:

JOHN BROOKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Consistent with the requirements of due process, RCW 71.09.070 requires DSHS conduct annual examinations of committed individuals to determine whether they "currently meet[] the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community." RCW 71.09.090(1) requires DSHS "shall authorize" a person to petition for a trial on a less restrictive alternative if the annual review indicates a less restrictive alternative is in the person's best interest and can adequately protect the community. *State v. McCuistion*, 174 Wn.2d 369, 388, 275 P.3d 1092 (2012) (citing *In re the Personal Restraint of Young,* 122 Wn.2d 1, 39, 857 P.2d 989 (1993)); *In re the Detention of Morgan*, 180 Wn.2d 312, 321-22, 330 P.3d 774 (2014). Where DSHS provides authorization, RCW 71.09.250 in turn provides the secure community transitional facility (SCTF) as a location for such less-restrictive alternative.

McCuistion observed "[t]his statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous."

174 Wn.2d at 388. *McCuistion* went further and described the scheme as "constitutionally critical." *Id.*

In response, the State contends it is free to employ whatever criteria it wishes in determining when and how it will authorize a person to seek a trial on a less-restrictive alternative. Respondent's Brief at 10-12. The State argues the statutory scheme does not define when it must authorize an LRA petition. *Id.* at 11-12. This is an ironic position to assert, as earlier in its brief the State accuses Mr. Brooks of incorrectly reading the relevant statutes and ignoring the "clear [statutory] path" to release set forth in the statutes. *Id.* at 4. Apparently, no such statutory path exists.

In any event, as argued in Mr. Brooks initial brief if the State's position is correct, this "constitutionally critical" component of 71.09 is wholly eliminated - the annual review is simply form not substance. Indeed, under the State's logic there is no reason to conduct annual reviews at all as the "secretary" is apparently empowered to employ whatever criteria she wishes in authorizing trials. At bottom, the State's position means *McCuistion* was wrong to find a safe harbor in the annual review. That casts serious constitutional doubt on the provisions of 71.09. Courts must interpret a statute to avoid constitutional doubt.

Utter v. Building Industry Association of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015).

Because DSHS was required to authorize Mr. Brooks's petition under RCW 71.09.090(1), Mr. Brooks was entitled to present the SCTF as his housing placement. But for DSHS's refusal to comply with the mandate of RCW 71.09.090(1), the trial court could not have granted summary judgment. Thus, the trial court erred in granting the State's summary judgment motion. In doing so, the court derived Mr. Brooks of due process.

B. CONCLUSION

For the reasons above, and in Mr. Brooks's initial brief, the Court should reverse the order granting summary judgment and remand for a trial on appropriateness of a less-restrictive alternative.

Respectfully submitted this 14th day of September, 2015.

s/ Gregory C. Link
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF SEPTEMBER, 2015.

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