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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF:

TROY BELCHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

AMICI CURIAE BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTEREST OF *AMICI CURIAE*

The Washington Association of Criminal Defense Lawyers ("WACDL") was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual constitutional rights.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 75,000 members and supporters, dedicated to the preservation of civil liberties, including the due process rights of juveniles facing various forms of civil commitment. The ACLU strongly supports adherence to the due process provisions of the United States constitution and compliance with art. I, §3 of the Washington State Constitution, which require particularly strong due process protection when the massive deprivation of liberty at issue in RCW 71.09 cases is involved. The ACLU has participated in numerous cases as *amici curiae* or as counsel to parties on this and related issues.

II.ISSUE TO BE ADDRESSED BY *AMICI*

Whether civil commitment of an individual under RCW 71.09

violates due process when it is based solely on juvenile sexual offending?

III. STATEMENT OF THE CASE

This case concerns whether Mr. Belcher's conduct as a juvenile can form the basis for indefinite civil commitment under RCW 71.09. It is undisputed that Troy Belcher has not committed a sexually dangerous act as an adult. CP 856. Mr. Belcher was confined under RCW 71.09 in 2011 based on his juvenile offending, and underwent a new trial in 2014 under RCW 71.09.090 on the grounds that his condition had so changed as to warrant release. As Mr. Belcher has aged, he has demonstrated his maturity as his brain has developed. 3 RP 615. He no longer receives negative behavior reports and lives in the least restrictive environment on McNeil Island. 2B RP 526, 3 RP 650. He is treatment compliant. 2B RP 527.

However, Mr. Belcher faces continued deprivation of liberty and will remain confined under RCW 71.09 until he overcomes numerous hurdles and his condition is considered so changed as to warrant release. RCW 71.09.090. This Court explained the process for seeking release from confinement in *State v. McCuistion*, 174 Wn.2d 369, 379-80, 275 P.3d 1092 (2012). First, there is an annual review hearing where an expert retained by DSHS opines as to whether the person still meets the conditions for continued confinement. *Id*. (citing RCW 71.09.070). If

DSHS finds that the confinement should continue, a show cause hearing is set, and the state bears the burden of producing prima facie evidence that the individual continues to meet the definition of a SVP and that conditional release to a less restrictive alternative would be inappropriate. *Id.* (citing RCW 71.09.090(2)(b)). "The court must order an evidentiary hearing if the State fails to meet its burden or, alternatively, the individual establishes probable cause to believe his "condition has so changed" that he no longer meets the definition of a SVP or that conditional release to a less restrictive alternative would be appropriate. RCW 71.09.090(1)." *Id.*

Further, should the individual be released, RCW 71.09.092 puts several highly restrictive conditions in place in order for a court to approve the release plan:

> Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following:
>
> (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW;
>
> (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center;
>
> (3) housing exists in Washington that is sufficiently secure

> to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization;
>
> (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and
>
> (5) the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.

RCW 71.09.092. In other words, the restriction of Mr. Belcher's liberty will extend well beyond his release from confinement.

This Court, and the United States Supreme Court, have recognized that because juvenile brains are not fully developed, it is unconstitutional under the Eighth Amendment to punish juvenile offenders in the same manner as adults. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *State v. O'Dell*, 183 Wn.2d 680, 698, 358 P.3d 359 (2015). Mr. Belcher asserts that these scientific findings apply with equal force where a liberty interest protected by due process under the Fourteenth Amendment is at stake. Because juvenile brains are not fully developed, consistent with United States and Washington State Supreme Court caselaw, it violates due process to use juvenile offending,

and nothing more, as a basis to detain an individual under RCW 71.09. In order to rectify this constitutional deficiency, the state must produce some evidence of adult sexual misconduct before it may subject an individual to the protracted confinement of RCW 71.09. As it stands, Mr. Belcher's detention is unconstitutional.

IV. ARGUMENT

A. The Differences in Juveniles' Brains Should Be Taken into Account when They Face a Deprivation of Liberty in RCW 71.09 Proceedings

It is not controversial to assert that children do not have the education, judgment, and experience of adults. *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011); *see also Roper*, 543 U.S. at 569. In the courtroom, they are constitutionally different from adults in their level of culpability. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016); *State v. Houston-Sconiers*, ___ Wn.2d ___, 391 P.3d 409, 420 (2017).

A juvenile's lack of maturity and fully developed executive function, vulnerability to outside influences, and "transitory, less fixed" personality traits make it extraordinarily difficult to evaluate whether a juvenile's offending will endure into adulthood. *Roper*, 543 U.S. at 570. Indeed, the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature,

the impetuousness and recklessness that may dominate in younger years can subside." *Johnson v. Texas*, 509 U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). Risky or antisocial behavior is fleeting for most teens and it ceases with maturity. *Roper*, 543 U.S. at 570 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Only a small number of children who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood. *Roper*, 543 U.S. at 570.

This Court has similarly recognized that adult and juvenile offenders cannot be treated the same when it comes to restricting their liberty through incarceration. *Houston-Sconiers*, 391 P.3d at 414; *O'Dell*, 183 Wn.2d at 698. In fact, this Court has found this concept so deeply ingrained that it has eschewed the need for expert testimony to show, for example, that "youth diminished his capacities for purposes of sentencing." *Id.* at 698. Because juveniles lack the maturity and experience of an adult, procedures put in place for adults must be adapted to the attributes of youth. *See id.* at 692; *Houston-Sconiers*, 391 P.3d at 414.

In cases like *Roper*, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct.

2455, 183 L. Ed. 2d 407 (2012), *O'Dell*, and *Houston-Sconiers*, courts acknowledged that juvenile brain development science needs to be taken into account before making a sentencing decision, but judicial recognition of the differences between children and adults extends to the context of criminal sentencing. For example, in *J.D.B.*, the United States Supreme Court held that courts must use a "reasonable juvenile" rather than a reasonable person standard when determining whether a youth is "in custody" and must receive Miranda warnings. In so doing, the court recognized that history is "replete with laws and judicial recognition that children cannot be viewed simply as miniature adults" exhibiting "the settled understanding that the differentiating characteristics of youth are universal." *Id*. at 2397 (internal quotation marks and citation omitted). Tort law also recognizes that a child's negligence must be evaluated against "that of a reasonable person of like age, intelligence, and experience under like circumstances." Restatement (Third) of Torts, § 10, Comment B (2005). It is a fallacy to assert that principles and theories embraced by these cases do not apply in RCW 71.09 cases, where an individual is facing significant deprivation of liberty.

All of the sexual misconduct used by the State to support Mr. Belcher's civil commitment under RCW 71.09 occurred before he reached the age of majority. As with those who are punished in the criminal

system for juvenile misconduct, those who face indefinite confinement specifically for their juvenile sexual misconduct are entitled to have their juvenile neurological accounted for when deciding whether indefinite curtailment of their liberty is appropriate. When that science is accounted for, it becomes clear that indefinite commitment of individuals whose sexual misconduct occurred as juveniles violates their due process rights.

This Court should take into consideration the well-established research regarding juvenile brain development in the context of Mr. Belcher's circumstances; the fact that Mr. Belcher's brain was not fully formed at the time of his sexual misconduct must be taken into account when deciding whether to curtail his liberty based entirely on juvenile sexual misconduct.[1]

B. Indefinite Commitment of Individuals Under RCW 71.09 Based Solely on Juvenile Sexual Misconduct Violates their Due Process Rights Because Dangerousness Cannot Be Assessed while a Juvenile's Brain Is in a Transitory State

To be constitutional, indefinite civil commitment must be premised on a showing of sustained impairment of volitional control. *In re Det. of*

[1] The state argues that the issue of whether a juvenile offense can serve as a predicate offense was resolved in *In re Det. of Anderson*, 185 Wn.2d 79, 89, 368 P.3d 162 (2016). However, in that case, the court merely addressed whether a juvenile adjudication could form the basis for civil commitment under RCW 71.09 because the statute referred to "convictions," not "adjudications." *Id.* at 85-89. The analysis was limited to interpreting the strict language of the statute. The court never considered whether the due process liberty issue asserted by Belcher was violated by initiating these proceedings based entirely on juvenile sexual offending.

Young, 122 Wn.2d 1, 26-27, 857 P.2d 989 (1993) (citing *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). The inability to control behavior must be sufficient 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." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *see also Foucha v. Louisiana*, 504 U.S. 71, 82-83, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term).

Due process demands clear evidence of sexual misconduct as an adult when the government seeks to indefinitely detain individuals who committed their sex offenses as a juvenile. Both this Court and the United States Supreme Court have recognized that youth is relevant to evaluating volitional control, even when young people commit a serious crime. *Miller*, 132 S. Ct. at 2464; *Houston-Sconiers*, 391 P.3d at 420. Because the juvenile brain is not fully developed, using juvenile conduct, and nothing more, to predict future dangerousness results in unfairly depriving individuals of their liberty, when it is likely that their behavior was the

result of their youth and not any finding of dangerousness. As the United States Supreme court has recognized: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. The language almost mirrors the *Crane* inquiry—and states that even experts struggle to make this distinction. If experts cannot definitively opine on this issue because of the nature of juvenile brain development, civil commitment under such circumstances can hardly be said to satisfy due process.

C. A Constitutionally Sound Scheme for Civil Commitment, Based on Research Specific to Juvenile Sex Offenders, Will Require some Proof of Adult Sexual Misconduct

The treatment of juvenile sex offenders is guided by the Association of for the Treatment of Sexual Abusers (ATSA), an "international, multidisciplinary organization that dedicates itself to preventing sexual abuse." ATSA, ATSA.com, http://www.atsa.com/ (accessed May 13, 2017, at 11:02 AM). Their treatment guidelines are grounded in the most recent research and clinical treatment. ATSA's recently released new practice guidelines for treating juvenile sex offenders provide useful guidance for this court on the sexual recidivism of juveniles. ATSA, *ATSA Practice Guidelines for Assessment, Treatment,*

and Intervention with Adolescents Who Have Engaged in Sexually Abusive Behavior 5 (2017) (Hereafter *ATSA Practice Guidelines*).[2] ATSA's research has led them to formulate the following statement:

> Research shows that sexually abusive behavior in adolescents rarely persists into adulthood. The vast majority of most adolescents who have engaged in sexually abusive behavior do not continue to sexually abuse and are not on a life trajectory for repeat offending.

Id. at 5.

According to ATSA, approximately 4 to 5% of teenaged males, and 1% of teenaged females, commit acts of sexual abuse. *Id.* at 5. Of those individuals, the global average of juveniles who recidivate is 5%. *Id.* Studies from the last 15 years have reported a mean recidivism rate of 2.75%. *Id*.

The analysis completed by ATSA is consistent with social science evidence. Children do not understand the consequences of their actions when they engage in sexual activity. Robin D'Antona, *Sexting, Texting, Cyberbullying and Keeping Youth Safe Online*, 6 J. Soc. Sci. 523, 524 (2010). Children are not predatory. Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. Marshall L. Rev. 73, 113 (2003); Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, The

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

Champion 20, 22 (Dec. 2009) (citing Nat'l Ctr. on Sexual Behav. of Youth, Ctr. for Sex Offender Mgmt. (CSOM) & Office of Juvenile Justice and Delinquency Prevention, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature Report* (2001)). They have low recidivism rates and are unlikely to become adult sex offenders. Shannon Parker, *Branded For Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 Va. J. Soc. Pol'y & L. 167, 188 (2014).

Consistent with the science, courts examining the question of whether juvenile sex offending can predict adult sexual reoffending have held that juvenile sex offending does not demonstrate a likelihood of committing a future sexually violent offense 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 811 (2011); *In re J.P.*, 339 N.J. Super. 443, 455, 772 A.2d 54 (N.J. Super. Ct. App. Div. 2001). This comports with social science findings and practice guidelines. 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); *ATSA Practice Guidelines* at 5 ("The vast majority of adolescents who have engaged in sexually abusive behavior do not continue to sexually abuse and are not on a life trajectory for repeat

offending”).

Because juvenile sexual offending does not demonstrate a likelihood of reoffending as an adult, there is no meaningful way to determine whether a juvenile sex offender will recidivate as an adult without evidence of sexual misconduct as an adult. *ATSA Practice Guidelines* at 5. The science is clear: sexual misconduct that occurs while one is a juvenile cannot be used to make decisions about future dangerousness. To be constitutional, civil commitment under RCW 71.09 must include adult sexual misconduct. Basing indefinite commitment on juvenile sexual misconduct alone violates due process.

V. CONCLUSION

The science underlying juvenile brain development applies with equal force regardless of the nature of the deprivation of an individual’s liberty. Relying on conduct that occurred before an individual’s brain was fully formed as the basis to seek indefinite commitment violates due process. This Court should reverse Mr. Belcher’s Commitment and hold that juvenile misconduct alone is insufficient to commit a person under RCW 71.09.

Respectfully submitted this 15th day of May, 2017.

By: _____

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DECLARATION OF SERVICE

I, Amy I. Muth, declare as follows:

On May 15, 2017, I served a true and correct copy of Amici Curiae Brief of Washington Association of Criminal Defense Lawyers and the American Civil Liberties Union of Washington and Declaration of Service via electronic mail, addressed as follows:

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

Respectfully submitted this 15th day of May, 2017.

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