

NO. 93900-4

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Detention of

TROY BELCHER,

Petitioner.

**ON APPEAL FROM THE SUPERIOR COURT
FOR COWLITZ COUNTY**

**ANSWER TO AMENDED AMICUS BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS**

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A. INTRODUCTION

Where there is no evidence of sexually dangerous misconduct as an adult, due process prohibits commitment under RCW 71.09. The Washington Association of Prosecuting Attorneys (“WAPA”) would seek to expand the persons who can be committed under RCW 71.09 to include juveniles who have no history of sexual misconduct as adults. This Court should decline WAPA’s invitation. To be constitutional, indefinite commitment must be based on demonstrated sexually dangerous misconduct as an adult. Because there is no evidence Troy Belcher has acted in a sexually dangerous way as an adult, his continued commitment violates due process.

B. ARGUMENT

The entitlement of children to greater protections than adults requires courts to adapt their procedures to account for the frailties of youth.

- 1. The United States Supreme Court does not limit its analysis of juvenile brain development and maturity to the eight amendment.*

In *J.D.B. v. North Carolina*, the United States Supreme Court recognized juveniles lack the maturity and experience of an adult and that procedures put in place for adults must be adapted to the attributes of youth. 564 U.S. 261, 272-74, 131 S. Ct. 2394, 180 L. Ed. 2d 310

(2011). Recognizing children are different, *J.D.B.* adopts a “reasonable child” standard for when a court can admit a child’s confession. *Id.* at 272 (“We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.”).

Importantly, *J.D.B.* relies on the same cases and social science used in the Court’s eight amendment analysis, recognizing that age is “more than a chronological fact” and that children “generally are less mature and responsible than adults.” *J.D.B.*, 564 U.S. at 727 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). It is the “common nature of juveniles” that requires courts to analyze adapt procedures that are otherwise constitutional to the unique characteristics of youth. *J.B.D.*, 564 U.S. at 272 (citing *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

Nor are the protections provided to children limited to when children are interrogated by the police. Children “lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J.D.B.*, 564 U.S. at 273 (citing 1 W. Blackstone, *Commentaries on the Laws of England* *464–*465). Contracts entered into by children are “voidable.” 1 E. Farnsworth, *Contracts* § 4.4, p. 379 and n. 1 (1990). Children can own property, but

are considered incapable of property management. 1 D. Kramer, *Legal Rights of Children* § 8.1, p. 663 (rev.2d ed. 2005); 2 J. Kent, *Commentaries on American Law* *78–*79, *90 (G. Comstock ed., 11th ed. 1867). Almost every state prohibits children from voting, jury duty, or marrying without parental consent. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

WAPA seeks to limit the reality that children are different to the eighth amendment. This has not been the approach taken by the United States Supreme Court. Instead, the United States Supreme Court has been clear that children are entitled to additional protections not afforded to adults when their rights and interests are at stake. Protections and procedures designed to protect children extend far beyond the eighth amendment and well into adulthood. Those rights remain with the children even as they age and mature. See, *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

2. *This Court recognizes the wall protecting the rights of juveniles extend beyond the eighth amendment.*

This Court also recognizes the important distinctions between juveniles and adults entitle youth to additional protections, even when they are no longer children. This Court has employed the United

Supreme Court’s analysis that children are entitled to greater protection than adults well beyond issues of cruel and unusual punishment.

This Court recognized in *State v. S.J.C.* that “the mind of a juvenile or adolescent is measurably and materially different from the mind of an adult, and juvenile offenders are usually capable of rehabilitation if given the opportunity.” 183 Wn.2d 408, 433, 352 P.3d 749 (2015) (citing *Miller v. Alabama*, 567 U.S. 460, ___, 132 S. Ct. 2455, 2464-65 & n. 5, 183 L. Ed. 2d (2012); Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, 35 *The Champion* 20, 24 (2011). In holding juveniles were entitled to greater sentencing rights than adults, this Court relied upon “empirical data, common sense and evolving standards of justice.” 183 Wn.2d 408, 428, 352 P.3d 749 (2015) (citing as example, *Miller*, 132 S. Ct. at 2464–65; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

This Court also extended the protections of youth to young adult offenders. In *State v. O’Dell*, this Court held a defendant’s youthfulness can support an exceptional sentence below the standard range for an adult defendant. 183 Wn.2d 680, 698–99, 358 P.3d 359 (2015). Like *S.J.C.*, this Court applied the United States Supreme Court jurisprudence to a non-eight amendment case holding youthful

offenders are entitled to have the trial court consider youthfulness at sentencing. *Id.* at 696. This Court has recognized that until full neurological maturity, young people have less ability to control their emotions, clearly identify consequences, and make reasoned decisions. *Id.* at 692. Likewise, in *State v. Houston-Sconiers*, this Court recognized the constitutional importance of age in holding trial courts must have absolute discretion to depart from sentencing ranges and enhancements when sentencing juveniles in adult court. 188 Wn.2d 1, 9, 391 P.3d 409 (2017).

3. *Mr. Belcher is not challenging whether juvenile offending can be a predicate for commitment.*

WAPA argues that if this Court were to hold that due process requires evidence of adult sexual misconduct in order for RCW 71.09 commitment to be constitutional, it would create a categorical exemption for juveniles who commit sexual offenses. This case is not about whether a juvenile offense can be used as a predicate for RCW 71.09 commitment. This Court recently held juvenile offenses can be predicate convictions for purposes of RCW 71.09. *In re Det. of Anderson*, 185 Wn.2d 79, 93, 368 P.3d 162 (2016). This holding was not challenged in trial court and Mr. Belcher is not challenging it now.

The issue WAPA addresses is separate and distinct issue from whether a juvenile offender who has no history of sexually dangerous misconduct as an adult can be confined under RCW 71.09 based solely on juvenile sexual misconduct. And while WAPA's brief focuses on adult offending, including references to cases offered as hypotheticals, this case does not involve a juvenile offender with adult misconduct. Mr. Belcher has not exhibited sexual misconduct as an adult. He only asks this Court to limit commitment to those who manifest adult sexual misconduct.

4. *Juvenile sex offending is not predictive of adult sexual reoffending.*

WAPA's broad stroke to include offenders who have history of adult sexual misconduct in fact ignores the realities of youth. The incontrovertible evidence demonstrates juvenile offending is not predictive of adult sexual misconduct. Sue Righthand & Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature*, 30 (March 2001).¹ This reality is recognized by social scientists and courts addressing similar issues to those before this Court. *See In re W.Z.*, 194 Ohio App. 3d 610, 625, 957 N.E.2d 367

¹ Available at <https://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf>.

(Ohio Ct. App. 2011); *see also* Association for the Treatment of Sexual Abusers, *ATSA Practice Guidelines for Assessment, Treatment, and Intervention with Adolescents Who Have Engaged in Sexually Abusive Behavior*, 5 (2017) (Hereafter *ATSA Practice Guidelines*).² Neither the evidence of specific instances of misconduct, nor the general practices of the King County Prosecuting Attorney’s Office in RCW 71.09 commitment hearings contradict this truth.

Instead, holding due process requires evidence of adult offending in order to confine a person under RCW 71.09 is in accord with social science. The Association for the Treatment of Sexual Abusers recognizes juvenile sex offenders rarely become adult sex offenders. *ATSA Practice Guidelines*, at 5. More importantly, the Association recognizes that youthful misconduct cannot predict a child’s future likelihood to commit a sexually dangerous offense. *Id.*

Courts have found the same thing. Simply put, juvenile sex offending does not translate into a likelihood to commit future sex offenses as an adult. *See United States v. Juvenile Male*, 590 F.3d 924, 940 (9th Cir. 2010), *vacated as moot*, 131 S. Ct. 2860, 180 L. Ed. 2d

² Available at http://www.atsa.com/pdfs/Adolescent/ATSA_2017_Adolescent_Practice_Guidelines.pdf.

811 (2011): *In re J.P.*, 339 N.J. Super. 443, 455, 772 A.2d 54 (N.J. Super. Ct. App. Div. 2001). Juveniles have fluid personalities, a propensity for risk taking, and difficulty appreciating consequences. *Roper*, 543 U.S. at 569. It is “the exception rather than the rule” for an adolescent sex offender to become an adult sex offender. Ian A. Nisbet, et al., *A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Offenders*, 16 *Sexual Abuse: A Journal of Research and Treatment* 223, 232 (2004); *see also* Righthand, at 30.

Without evidence of adult sexual misconduct, there is an insufficient basis to predict future likelihood to commit a future sexually dangerous offense. The tools that can be used to predict future sexually violent behavior do not work for juvenile offenders. *J.P.*, 339 N.J. Super. at 461; *ATSA Practice Guidelines*, at 5; Inga Hempel, et al., *Review of Risk Assessment Instruments for Juvenile Sex Offenders: What Is Next?* *International Journal of Offender Therapy and Comparative Criminology* Vol. 57, 208 (2011).

The only actuarial evidence the government was able to present only demonstrated a future likelihood to commit violent offenses and could not distinguish between general offending and sexual reoffending. Due process requires proof “sufficient to distinguish the

dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *In re Det. of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)). No tools presented at trial could do this.

None of the evidence offered at trial by the government contradicts the reality that juvenile sex offending is not predictive of adult offending. Mr. Belcher has grown up and as he has done so, he has matured and is able to act in age appropriate ways. Mr. Belcher has not demonstrated sexually dangerous behavior as an adult. He does not have a diagnosis for sexual paraphilia. He does not manifest an interest in sexually deviant behavior. He has become what social science would expect. Holding him without evidence he has demonstrated sexually dangerous behavior as an adult violates due process.

5. *Due process requires evidence of adult sexual misconduct in order to commit a person under RCW 71.09.*

This Court should find juvenile sexual offenders must be treated differently than those who committed their offenses as adults. This Court has “built a constitutional wall around juvenile justice; and while

the dimensions of this wall have changed, its structural integrity has not.” *S.J.C.*, 183 Wn.2d at 417. WAPA would have this Court step back from its holdings on juvenile justice and limit the role youth plays on the constitutional and procedural protections afforded to juveniles when the government seeks to commit them under RCW 71.09.

Instead, this Court should continue to hold that juveniles are entitled to greater protections than adults. This Court should hold due process requires adult history of sexual misconduct where the government seeks to detain a youthful offenders under RCW 71.09.

C. CONCLUSION

Due process requires the government to establish evidence of sexual misconduct as an adult before a child sex offender may be indefinitely committed. Mr. Belcher’s continued confinement, based on evidence of his youthful misconduct, violates due process.

DATED this 30 day of May 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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PETITIONER.)

DECLARATION OF DOCUMENT FILING AND SERVICE

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