

NO. 93900-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Troy Belcher:

TROY BELCHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

**STATE'S ANSWER TO AMICUS BRIEF OF WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

Proceedings pursuant to RCW 71.09 require highly specialized expert testimony about the person's current psychological make-up. In each case, this testimony can include individualized consideration of brain development and its effects on behavior, beginning with the earliest available records and extending to the current day mental status. Evidence of current mental condition is required first at the initial commitment trial, each year thereafter during the annual reviews, and subsequently at any trial awarded as a result of the show cause hearings.

Amici Curiae Washington Association of Criminal Defense Lawyers (WACDL) and the American Civil Liberties Union of Washington (ACLU) urge this Court to create a bar to civil commitment where the commitment is predicated on crimes committed when the individual was a juvenile. This Court should reject that remarkable departure from current law in favor of the fact-specific, individualized, case-by-case analysis that is currently required. Juvenile sexually violent conduct is relevant, but not dispositive, when establishing the person's current mental condition and their likelihood of re-offense. Barring consideration of this highly probative evidence, or requiring release altogether absent a sexually violent act in adulthood, would result in the premature release of dangerous sexual offenders who are otherwise suitable for commitment.

Amici otherwise argue for holdings that the law already requires. The trial court must consider evidence that brain development continues during adolescence and early adulthood. The system already accounts for

juveniles whose brain development renders them no longer mentally ill and dangerous as adults, while also accounting for the small number of juvenile sex offenders who are sexually violent predators and whose mental illness and dangerousness continue into adulthood. The fact that the person's brain has matured since their juvenile crimes were committed is certainly a consideration at the commitment proceedings, and Belcher's expert testified at length about this. The trial court carefully considered Belcher's expert's testimony, and entered detailed findings of fact and conclusions of law determining that Belcher continued to be mentally ill and sexually dangerous as an adult. This Court should affirm.

II. RESPONSE TO ARGUMENTS OF AMICI

A. **Washington's SVP Statute Already Requires an Individualized Consideration of a Person's Current Mental Illness and Dangerousness, Which Includes Consideration of Brain Development and Maturation**

Civil commitment pursuant to RCW 71.09 requires ongoing proof that the individual is currently mentally ill and dangerous, first at the initial commitment trial, followed by yearly reviews, and subsequently at any trial ordered as a result of a show cause hearing. *See* RCW 71.09.060, .070, and .090. That proof is demonstrated by all relevant evidence, including prior convictions and conduct over the entire course of an individual's life. *In re Det. of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790, 802 (1999) (citing *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993)). Age at offense, as well as stage of brain development at the time of conviction and at the

time of evaluation, are all highly relevant and admissible in determining current mental status and risk for recidivism. *Id.*

1. Current mental illness and dangerousness justify commitment and significant statutory protections are in place to prevent ongoing detention when a person no longer meets SVP criteria.

The State has not just a legitimate, but a compelling interest in treating dangerous sex offenders and protecting the public from mentally ill and dangerous persons. *Young*, 122 Wn.2d at 26 (citing *Addington v. Texas*, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809–10, 60 L.Ed.2d 323 (1979); *Vitek v. Jones*, 445 U.S. 480, 495, 100 S.Ct. 1254, 1264–65, 63 L.Ed.2d 552 (1980)). Under principles of substantive due process, indefinite civil commitment is permitted whenever there is clear and convincing evidence that a person is currently both mentally ill and dangerous. *Young*, 122 Wn.2d at 25-42; *Kansas v. Hendricks*, 521 U.S. 346, 356-60, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The indefinite commitment remains constitutional as long as the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jones v. U.S.*, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).

Washington’s statute ensures release mechanisms for individuals whose brain further develops after commitment such that they are no longer mentally ill or dangerous. Belcher’s due process rights have continually been protected through the numerous statutory protections afforded to Sexually Violent Predators (SVPs). He was committed by a unanimous jury

as a sexually violent predator in 2011 when he was 26 years old. CP at 847-48. At trial, he presented evidence that his juvenile offenses were an insufficient basis to conclude he was suitable for commitment, but the jury did not agree. *Belcher v. State*, No. 41937-8-II, 2013 WL 634536, at *4 (Wash. Ct. App. Feb. 20, 2013). After his first trial, he was subject to an annual review, pursuant to RCW 71.09.070. At any time, Belcher could have sought conditional release to a less restrictive alternative placement based only on the passage of time without having to show positive change through treatment. RCW 71.09.090(2)(d). Instead he sought and was granted a second trial through the statutory procedures included in RCW 71.09.090(2)(c) and (4)(a). At trial, the State had to prove beyond a reasonable doubt that he remained a sexually violent predator. RCW 71.09.090(3)(c). He was re-committed in 2015 after a bench trial when he was 30 years old. CP at 848. Both of his commitments satisfied due process because the State proved beyond a reasonable doubt that he was currently both mentally ill and dangerous at the time of his commitment. *Belcher*, 2013 WL 634536, at *4; CP at 857.

2. Juvenile offenses should be considered when determining whether a person is currently mentally ill and dangerous.

Amici contend that due process requires that juvenile convictions cannot be considered absent additional proof of adult sexual misconduct. Br. of Amici at 2, 5. There is no authority to support this proposition, and this Court should reject such a bar. This Court recently upheld the

consideration of offenses committed by juveniles in SVP proceedings. *In re Det. of Anderson*, 185 Wn.2d 79, 86–87, 368 P.3d 162, 165 (2016) (71.09 RCW applies *equally* to juvenile adjudications and adult convictions for sexually violent offenses). This Court notably analyzed the statute and dismissed the idea of rejecting juvenile adjudications because it would:

Leave[] some baffling holes in the SVP statutory scheme. For example, if a juvenile adjudication is not a conviction for the purposes of chapter 71.09 RCW, then no one with a former juvenile adjudication for a sexually violent offense []could meet the definition of an SVP found in RCW 71.09.020(18). While that certainly could be a reasonable policy choice, it cannot have been what was actually intended.

Anderson, 185 Wn.2d at 88.¹ The *Anderson* Court further recognized that the primary purpose of the statute, protecting the public from dangerous sexual predators, would be “better served” by the use of juvenile “convictions” as predicate offenses in proceedings pursuant to RCW 71.09. *Id.* at 89.

Consideration of a person’s complete history is also consistent with the science addressing what information is needed to support an accurate psychiatric evaluation and diagnosis. *See also* The American Psychiatric Ass’n, *Practice Guidelines for the Psychiatric Evaluation for Adults* 4-7 (3rd ed. 2016) (recommending consideration of complete history of psychiatric and social history, including prior aggressive behaviors

¹ Civil commitment of juveniles exists in other contexts as well. *See* RCW 71.34 et seq. (allowing for the civil commitment of minors who are a danger to themselves or others); *Dependency of Q.L.M. v. State, Dep’t of Soc. & Health Services*, 105 Wn. App. 532, 545, 20 P.3d 465, 472 (2001) (juvenile detainee failed to demonstrate any right to confidentiality that could contravene the clear mandate of RCW 71.09.025 when the State pursues civil commitment against a juvenile).

including sexually aggressive acts or threats). This is especially so in cases such as here, where the individual has been confined since becoming an adult, and therefore has not had the same opportunity to offend as an adult. *See State v. McCuiston*, 174 Wn.2d 369, 383, 275 P.3d 1092, 1099 (2012) (good behavior within an institution is not probative of behavior without external restrictions). The ability to evaluate Belcher's conduct in the community is restricted to when Belcher was a juvenile. While the court should certainly take into account his youth at the time of these offenses, they should not be eliminated from consideration.

3. The annual review process also ensures consideration of maturation and brain development, and the trial court here considered testimony on these issues.

The Department of Social and Health Services must annually submit an evaluation by a qualified professional indicating whether the SVP "currently meets" commitment criteria. RCW 71.09.070. This necessarily requires consideration of whether a person has so matured through further brain development that he or she no longer "currently meets" commitment criteria. In addition, the SVP has the right to an annual review hearing, to counsel, and to an expert of his or her own choosing. RCW 71.09.070, .090(2)(a) - (c). Nothing prevents an SVP's expert from addressing his or her brain development and maturation as part of the expert analysis. While Amici argue that SVPs are entitled to have their "juvenile neurological [brain development] accounted for" when deciding indefinite commitment (Br. of Amici at 8), the statute already accounts for this by allowing for

expert testimony in every case at public expense. *See* RCW 71.09.050(2) (initial commitment proceedings); RCW 71.09.090(4)(b) (at show cause proceedings); RCW 71.09.090(3)(a) (re-commitment proceedings).

4. Belcher's expert testified about his maturation and brain development since his juvenile offenses, and the trial court considered these issues.

In 2014, the trial court ordered a new trial because Belcher met his burden to show that he had changed as a result of treatment pursuant to RCW 71.09.090(2)(c)(ii)(A). CP 847. Belcher had the right to "all constitutional protections" that were afforded at his initial commitment trial, including the right to have "experts evaluate him" at public expense. RCW 71.09.090(3)(a). Belcher's expert witness testified at length about the unique considerations applied to an offender whose predicate crimes were committed when they were young. *See* RP 5A - 5B at 847-1124.

a. Belcher was able to offer exactly the evidence that he and Amici wanted the trial court to consider.

Belcher retained Brian Abbott, Ph.D., as his expert at trial. *See* Testimony of Dr. Abbott, RP Vols. 5A & 5B at 847-1124. Dr. Abbott testified in significant detail about juvenile brain development, statistics on juvenile sexual recidivism and other factors that impact "impulse control, reason and judgment skills" as the young mature. RP at 1027.

Dr. Abbott testified at length that Belcher did not qualify for civil commitment because of his age. *See* RP at 847-1124; RP at 913 (because of his age Belcher did not suffer from antisocial personality disorder);

RP at 916 (Belcher had a difficult childhood); RP at 921 (Belcher has limited pro-social emotions); RP at 925 (his behavioral acting out is merely maladaptive coping); RP at 926 (Belcher handles negative emotions by acting out). Dr. Abbott opined that Belcher did not suffer from the requisite mental abnormality or personality disorder. CP at 855. Dr. Abbott also specifically testified that most adult offenders do not have juvenile offenses, and that most child sexual offenders grow up and gain “developmental maturity.” RP at 1027. He elaborated that “the prefrontal cortex” of the brain doesn’t fully develop until the individual is in the mid-20s. RP at 1027. It was Dr. Abbott’s opinion that this accounted for the low recidivism rates for juveniles, and that the sexual offending declines as they age and develop better “impulse control, reason and judgment skills.” RP at 1027.

b. The State’s evidence also considered Belcher’s relevant juvenile and adult history, including that his convictions were for juvenile offenses.

Consistent with commitment proceedings against every other SVP, the State offered evidence spanning Belcher’s entire lifetime, including his current mental functioning, sexual misconduct within several institutions including the Special Commitment Center (SCC), his pervasive rule violations, and a thorough psychological evaluation that contained numerous considerations about his current mental condition and current risk for sexual re-offense. *See* CP at 850; Testimony of Brian Judd, Ph.D., RP Vol. 2A at 339-381; 2B at 424-548; Vol. 3 at 550- 724; Vol. 6 at 1148-1184.

The State retained Dr. Judd, who specialized in neuropsychology, or the study of brain behavior. RP at 341. Dr. Judd's internship was focused on pediatric neuropsychology, which included individuals up until age 18. RP 341. In Belcher's case, Dr. Judd concluded that Belcher's mental condition persisted into his adulthood. The evidence included relevant behavior such as the following: as a 19 or 20-year-old, he was alleged to have engaged in sexually coercive behavior with residents at his juvenile facility (RP at 445); as an adult he was so sexually driven that he violated numerous rules in order to have sex while incarcerated on multiple occasions (RP at 369-70, 504); he lied at his trial about those incidents, (RP at 365; CP at 852); and that his pathological lying persisted while he was testifying under oath (CP at 852). The State also presented evidence that close to the time of trial, Belcher lied to the SCC in an effort to gain access to a 15-year-old girl by falsely claiming she was his daughter and should be allowed to visit him at the SCC. CP 852.

Finally, Belcher's lies also reflected lack of remorse and an inability or unwillingness to take responsibility for his prior crimes of sexual violence. RP 2B at 462. In particular, he has provided multiple changing descriptions of his sexual offenses against L.C. and J.A., including the level of force used against both girls. RP 2A at 374. 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. Such attitudes are relevant from a therapeutic standpoint insofar as full acknowledgement of one's crimes is the foundation of sex

offender treatment. *Id.* Belcher's deceitfulness is "very prevalent throughout" his records, both while in juvenile custody and since admission to the SCC. *Id.* at 362-63. He lied about the number of children he has fathered and his status as a Level 3 offender if released as a result of his trial. *Id.* at 365-66.

c. The trial court considered all of the evidence, including Belcher's evidence about brain development, and concluded that Belcher was still an SVP.

The trial court fully considered the testimony of Belcher's expert, the State's expert, Belcher's testimony, and evidence of Belcher's behavior both as a juvenile and as an adult. CP at 847-858. But the trial court did not find Dr. Abbott's "ultimate conclusions logical or persuasive." CP at 857. Instead, the trial court found made several findings that have not been challenged and are thus a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Specifically, the trial court accepted the evaluations and conclusion of Dr. Judd. CP at 855. The court rejected Dr. Abbott's "narrow view of the facts and circumstances surrounding Belcher's relevant psychological issues," which "appeared biased and lacked credibility." CP at 855.

With regard to evidence of maturation, the trial court properly considered Belcher's improved behavior at the SCC, and commended him for it. Findings of Fact No. 27, CP at 856. Even so, the court rejected the notion that Belcher was no longer an SVP because there was no recent evidence of sexually assaultive behavior. The court noted that he has been

incarcerated and not “exposed to meaningful opportunities to assault women or children who refused his sexual advances.” CP at 856. The court further found relevant the fact that he has “only relatively recently significantly reduced behavioral infractions” compared to the “totality of Mr. Belcher’s lifetime behaviors and psychological problems.” CP at 856. The court heavily weighed the fact that Belcher quickly reoffended when he was in the community on parole, and that “he continues to fail to be transparent and truthful in treatment, his relationships, and his interactions” with everyone. CP at 856.

In sum, the trial court considered detailed expert testimony on both sides that addressed whether Belcher had so matured since his juvenile offenses that he was no longer an SVP. The trial court adopted the evaluations and conclusions of the State’s experts, but ultimately rejected those of Belcher’s expert.

B. The Determination of Whether Someone is an SVP Has Never Rested Solely on Prior Offenses

Amici also assert that SVP commitment cannot be based on juvenile conduct “and nothing more.” Br. of Amici at 4-5, 9. The State agrees. No sex offender, adult or juvenile, may be committed pursuant to RCW 71.09 based on their prior sexual offending “and nothing more.”

The Washington Legislature targeted a narrow subset of candidates for commitment as sexually violent predators by requiring a prior conviction or charge for a sexually violent offense. *See* RCW 71.09.010. Consequently, in addition to requiring proof of mental illness and

dangerousness, the State also must prove a predicate conviction or charge. RCW 71.09.020(18). This Court already determined that including this additional element does not infringe due process. “Under the very definitions of the Statute, only ‘sexually violent offenders’—those ‘likely to engage in predatory acts of sexual violence’—are subject to its provisions.” *Young*, 122 Wn.2d at 32. This Court recognized that “there is no doubt that commitment is predicated on dangerousness under the Statute” and thus “the Statute satisfies the due process concerns outlined in *Addington v. Texas*.” *Id.* (internal citation omitted). The sexual offenses serve only as predicate offenses, screening out the vast majority of sexual offenders in the State, and leaving only a small subset of dangerous recidivist sexual offenders.

But the commitment scheme also requires proof of *current* mental illness that is tied to *current* dangerousness. *In re Det. of Thorell*, 149 Wn. 2d 724, 731–32, 72 P.3d 708, 713 (2003) (citing *Hendricks*, 521 U.S. at 358). In every case, the State must prove that the person is likely to reoffend. “What is critical to both *Hendricks* and *Crane* is the existence of ‘some proof’ that the diagnosed mental abnormality has an impact on offenders’ ability to control their behavior.” *Id.* at 736.

Amici agree that there exist a very small number of offenders who have a mental illness that makes them sexually dangerous both as juveniles and as adults. Br. of Amici at 10-11 (acknowledging that while rare, sexually abusive behavior in adolescents may persist into adulthood). Indeed, it is the primary purpose of the statute to identify the most

dangerous recidivist offenders, whether they were young when they first offended, or whether their offending had a later onset. RCW 71.09.010.

Amici claim that nevertheless, because only a small number of juveniles who experiment in risky or illegal behavior repeat the conduct, commitment should be barred. Br. of Amici at 10-12 (arguing recidivism rate for juveniles is roughly 5 percent). None of the arguments Amici make in this regard are restricted solely to juvenile offenders. Statistics on sexual recidivism for adults are also generally very low and are virtually identical to those cited by Amici. *See* U.S. Dep't of Justice, Patrick A. Langan, Erica L. Schmitt, & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994* (2003) (citing 5.3 percent recidivism rate). Thus, the rate of juvenile sexual recidivism is nearly identical to that of adults, and is not a good reason to treat them differently.

Instead, this Court should simply recognize that at all ages, the people who meet the definition of sexually violent predator are rare. But the rare nature of the mental health problems that lead to this extreme behavior, sometimes manifesting when the person is still a juvenile, does not make it unconstitutional for the State to commit in these cases, so long as the statutory elements are satisfied beyond a reasonable doubt.

Finally, the record shows that Belcher *is* a member of the “smaller number of juveniles” who are likely to repeat sexually violent behavior into adulthood. When he was on parole for his first conviction of Rape in the Second Degree with Forcible Compulsion, he committed Attempted Rape in the Second Degree. CP at 848. Prior to that he had been expelled from

school for sexual misconduct. CP at 848-49. Additionally, a former girlfriend alleged he raped her before he was incarcerated. CP at 849.

While it is clear Belcher is already a recidivist offender, thus taking him outside the norm, his risk for future offenses remains extremely high, even though he is now an adult. Of the sexual offenders, including juvenile offenders, who scored like Belcher on the actuarial instruments used by the State's expert, between 87 percent and 93 percent were charged with a new offense within 10 and 12 years. RP at 468, 546, 562. Dr. Judd's testimony established, and the trial appropriately agreed, that Belcher is part of a small subgroup of offenders where mental illness and sustained inability to exercise volitional control extend to adulthood. CP at 850-57.

In sum, Belcher was committed because the State proved he had a mental abnormality and he was likely to reoffend. His juvenile offending was highly relevant evidence, but it was not the sole basis of his conviction.

C. Amici Propose an Arbitrary Rule That Would Endanger the Community by Allowing Dangerous Offenders to Avoid Commitment, Not Due to an Absence of Mental Illness and Danger, but Due to the Date of Their Criminal Convictions

In addition to Amici's argument about what evidence should be considered, Amici also seem to argue that no one should be committed without evidence of sexual misconduct committed as an adult. Br. of Amici at 13. Amici's standard is unworkable, and is not required by due process. This arbitrary rule would allow dangerous offenders whom the State has proven to be mentally ill and dangerous to go free merely because

they have not had an opportunity to commit sexually violent offenses as adults. *See* Br. Of Amici at 12-13 (reciting just two examples).

Amici misunderstand that the primary purpose of civil commitment is protecting the public from dangerous offenders as long as they remain mentally ill and dangerous. *See Anderson*, 185 Wn.2d at 88. Amici's proposed rule isn't entirely clear,² but it appears in any case they are advocating for a system that does not account for the very small, discrete population of sex offenders who have serious difficulty controlling their sexually violent behavior even at a young age.

RCW 71.09 already contains sufficient safeguards to protect against erroneous deprivation of liberty. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 705, 257 P.3d 570, 575 (2011) (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Due process does not require the State to ignore offenders who qualify for commitment simply because their juvenile convictions kept them in detention and prevented them from reoffending after they turned 18. Instead this Court should maintain the current framework that allows for evaluation of individuals on a case-by-case basis, and that certainly permits consideration of brain development and maturation on an individualized basis.

² Compare Br. of Amici at 5-8 (arguing due process requires consideration of juvenile brain development at commitment), with Br. of Amici at 8-10 (arguing that proof of adult sexual misconduct is required prior to commitment).

1. Belcher's conduct as an adult supports the trial court's finding that he still meets the definition of an SVP.

Amici argue that it is undisputed that Belcher has not committed a sexually violent offense as an adult and that this is significant. Br. of Amici at 2. This argument ignores several important facts. First, Belcher has been in total confinement since he became an adult, and has thus had no chance to commit an act of sexual violence in the community. RP at 433. In this exact context this Court long ago recognized that "due process does not require that the absurd be done before a compelling state interest can be vindicated." *Young* 122 Wn.2d at 41.

Second, Belcher was accused of sexual misconduct when he was an adult for sexually coercive behavior against two male residents while he was incarcerated at JRA in 2002 and 2004, when he was 18 - 20 years old. RP at 445. Third, Belcher was charged with solicitation to commit murder against one of the victims of sexual assault when he was an adult. CP at 849.

The trial court also considered Belcher's testimony at trial and assessed his credibility. CP at 856-57. The court found that Belcher continues to lack remorse for his prior crimes, he continues to rationalize his sexually assaultive behavior, and he refuses to admit he committed any sexually assaultive crimes. CP at 852. Of particular concern to the trial court was Belcher's "deceitfulness regarding his relationship" at the time of trial with a fifteen-year-old girl, J.R. Belcher initially testified that this girl was his daughter, and sought permission to have her visit him at the SCC. RP at 102, 109. The trial court was understandably concerned about

Belcher's "representing to the SCC that she was his daughter, [when] J.R. was neither his biological nor legal daughter." CP at 852. There were additional instances where the trial court found he had lied about his sexual activity and sexual offenses. CP at 852, 854.

Amici argue that Belcher's recent lack of Behavioral Management Reports shows he isn't suitable for commitment. Br. of Amici at 2. First, good behavior within a highly structured institution is not unusual. *See McCuiston*, 174 Wn.2d at 383; *see also* Miles D. Harer & Neal P. Langan, *Gender Differences in Predictors of Prison Violence: Assessing the Predictive Validity of a Risk Classification System*, 47 *Crime and Delinquency* 513, 513-536 (2001) (showing that less than one in every ten prisoners engaged in any violent behavior while incarcerated). Manifestations of personality disorder "can wax and wane because the manifestation of the disorder may also depend upon the opportunity to act upon these various urges" and "can be less prominent in a structured environment." 2B RP at 424. All of Belcher's adult conduct supports the trial court's findings and ultimate conclusion that Belcher remains an SVP who is likely to reoffend if released into the community.

2. Belcher's constellation of mental health symptoms remains essentially unchanged from when he was in the community.

In 2011, Dr. Judd initially assessed Belcher as suffering from Paraphilia Not Otherwise Specified (non-consent). *Belcher*, 2013 WL 634536, at *3. At the time of the 2015 trial, Dr. Judd had assigned

either a provisional diagnosis or what is known as a “Rule Out” diagnosis of Paraphilic Disorder (non-consent). RP 2B at 427-431, 443.³ A “Rule Out” diagnosis does not mean the evaluator has ruled out the assessment. It means instead that this remains a diagnostic consideration. RP at 431. Dr. Judd testified that he still had “diagnostic concerns” that Belcher suffered from rape paraphilic disorder because paraphilic disorders are chronic and long term, and do not remit. RP at 435. Dr. Judd also testified that it is not uncommon for individuals at the SCC not to commit sexually violent offenses against women, and thus he was left basing his assessment on Belcher’s self-reports and physiological test results. RP at 434. He acknowledges that there was a strong incentive to “underreport or minimize” any deviant interest. RP at 434. Dr. Judd concluded that paraphilic disorder was still a diagnostic consideration for Belcher, because of the lack of information at this point in time. RP at 436.⁴

Dr. Judd ultimately opined that Belcher, as a 31-year-old, is not psychologically any different than he was when he was in the community with regards to what drove his sexual offending. RP at 444. Dr. Judd opined that Belcher suffered the “same constellation of symptoms” he had “when he was younger to the point now where he’s an adult.” RP at 463-64.

³ Dr. Judd explained the change in terminology from paraphilia to paraphilic disorder in the newest version of the Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM V). RP at 426-7.

⁴ Dr. Judd placed very little weight on the polygraph and plethysmograph tests because Belcher had been inconsistent in his versions on the sexual history polygraph and what he has stated under oath, and other irregularities in the administering of the test. RP at 436-42.

There were other significant considerations regarding Belcher's adult behavior. Dr. Judd found it significant that Belcher had been charged with solicitation to commit murder against one of the victims of sexual assault when he was an adult. RP 2A at 361; CP at 849. Dr. Judd also expressed concern about the allegations that when Belcher was 18 to 20 years old, he had engaged in sexually coercive behavior with two residents at JRA. RP 2B at 445. And further, Belcher has admitted to having sexual contact with at least five different women while in custody. RP at 498-500. While Belcher has described those encounters as mutually consensual, he also acknowledges that they were against the rules of the institution, and yet he was willing to engage in such activities knowing there would be negative consequences. 1B RP at 93-4, 125-27, 135.

And finally, the basis of Belcher's commitment, his mental condition and risk for re-offense, was assessed when he was an adult. Dr. Judd interviewed Belcher four times, each when he was an adult. RP at 352. Dr. Judd opined that as an adult, Belcher currently suffers from a mental abnormality that causes him serious difficulty controlling his sexually violent behavior and that he is more likely than not to commit criminal acts of sexual violence if not confined in a secure facility. RP at 463-64. The trial court ultimately adopted Dr. Judd's conclusions in unchallenged findings of fact. Conclusions of Law Nos. 5, 6, and 7, CP at 857.

In sum, consistent with due process, the trial court considered the full spectrum of Belcher's behavior both before and after he became an

adult. The court considered testimony about Belcher's development since his juvenile offenses, but ultimately agreed with the State's expert that he was still mentally ill and dangerous. The trial court correctly concluded that Belcher still meets the definition of a sexually violent predator, considering all of the evidence before the court.

III. CONCLUSION

This Court should reject Amici's argument that due process requires adult sexually violent acts or convictions before civil commitment proceedings may be initiated. This arbitrary rule would allow dangerous offenders whom the State has proven to be mentally ill and dangerous to go free merely because they have not had an opportunity to commit sexually violent offenses as adults. Due process is satisfied in commitments pursuant to RCW 71.09 because in all cases where juvenile or adult offending forms the predicate sexually violent offense, the State must prove beyond a reasonable doubt that the individual is currently mentally ill and dangerous, considering among other things the person's brain development since the sexually violent act. This was expressly done in Troy Belcher's case. The statute satisfies due process.

RESPECTFULLY SUBMITTED this 1st day of June, 2017.

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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 June 1, 2017, I served a true and correct copy of State's Answer To Amicus 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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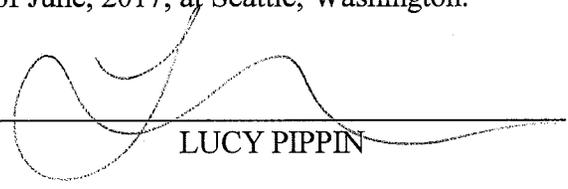
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of June, 2017, at Seattle, Washington.


LUCY PIPPIN

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

June 01, 2017 - 2:31 PM

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Appellate Court Case Title: In re the Detention of: Troy Belcher
Superior Court Case Number: 07-2-02187-7

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