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NO. 93900-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

TROY BELCHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Troy Belcher, now 32 years old, was committed as a Sexually Violent Predator (“SVP”) in 2011 by a unanimous jury. In 2015, the trial court granted his request for a new trial based on his expert’s report asserting that Belcher had “so changed” through treatment that he was no longer a Sexually Violent Predator. After a bench trial, at which the trial court carefully weighed the evidence, the court entered detailed findings of fact and conclusions of law determining that Belcher continued to meet criteria for commitment.

Belcher’s commitment comports with the Constitution and with the Sexually Violent Predator Act (“SVPA”). The State presented overwhelming evidence, and the trial court correctly found, that Belcher is both mentally ill and dangerous. In so finding, the trial court relied on the comprehensive evaluation of the State’s expert, who conducted a thorough evaluation of Belcher’s mental condition and of his risk to reoffend. That expert considered a variety of relevant factors, including but not limited to actuarial instruments used to assess risk. Belcher’s age at the time of his sexual offenses does not undermine the State’s expert’s diagnosis or assessment of his current risk. Due process does not require the release of sex offenders who are both mentally ill and dangerous simply because they committed their offenses as juveniles. This Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

- A. Does the Constitution prohibit the involuntary commitment of persons who committed their crimes as juveniles and continue to be mentally ill and dangerous?
- B. Where expert testimony supported Belcher's commitment on the basis of a mental abnormality and established a nexus between that mental condition and the likelihood of re-offense, does his continued commitment comport with the Constitution?
- C. Where the State presented overwhelming evidence that Belcher was both mentally ill and dangerous, does his commitment comport with due process?

III. COUNTERSTATEMENT OF THE CASE

Troy Belcher was born on December 13, 1984, and he is now 32 years old. He has been convicted of two sexually violent offenses as that term is defined in RCW 71.09.020(17). He was convicted of Rape in the Second Degree by Forcible Compulsion on October 15, 1998. CP at 847; Finding of Fact ("FoF") No. 1. In that incident, Belcher, 13, forced his way into a home where a 13-year-old girl was babysitting. *Belcher v. State*, No. 41937-8-II, 2013 WL 634536, at *1 (2013). Belcher, after telling the girl he wanted to have sex with her, pushed her up the stairs and into one of the bedrooms, pinned her down on the floor, and vaginally raped her. *Id.*

While still on parole for this offense, Belcher attempted to rape another 13-year-old girl. Belcher had lured the girl into the woods, offering to show her a shortcut to her friend's house. *Belcher*, 2013 WL 634536, at *2. Once in the woods, Belcher pushed the girl onto the ground, pulled down his pants and straddled her, telling her she would not get hurt as long as she didn't scream. *Id.* The girl managed to push Belcher off and run away. *Id.* Belcher was convicted of Attempted Rape. CP at 848; FoF No. 4.

Additional allegations not resulting in charges or convictions also came to the attention of authorities. CP at 848-49; FoF No. 5. In 1998, Belcher was expelled from middle school after eight female students, ages 11 to 13, reported that he had been sexually harassing them for several months. *Id.* Several reported that Belcher had grabbed their breasts and buttocks. *Id.* In addition, one of Belcher's former girlfriends alleged that he had vaginally raped her, but she had never reported the incident. *Id.*

Belcher's criminal convictions were not limited to sexual crimes. While incarcerated at Green Hill School after his conviction for Attempted Rape, Belcher solicited someone to kill one of his former victims. CP at 849; FoF No. 6; *Belcher*, 2013 WL 634536, at *2. In 2004, Belcher was charged with Solicitation to Commit Murder in the First Degree and Intimidating a Witness. *Belcher*, 2013 WL 634536, at *2. Belcher pled guilty to Intimidating a Witness.

In 2007, shortly before his scheduled release following his conviction for Intimidating a Witness, the State filed a petition alleging that Belcher was an SVP. *Belcher*, 2013 WL 634536, at *3. He was detained pursuant to that petition and sent to the Special Commitment Center (“SCC”), a treatment facility on McNeil Island where persons detained under the SVPA are housed. In 2011, a unanimous jury determined he was an SVP and he was committed to the Department of Social and Health Services (“DSHS”) for care and treatment until further order of the court. *Id.* at *4; RCW 71.09.060. His commitment was affirmed. *Belcher*, 2013 WL 634536, at *8.

In 2014, Belcher was granted a new trial based upon an expert opinion that his condition had changed through treatment. After a fair trial, the trial court found that he continued to meet commitment criteria. On appeal, Belcher argued that his re-commitment violated due process because it was based on conduct that occurred while he was a juvenile. He also argued that the State’s expert’s diagnosis violated due process, as well as that expert’s use of certain actuarial instrument which, he asserted, were not appropriately used on persons who committed their crimes while a juvenile. The Court of Appeals affirmed, holding that due process did not prevent the use of juvenile convictions as a basis for commitment, and that a rational trier of fact could find beyond a reasonable doubt that Belcher continued to meet commitment criteria. *In re Det. of Belcher*, 196 Wn. App 592, 385 P.3d 174, 181 (2016).

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The State Proved Beyond a Reasonable Doubt that Belcher Suffers from a Mental Abnormality

Belcher argues that commitment on the basis of an Antisocial Personality Disorder (“ASPD”) with high psychopathy violates due process. Pet. at 20. This argument fails. Due process does not require any particular diagnosis in order to support a finding of mental abnormality or to support commitment.

At trial, the State presented the testimony of Dr. Brian Judd, who conducted a comprehensive evaluation of Belcher, including but not limited to a review of roughly 5,000 pages of information and four interviews with Belcher conducted between 2011 and 2015. Vol 2A RP at 352; Vol 3 RP at 566. Dr. Judd concluded that Belcher suffers from a mental abnormality consisting of a combination of ASPD and high psychopathy. Vol. 2B RP at 464; CP at 852-53; FoF No. 17. He also concluded, based on both static and dynamic factors as measured by various instruments commonly used by experts in his field to assess risk, that Belcher was likely to commit predatory acts of sexual violence if not confined in a secure facility. Vol. 3 RP at 565.

In assigning a diagnosis of ASPD, Dr. Judd relied upon the 5th edition of the Diagnostic and Statistical Manual, or DSM-5. Vol 2A RP at 353. There are seven essential features of an ASPD; Belcher, Dr. Judd noted, currently meets six of those. *Id.* at 359-375; CP at 852; FoF No. 14. Belcher has failed to conform to social norms as demonstrated by his numerous arrests and

convictions, relating not only to sexual misconduct but to thefts, solicitation to commit murder, and intimidating a witness. Vol. 2A RP at 361. Belcher's deceitfulness is, as well, "very prevalent throughout" his records. *Id.* at 362-63. He has lied about the factual basis of his offenses (*Id.* at 365), the number of children he has fathered (*Id.* at 365-66), and his status as a Level 3 offender if released as a result of his trial. *Id.* at 366. He is frequently impulsive and fails to plan ahead, and his juvenile records note that his lack of impulse control makes his behaviors "very dangerous and unpredictable." *Id.* at 368-69. He also demonstrates irritability and aggressiveness in his physical aggression toward SCC staff. *Id.* at 370-71. Belcher has demonstrated consistent irresponsibility and a lack of remorse since adolescence, as evidenced by changing descriptions of his sexual offenses against his two 13-year-old victims. *Id.* at 373-74. Since the time of his first incarceration, Belcher has denied the impact of his behaviors on his victims, and, indeed, he at times continues to deny that he committed any offenses at all. *Id.* at 375; CP at 852; FoF No. 14. Such attitudes are relevant from a therapeutic standpoint insofar as full acknowledgement of one's crimes is the foundation of sex offender treatment. Vol. 2A RP at 375.

In Belcher's case, this ASPD is exacerbated by the presence of a high level of psychopathy as measured on the Hare Psychopathy Checklist-Revised, or PCL-R. Vol. 2B RP at 452. Psychopathy, Dr. Judd explained, is "a

construct which refers to individuals that have a pattern of conduct which is demonstrated by impulsivity, potentially aggressiveness.” *Id.* at 471-72. The PCL-R is regarded as “the gold standard for identification of psychopathy.” *Id.* Psychopaths display a lack of empathy for others and a lack of remorse. *Id.* While some regard psychopathy as an extreme or more severe type of ASPD and others regard it as an independent classification, it is clear that people with psychopathy are, as Dr. Judd explained, “worse, for lack of a better word” than people with antisocial personality disorder. *Id.* at 453. While 50-75% of persons incarcerated suffer from antisocial personality disorder, only 20-30% meet the criteria for psychopathy. *Id.* at 454. Psychopathy, he explained, appears to “kindle” ASPD (*Id.* at 523), and psychopaths have a broader range of criminal conduct, are more violent, and tend to re-offend more quickly than those suffering simply from antisocial personality disorder. *Id.* at 454.

These two conditions—ASPD and psychopathy—combine in Belcher’s case to constitute a mental abnormality under the law. Vol. 2B RP at 464, 456-58; RCW 71.09.020(8).¹ Whether acquired or congenital, both psychopathy and antisocial personality disorder affect the individual’s “emotional capacity,” or ability to appreciate another person’s pain. Vol 2B RP at 458. The combination of these conditions “basically limit[s] [Belcher’s]

¹ A mental abnormality is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” RCW 71.09.020(8).

ability to experience empathy, to experience a sense of remorse for his conduct and his behavior, [and] to identify with other people's feelings and emotions." *Id.* at 462. This means that there is a greater probability that Belcher will experience others simply as objects through which he can achieve gratification, uninhibited by empathy. *Id.* at 462-63. This condition affects his volitional capacity, or his ability to inhibit his urges, in that people with this condition "don't have the ability to intervene" in their own assaultive behavior. *Id.* at 458. This in turn predisposes that person to the commission of criminal sexual acts. *See* RCW 71.09.020(17).

Belcher appears to argue that any commitment based entirely or in part on ASPD violates due process because that diagnosis does not distinguish him from "the dangerous but typical recidivist convicted in an ordinary criminal case." Pet. at 16-17 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)). This argument has repeatedly been rejected by the appellate courts both in this state and around the nation.² If, as noted by the

² *See e.g. Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), does not preclude civil commitments based on a diagnosis of ASPD); *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 599 (Cal. 1999) (*Foucha* does not "purport[t] to limit the range of mental impairments that may lead to the "permissible" confinement of dangerous and disturbed individuals."); *In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006) (under both *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), and *Crane*, sufficient evidence in the record established nexus between G.R.H.'s ASPD and his difficulty controlling his sexually violent behavior); *In re Det. of Sease*, 149 Wn. App. 66, 201 P.3d 1078, 1085 (2009) (affirming civil commitment based on diagnoses of ASPD and at least one other personality disorder); *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis.App. 1998); *In re Shafer*, 171 S.W.3d 768, 771 (Mo.App. S.D. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo. 2007); *In re Det. of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004) (concluding that neither *Hendricks* nor *Crane* precluded

federal district court in *Brown v. Watters*, 599 F.3d 602 (7th Cir. 2010), “the condition of [ASPD] is serious enough to cause an inability to control sexually violent behavior, the standards set by the Supreme Court would be satisfied.” *Id.* at 615. Belcher asserts, however, that Dr. Judd’s diagnosis of ASPD with psychopathy does not constitute a mental abnormality or form the basis for commitment. Pet. at 15-19. The term “mental abnormality,” however, as applied to Belcher’s particular mental condition and the way that mental condition has expressed itself in criminal behavior, has real meaning and withstands constitutional challenge. What is critical, for purposes of Dr. Judd’s expert testimony, is that he “adequately explained and gave meaning to [the term ‘mental abnormality’] within a psychological context.” *In re Young*, 122 Wn.2d 1, 49-50, 857 P.2d 989 (1993).

Nor does it matter that the mental condition described by Dr. Judd is not a diagnosis within the pages of the DSM-V. More than 22 years ago, this Court, in *Young*, rejected the argument that a diagnosis, in order to be valid, must appear in the DSM. *Id.* at 28. What is critical, this Court wrote, “is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.” *Id.*

commitments based on ASPD). If, as noted by the federal district court in *Brown*, “the condition of [ASPD] is serious enough to cause an inability to control sexually violent behavior, the standards set by the Supreme Court would be satisfied.” *Brown*, 599 F.3d at 615.

(quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Sexually Violent Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)).

Belcher also argues that Dr. Judd's diagnosis does not distinguish Belcher from a "typical recidivist in an ordinary criminal case" as required by *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Pet. at 5-7, 16. Neither the United States Supreme Court nor the appellate courts of other jurisdictions, however, share Belcher's fixation on the semantics of particular diagnostic classifications. Psychiatry, the Court has noted, "is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). While no particular psychiatric diagnosis is required, commitment under the SVP law requires "proof of serious difficulty in controlling behavior," sufficient, "when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself," "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413.

Sufficient proof was presented here. Dr. Judd explained the basis for his diagnosis at length, discussing the factual basis for both his opinion that the combination of Belcher's ASPD and high level of psychopathy constituted a mental abnormality under the law. Vol. 2B RP at 464. Dr. Judd explained both what he understood by the term "mental abnormality" (*Id.* at 456-58) and why that term applied to Belcher: He suffers from a "congenital or acquired condition" in the form of this combination of an ASPD with high psychopathy. *Id.* This condition "affects his emotional or volitional capacity" by "basically limit[ing] [Belcher's] ability to experience empathy, to experience a sense of remorse for his conduct and his behavior, [and] to identify with other people's feelings and emotions." *Id.* at 462. Finally, this mental condition predisposes Belcher "to the commission of criminal sexual acts in a degree constituting ...a menace to the health and safety of others" and causes Belcher to have serious difficulty controlling his sexually violent behavior. *Id.* at 462-64. This testimony gave meaning to the term mental abnormality "within a psychological context" as required by *Young*, and provided the trial court a basis to conclude, as required by *Crane*, that Belcher had "serious difficulty" controlling his sexually violent behavior.

Belcher also argues that commitment is improper because it is based on behaviors long ago, and that he no longer evidences the antisocial behavior so prominent in his youth. Pet. at 4-9. Dr. Judd explained,

however, that Belcher's antisocial tendencies have persisted over a sustained period of time, emerging first in late childhood and adolescence, and continuing until the last few years before this trial. Vol. 2B RP at 424. While the manifestation of the disorder "can be less prominent in a structured environment" (*Id.*), ASPD "tends to be seen" as a chronic condition, for which there is "no real cure[.]" Vol. 2A at 380. Because Belcher had a sufficient number of relevant symptoms "both as an adolescent and as an adult," the diagnosis was warranted. *Id.* at 361. The mere fact of aging is insufficient to reduce Belcher's risk of re-offense.

The trial court also heard extensive testimony from Belcher's expert, Dr. Brian Abbott, regarding Belcher's mental condition.³ 5A RP at 847-1047; 5B RP at 1048-1123. Much of this testimony related to Belcher's argument that his youthful behavior was not predictive of his behavior as an adult, and included testimony related to his diagnosis, the development of the pre-frontal cortex, the decreasing rates of recidivism for adolescents as they enter their adult years, and the difficulty in assessing risk for persons who committed sexual offenses as adolescents. Vol. 5A RP at 993-1027. The court thus had an opportunity to consider the possibility that, although Belcher had indeed been a juvenile at the time of his offenses, he had since matured to the point that he could no longer be said

³ Dr. Abbott did not conduct a risk assessment of Belcher. CP at 856; FoF No. 26.

to be “likely” to reoffend. The trial court, however, rejected Dr. Abbott’s “narrow view of the facts and circumstances surrounding Mr. Belcher’s relevant psychological issues” as biased and lacking in credibility, noting that Dr. Abbott’s opinions “have been inconsistent over a very short period of time” and “seem to change depending on Mr. Belcher’s legal position, rather than psychological or other forensic issues.” CP at 855-56; FoF Nos. 24-25. Belcher does not assign error to these findings. The trial court correctly concluded that Belcher suffered from a mental abnormality.

B. The State Proved Beyond a Reasonable Doubt That Belcher Is Likely To Reoffend

Belcher argues that the State presented no reliable actuarial evidence supporting the State’s expert’s opinion that Belcher will reoffend, and that Belcher’s youth at the time of his offenses means that the State could not prove a lack of volitional control. Pet at 10. First, this argument assumes that a risk assessment consists only of the application of an actuarial instrument. This is wrong, in that a comprehensive risk assessment such as the one conducted by Dr. Judd considers many factors, including but not limited to static factors as measured by certain actuarial instruments, dynamic factors, relevant psychological factors, and, of course, the evaluator’s own clinical judgment. Moreover, Belcher’s argument conflates the State’s ultimate burden—that is, to demonstrate beyond a reasonable doubt that Belcher is more likely than not to reoffend—with the use of or score on a particular

actuarial instrument. Dr. Judd's risk assessment was not limited to the scoring of a single actuarial instrument any more than the score on that instrument is dispositive of his risk to reoffend.

Belcher also argues that, given the limitations of the instruments Dr. Judd used, the State was able to demonstrate only that Belcher was likely to commit violent acts if released, not acts of sexual violence, as required by the statute. Pet. at 13. The record does not support this claim. In conducting his comprehensive assessment, Dr. Judd testified that he relied upon the PCL-R as a "foundation" from which to begin his risk assessment Vol. 2B RP at 466. In order to score this instrument, the evaluator looks at the subject's lifetime functioning, including juvenile behavior if such records are available. Vol. 2B at 472. Belcher's "grandiose sense of self," his need for stimulation, his pathological lying, and his use of deception to cheat, bilk, defraud, or manipulate others are all characteristic of psychopaths. *Id.* at 471-84. Belcher demonstrates a lack of guilt or remorse for his crimes, minimizes the use of force involved in his sexual crimes or, in some cases, denies those offenses altogether. *Id.* at 484-89. This, combined with his refusal to engage in treatment classes, "makes offense-specific treatment virtually impossible." *Id.* at 516. Belcher also demonstrates behaviors and attitudes that are callous, displaying no empathy for his victims, often claiming that he did nothing wrong and blaming them for his current dilemma. *Id.* at 494. He shows poor

behavioral controls, tending “to respond to frustration, failure, discipline, and criticism with violent behavior or with threats and verbal abuse,” and striking out in anger or rage when frustrated. *Id.* at 497. He has demonstrated promiscuous sexual behavior, having had many victims and sexual partners, and having, even when married, engaged and sought to engage in sexual contact with others while at the SCC. *Id.* at 498-500. Belcher, who had early behavior problems such as fights and suspensions from school (*Id.* at 508) is, as well, “extremely impulsive in his lack of self-control and judgment,” a factor that adds “significantly” to his dangerousness. *Id.* at 511.

Belcher scored a 31 on the PCL-R; a score of 30 is generally regarded as a cutoff for the presence of psychopathy. Vol. 2B RP at 472, 476. Persons who suffer from ASPD as well as meeting the conventional criteria for psychopathy are “at disproportionately higher risk” to reoffend as compared to both persons with ASPD or with neither psychopathy nor an ASPD. *Id.* at 524-25; Vol. 3 RP at 557.

After considering the impact of Belcher’s psychopathy on his risk to reoffend, Dr. Judd then used two actuarial instruments, in this case, the Violence Risk Appraisal Guide-Revised, or VRAG-R, and the SORAG, or Sex Offender Risk Appraisal Guide, as part of his overall risk assessment.⁴

⁴ On appeal from his initial commitment trial, Belcher argued unsuccessfully that the SORAG, which Dr. Judd had used, “is an improper or inaccurate tool to use on those who committed sex crimes as juveniles.” *Belcher*, 2013 WL 634536, at *7.

Vol. 2B RP at 466. The use of actuarial instruments as part of a comprehensive risk assessment is well-accepted. *In re Det. of Thorell*, 149 Wn.2d 724, 755, 72 P.3d 708 (2003). Such instruments are not, however, dispositive of the ultimate issue of risk. Because actuarial measurements only evaluate a “limited set of predictors” often involving statistical analysis of small sample sizes, the results “have a variety of potential predictive shortcomings” (*Id.* at 753), and may underestimate the risk of re-offense. *See, e.g., In re Det. of Kelley*, 133 Wn. App. 289, 296, 135 P.3d 554 (2006); *see also In re Det. of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833 (2006). For these reasons, experts “conside[r] potentially important factors not included in the actuarial measure.” *Thorell*, 149 Wn.2d at 753. This consideration can include various other dynamic risk factors—that is, risk factors that are susceptible to change-- that identify the offender as a high risk to reoffend. *Lewis*, 134 Wn. App. at 906.

The VRAG was initially published in 1993, and, along with the SORAG, is the “oldest risk assessment instrument[t] that we have.” Vol. 2B RP at 536. Explaining that certain otherwise-well-accepted actuarial instruments, such as the Static-99, are not appropriate for use on persons who committed their crimes below a certain age, Dr. Judd testified that the VRAG-R is in fact appropriate for use with such populations. *Id.* at 468; Vol. 3 RP at 660-61. Although the VRAG-R is designed to assess the risk of

all violent recidivism, including sexual recidivism, it is regarded as a useful tool for purposes of assessing the risk of sexual violence as well. As Dr. Judd explained, “it provides at least a structured ... assessment technique for assessing an individual’s risk for recidivism[,] and provides information as to whether the person will be recharged for a violent, including a sexually violent, offense.” Vol. 2B RP at 533-34. Because a sexually-motivated offense may be pled down to a non-sexual offense, looking at instruments that measure recidivism in terms of violence, including sexual violence, such as the VRAG, “was probably a more appropriate way to assess the probability of an individual’s future sexual recidivism” rather than simply looking at a measure that focused on “rap sheet sexual recidivism.” *Id.* at 535-36.

Belcher’s score on the VRAG-R places him in the highest “bin,” or category, on the VRAG-R, between the 95th and 96th percentile compared to the standardization sample. Vol. 2B RP at 546. After 12 years of follow up, 87 percent of those with this score were charged with a violent--including sexually violent-- offense. Belcher’s score on the SORAG was similar: Of those with the same score as that assigned Belcher, 93% were re-charged for violent offenses within 10 years. Vol. 3 RP at 562. Even with a score as high as this, however, this result was simply another “piece of the puzzle.” *Id.* at 546. Research demonstrates that non-compliance with supervision has perhaps the strongest relationship with sexual recidivism,

exceeding even deviant sexual interest and other risk factors known to be empirically related to recidivism. *Id.* at 553. Belcher, Dr. Judd noted, had had roughly 85-90 infractions at the SCC since his arrival in 2007 (Vol. 2A RP at 369), more than 50 of which have been since his commitment in 2011.

After considering all of this information, Dr. Judd concluded that Belcher suffered from a mental abnormality that made him more likely than not to commit predatory acts of sexual violence if not confined. Vol. 2B RP at 456-62. This determination was well supported by the evidence, and comported with due process.

C. Belcher's Commitment Comports with Due Process

The constitutionality of Washington's statute has been repeatedly upheld against various due process challenges. *Young*, 122 Wn.2d 1; *Thorell*, 149 Wn.2d 724; *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Substantive due process requires that those civilly committed under the sexually violent predator law be both mentally ill and dangerous. *Hendricks*, 521 U.S. at 358. Commitment must be supported by proof that the person has serious difficulty controlling his or her sexual behavior. *Crane*, 534 U.S. 407; *Thorell*, 149 Wn.2d 724.

Belcher appears to add a new requirement to due process: Not only must the State demonstrate "serious difficulty controlling behavior," it

must demonstrate “*sustained* impairment of volitional control.” Pet. at 9. Because human brains continue to develop until an individual’s mid-twenties, Belcher reasons, evidence of impaired volitional control before that time should not be considered. This logic would essentially prevent the State from acting to protect the public and incapacitate and treat dangerous sex offenders until some “sustained impairment” occurring after the brain’s full maturation could be developed. Due process does not require this.

The Legislature has included juvenile sex offenders in the group subject of commitment as sexually violent predators (RCW 71.09.025; 030), and juvenile adjudications have been upheld as appropriate predicate offenses under the SVP statute. *In re Det. of Anderson*, 185 Wn.2d 79, 89, 368 P.3d 162 (2016). Belcher does not argue that these portions of the statute are unconstitutional. Thus he finds himself in the untenable position of arguing the unconstitutionality of a practice explicitly permitted by a statute that he does not challenge. Even setting this problem aside, his challenge fails. Belcher begins with the widely-accepted premise that the juvenile brain continues to develop until a person’s mid-twenties. He then, however, asks this Court to infer from that premise, and cases that discuss it, that “it is a violation of substantive due process to hold a person whose sexual misconduct occurred only when they were a juvenile.” Pet. at 6-7. This inference is not merited, and the cases he cites relating to the

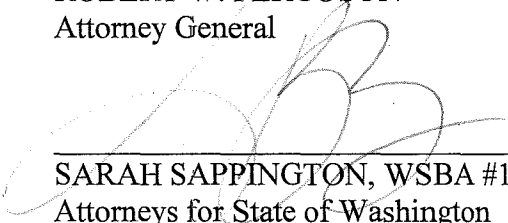
sentencing of juveniles⁵ are inapposite. Unlike the SVPA, all are criminal cases, none of which are analyzed under the Due Process Clause. Unlike these criminal cases, Belcher's case will be reviewed annually, and he will have regular opportunities to argue that he should be released, whether conditionally or unconditionally. *See* RCW 71.09.090. The trial court heard and rejected Belcher's expert's extensive testimony in support of Belcher's theory that his youthful behavior was not predictive of his behavior as an adult. Where the State provided overwhelming evidence that Belcher suffered from a mental abnormality and was more likely than not to reoffend if released, Belcher's commitment comports with due process.

V. CONCLUSION

For the reasons set forth above, this Court should deny review.

RESPECTFULLY SUBMITTED this 2nd day of February, 2017.

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⁵ *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (under 8th Amendment, juveniles offenders may not receive a life-without-parole sentence where the juvenile did not commit homicide); *Miller v. Alabama*, --U.S.--, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (giving juvenile offenders mandatory life-without-parole sentences violates 8th Amendment); *State v. O'Dell*, 183 Wn.2d 680, 691, 358 P.3d 359 (2015) (sentencing court must exercise its discretion to determine whether defendant's youthfulness can support exceptional sentence below the standard range).

NO. 93900-4

WASHINGTON STATE SUPREME COURT

In re the Detention of:

TROY BELCHER,

Petitioner.

DECLARATION OF
SERVICE

I, Lucy Pippin, declare as follows:

On February 2, 2017, pursuant to the Electronic Service Agreement, I served a true and correct copy of State's Answer to Petition for Review and Declaration of Service via electronic mail, addressed as follows:

Travis Stearns
Washington Appellate Project
travis@washapp.org
wapofficemail@washapp.org

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

DATED this 2nd day of February, 2017, at Seattle, Washington.



LUCY PIPPIN