

NO. 47328-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

IN RE THE DETENTION OF  
TROY BELCHER,  
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ

---

APPELLANT'S REPLY BRIEF

---

TRAVIS STEARNS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....ii

A. ARGUMENT IN REPLY ..... 1

    1. Involuntary commitment violates due process where it is based upon conduct which occurred when the detainee was a child. .... 1

    2. Future likelihood to commit a sexually violent crime cannot be established by proof a person is likely to commit a future crime. .... 7

    3. Due process requires that involuntary commitment be based upon a valid, medically recognized mental disorder..... 9

    4. The State’s expert lacked the necessary qualification to diagnose an anti-personality disorder..... 11

B. CONCLUSION ..... 13

TABLE OF AUTHORITIES

**Cases**

*Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ..... 3

*In re Det. of Anderson*, \_\_\_ Wn.2d \_\_\_, 91385-4, 2016 WL 454049, (Wash. Feb. 4, 2016)..... 1

*In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003) ..... 15

*In re J.P.*, 339 N.J. Super. 443, 772 A.2d 54 (N.J. Super. Ct. App. Div. 2001) ..... 8, 17

*Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) ..... 16, 21

*Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) ..... 2, 16

*Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ..... 3

*Montgomery v. Louisiana*, 577 U.S. \_\_\_, 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016)..... 3

*Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ..... 3

*State v. Donald DD.*, 24 N.Y.3d 174, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014) ..... 23

*State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003)..... 30

*State v. Maynard*, 183 Wn.2d 253, 351 P.3d 159 (2015) ..... 4

*State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) ..... 4

*State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005)..... 30

*Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 645 P.2d 697 (1982) ..... 30

*United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *vacated as moot*, 131 S. Ct. 2860, 180 L.Ed.2d 811 (2011)..... 7

**Statutes**

RCW 71.09.020 ..... 29, 32

RCW 9.94A.540 ..... 5

**Other Authorities**

Porter, Stephen et al, *Crime profiles and conditional release performance of psychopathic and non-psychopathic sexual offenders*, 14 *Legal and Criminological Psychology* 109 (2009) .....27

Righthand, Sue & Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature* (March 2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf> ..... 7

## A. ARGUMENT IN REPLY

Troy Belcher's right to due process was denied when he was committed under RCW 71.09 based upon his juvenile sex offenses, where there was no evidence of adult sexual violence. The State's reliance upon diagnostic tools meant only to predict whether a person would commit a future unspecified offense rather than a future sexually violent act also violated Mr. Belcher's right to due process. The reliance upon an anti-social personality disorder diagnosis alone is constitutionally insufficient to establish a mental abnormality and requires proof from a licensed forensic psychiatrist or psychologist.

### **1. Involuntary commitment violates due process where it is based upon conduct which occurred when the detainee was a child.**

While Washington's Supreme Court recently held that juvenile adjudications are predicate offenses in the context of RCW 71.09.030, it failed to address the question of whether a child offender may be involuntarily detained where there is no evidence the person has committed a sexually violent act as an adult. *See, In re Det. of Anderson*, \_\_\_ Wn.2d \_\_\_, 91385-4, 2016 WL 454049, at \*2 (Wash. Feb. 4, 2016).

This Court should find the 14<sup>th</sup> Amendment of the United States Constitution is violated when the State seeks to commit a person whose sexually violent acts occurred when they were a juvenile, where no further sexually violent acts occurred after that person has become an adult. *Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

The State does not contest the “now widely-accepted premise” that juvenile brains are not fully formed and continue to develop into a person’s mid-twenties. State’s brief at 20. The State fails to recognize the Supreme Court’s continued recognition that the actions of youths are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.” *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). This jurisprudence has shaped every case the Supreme Court has heard with regard to juveniles since *Roper v. Simmons*. 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *see also Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012) ; *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 14-280, 2016 WL 280758, at \*16 (U.S. Jan. 25, 2016).

The diminished culpability of youthfulness has become a cornerstone of judicial analysis in Washington as well. Recently,

Washington’s Supreme Court recognized that youth may impact the culpability of youth, even when they are in adult court. *State v. O’Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015) . Washington’s Supreme Court has even created special procedures to protect youth from the injustices related to remedies created only for adults, when jurisdictional issues prevent them from returning to juvenile court. *State v. Maynard*, 183 Wn.2d 253, 264, 351 P.3d 159 (2015).

Washington’s legislature has likewise recently recognized the differences of youth, finding that “adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults.” RCW 9.94A.540.

This understanding that youthful actions must be analyzed differently from that of an adult is especially apparent when youth commit sexual offenses. The United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (OJJDP) has recognized that juvenile sex offenders are unlikely to become adult sex offenders. Sue Righthand & Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature*, 30 (March 2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf>. So have the courts. *United States v. Juvenile Male*, 590 F.3d 924, 940 (9th

Cir. 2010), *vacated as moot*, 131 S. Ct. 2860, 180 L.Ed.2d 811 (2011) (most juveniles who commit sexual offenses as adolescents cease that conduct as adults and it is “the exception rather than the rule” for an adolescent sex offender to become an adult sex offender.) Propensity for committing offenses as a youth does not translate into a likelihood to commit future sex offenses as an adult. *Id.*, 590 F.3d at 940.

While the State argues their expert’s evaluation of Mr. Belcher’s future dangerousness was based upon a more complete assessment than the diagnostic tools used by the State’s expert, this ignores the clear record which established Dr. Judd was dependent upon these tools to determine Mr. Belcher’s likelihood to commit a future sexually violent act. State’s brief at 22-23. In fact, tools do not exist which can be used to evaluate a youthful offender’s risk of recidivism for adult sexual offenses when the sexually violent acts occurred when the offender was a youth. *See e.g., In re J.P.*, 339 N.J. Super. 443, 455, 772 A.2d 54 (N.J. Super. Ct. App. Div. 2001) . This is because there is little correlation between juvenile and adult sexual offending, basing involuntary commitment solely upon acts committed as a juvenile violates due process.

In addition to using evaluations which only measured the likelihood Mr. Belcher would commit a new violent crime as an adult, the State's expert based his clinical diagnosis upon Mr. Belcher's behavior when he was a child and an adolescent. 2B RP 464 (emphasis added). But Mr. Belcher only engaged in sexually violent behavior as a child. CP 856 (Finding of Fact 27). He was 13 and 15 years old when he committed his sexual offenses. CP 848. The only allegations of other sexual assaults occurred when he was a child. *Id.* at 848-49. There are no instances of him acting in a sexually violent way as an adult. 5A RP 898. To the contrary, all of his sexual activity since he became an adult is described by the State as consensual. *Id.* Because there is no evidence Mr. Belcher has or will commit sexually violent acts as an adult, this is an insufficient basis to satisfy constitutional requirements of due process. *See* CP 855 (Finding of Fact 23).

In fact, there is no current evidence Mr. Belcher has any interest in committing a sexually violent act. He is now 30 and has never acted out in a sexually violent way as an adult. CP 856 (Finding of Fact 27). The penile plethysmograph performed on Mr. Belcher indicates he is not aroused by deviant sexual behavior. 3 RP 636. The State's polygraph examinations reach the same conclusion: that Mr. Belcher is

uninterested in violent sexual behavior. 3 RP 642. Mr. Belcher has grown up and displays no interest in committing a sexually violent act.

For due process to be satisfied, the State must establish a present likelihood to commit a sexually violent act. Although the State argues there must be “international opinion” prior to this court acting to protect the rights of persons held indefinitely for acts committed as children, no such standard exists. State’s brief at 22. Instead, this Court should rely upon clearly established federal and state law which make clear juveniles are different. A child who has never committed a sexually violent act as an adult must be afforded the same protections given to other children who have fact a life of incarceration.

And while Mr. Belcher committed sexually violent acts as a child, he has never acted in a similar way as an adult. Social science has demonstrated that, especially with regard to sex offenses, children grow out of their criminal behavior. Basing Mr. Belcher’s commitment on acts committed as a child fails to satisfy both scientific principles and due process of law. CP 28 (Finding of Fact 28). The commitment order should be reversed.

**2. Future likelihood to commit a sexually violent crime cannot be established by proof a person is likely to commit a future crime.**

Due process necessitates 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) ). The State must establish a person not only has difficulty controlling behavior, but has “serious difficulty controlling dangerous, sexually predatory behavior.” *Id.* at 735. “That distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.” *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)).

While the State highlights that the tools used to evaluate Mr. Belcher are among the first tools used to assess risk of violent and sexually violent reoffending, the State fails to address the fact that these tools are not capable of making a distinction between violent and sexually violent acts when there are no adult sexual acts upon which to

base the evaluation. State's brief at 23. In fact, there is no reliable scientific instrument which can measure the likelihood that a youthful offender will reoffend as an adult. 2B RP 468. Tools normed for adult offenders are heavily dependent upon past adult conduct to predict future risk and have been rejected by courts and the scientific community. 2B RP 486; *see also J.P.*, 339 N.J. Super. at 461.

The State also fails to address the analysis conducted by the New Jersey courts in striking down the analysis argued by the State here. In *J.P.*, the court make clear there were reasons to doubt the effectiveness of actuarial tools as applied to youthful offenders. *Id.* at 455.

This court should not accept the argument that proving Mr. Belcher's likelihood to commit any violent offense establishes anything with regard to his likelihood to commit a sex offense as an adult. While the State argues the assessment of violent recidivism is helpful because "a sexually motivated offense may be pled do to a non-sexual offense," this court must reject this argument. State's brief at 24. Instead, this court must recognize that the Violence Risk Appraisal Guide, known as the VRAG-R, is not designed to demonstrate that a person is likely to commit a new sexually violent offense. 3 RP 675. It is only a tool

designed to predict whether a person is likely to commit a violent offense. 2B RP 536, 545, CP 854 (Finding of Fact 20). Dr. Judd reliance upon this tool, supported only by an historical analysis of Mr. Belcher's behavior as a child, is insufficient to establish Mr. Belcher is likely to commit a sexually violent offense.

**3. Due process requires that involuntary commitment be based upon a valid, medically recognized mental disorder.**

The State argued Dr. Judd's diagnosis was sufficient for commitment. State's brief at 25. While the State argues here that antisocial personality disorder is sufficient to justify commitment, this opinion was not supported by their expert at trial. 2A RP 358-59, 377, 3 RP 565. Because Dr. Judd recognized this diagnosis was insufficient, he attempted to create a novel diagnosis not supported in the scientific community to justify continuing to indefinitely detain Mr. Belcher and described it as anti-social personality disorder with a "high level" of psychopathy. 2B RP 464, CP 851 (Finding of Fact 12).

This is not sufficient for due process which requires a diagnosis which "the psychiatric profession itself classifies . . . as [] serious mental disorders." *Crane*, 534 U.S. at 410. Evidence "that a respondent suffers from anti-social personality disorder cannot be used to support a

finding that he has a mental abnormality” without other clear evidence of mental abnormality. *State v. Donald DD.*, 24 N.Y.3d 174, 177, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014) . Because Mr. Belcher could only be diagnosed with an anti-social personality disorder, the State attempts to invent a new diagnosis. State’s brief at 33. This Court should reject the State’s attempt to do so.

Instead, it is becoming clear the testing conducted by Dr. Judd is not a good or consistent predictor of sexual recidivism. 5A RP 950. While a person diagnosed with an anti-social personality disorder with a high PCL-R score may engage in more frequent offending, it does not mean that the person is likely to engage in sexual violence. 5A RP 970-71, *see also*, Stephen Porter, et al, *Crime profiles and conditional release performance of psychopathic and non-psychopathic sexual offenders*, 14 *Legal and Criminological Psychology* 109–18 (2009). A high PCL-R score is simply not an indicator of whether a person is likely to commit a future sexually violent offense.

This is why Dr. Judd was only able to conclude Mr. Belcher was likely to engage in future violent offenses, which might include sexually violent offenses. 2B RP 536, 546. The Court cannot ignore this important distinction. Likelihood to commit a new offense is not

the same as likelihood to commit a sexually violent offense. Especially when social science has established that very few youthful sex offenders like Mr. Belcher commit sex offenses as an adult, this Court cannot be satisfied that the State established a mental abnormality which satisfies RCW 71.09.

**4. The State's expert lacked the necessary qualification to diagnose an anti-personality disorder.**

While the State's asks this court to ignore the clear language in RCW 71.09.020 with regard to whom may offer an opinion with respect to purported evidence of "personality disorder," this Court should decline to do so. State's brief at 37.

RCW 71.09.020 clearly requires that "evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist." RCW 71.09.020, Because this language is unambiguous, it should alone control. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). And because "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous," this court may not ignore the term "forensic" as argued

by the State. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)

(internal quotations and citations omitted).

While this State does not have particularized licensing for forensic psychologists, the question of whether such licensing exists is not in dispute. In fact, forensic psychology and forensic psychiatry are both subspecialties within the fields of psychology and psychiatry. Each has separate board certification procedures beyond the general field. The Court should reject the State's argument that the legislature did not contemplate licensing under the national boards which certify that a psychologist or psychiatrist is a specialist. Instead, this Court should find that in using the term "licensed forensic psychologist or psychiatrist," the Legislature expressed its intent to limit the class of experts to those licensed in these subspecialties.

While Dr. Judd is a licensed psychologist, he is not licensed as a forensic psychologist. 2A RP 340; CP 301-303, 850 (Finding of Fact 9). Without evidence from a "licensed forensic psychologist or psychiatrist" to support the finding of a personality disorder, the State cannot meet its burden of showing Mr. Belcher suffers from a personality disorder. RCW 71.09.020 (9).

The State's reliance upon a psychologist who is not licensed as a forensic psychologist was legally insufficient to establish Mr. Belcher suffers from a personality disorder. This Court should find the State failed to prove Mr. Belcher suffers from a personality disorder. As such, this court reverse the trial court's finding Mr. Belcher continues to meet the criteria for continued confinement.

#### B. CONCLUSION

The State argues for this Court to affirm Mr. Belcher's indefinite commitment. This court should reverse on four independent grounds. Reliance upon youthful sexual offenses to establish indefinite confinement violates due process and the State violated Mr. Belcher's right to due process when it failed to establish Mr. Belcher had any propensity to commit a sexually violent act as an adult. Mr. Belcher's due process rights were also violated when the State only presented evidence Mr. Belcher was generally likely to commit a future offense and not a sexually violent offense. It is further constitutionally insufficient for the State to only establish a person suffers from an anti-personality disorder to establish a mental abnormality, even when there is additional evidence that the person has a great propensity towards anti-social behavior. Finally, where the State seeks to establish a person

suffers from a personality disorder to satisfy RCW 71.09, legal sufficiency requires the State to rely upon the expert opinion of a licensed forensic psychiatrist or psychologist. The failure of the State to present such expert opinion is legally insufficient.

For all these reasons, Mr. Belcher respectfully asks this Court to order his unconditional release.

DATED this 24th day of November 2015.

Respectfully submitted,

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

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

IN RE THE DETENTION OF )

TROY BELCHER, )

APPELLANT. )

NO. 47328-3-II

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 23<sup>RD</sup> DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON, AAG  
[sarahs@atg.wa.gov]  
[crjsvpef@atg.wa.gov]  
OFFICE OF THE ATTORNEY GENERAL  
800 FIFTH AVENUE, SUITE 2000  
SEATTLE, WA 98104-3188

( ) U.S. MAIL  
( ) HAND DELIVERY  
(X) AGREED E-SERVICE  
VIA COA PORTAL

**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2016.

X \_\_\_\_\_



**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

# WASHINGTON APPELLATE PROJECT

**February 23, 2016 - 3:59 PM**

## Transmittal Letter

Document Uploaded: 3-473283-Reply Brief.pdf

Case Name: DETENTION OF TROY BELCHER

Court of Appeals Case Number: 47328-3

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

[sarahs@atg.wa.gov](mailto:sarahs@atg.wa.gov)

[crjsvpef@atg.wa.gov](mailto:crjsvpef@atg.wa.gov)