No. 93900-4

NO. 47328-3-III

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 OPENING BRIEF

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A. INTRODUCTION

Troy Belcher was a child when he committed the sexual offenses for which the State indefinitely committed him. Mr. Belcher had been abandoned, with no father and an alcoholic mother. He had few community ties or connections to positive role models.

Fifteen years later, Mr. Belcher has grown up. He is no longer the person he was when he committed these offenses. As an adult, Mr. Belcher has never engaged in acts of sexual violence nor exhibited any interest in engaging in sexually violent conduct. He may suffer from an anti-social personality disorder, but there is insufficient evidence to conclude he suffers from a mental abnormality which would make him likely to commit a predatory sexually violent act.

Like all juvenile sex offenders, there is little likelihood Mr. Belcher will reoffend as an adult. Social science overwhelmingly demonstrates that juvenile sex offenders do not become adult sex offenders. Mr. Belcher's case goes beyond this generic truth. As an adult, he has become treatment compliant. He resides in the least restrictive environment at the Special Commitment Center and has had no behavior management reports in two years. He has passed polygraphs which show no deceit with regard to his sexual history and

penile plethysmographs show no reaction to sexually violent content. Where there is no evidence of sexual violence as an adult, due process is violated when indefinite confinement is based upon youthful activity.

B. ASSIGNMENTS OF ERROR

1. Indefinite confinement based upon conduct committed as a juvenile violates due process.

2. Future dangerousness findings based upon diagnostic tools designed to determine whether a person is likely to commit future violent crimes does not satisfy due process.

3. Commitment absent a valid, medically recognized mental disorder violates due process.

4. Indefinite confinement based upon an anti-social personality disorder is insufficient to satisfy due process.

5. A mental abnormality may not be based solely upon a medical diagnosis of anti-social personality disorder.

6. The State failed to present legally sufficient evidence of anti-social personality disorder.

7. The court erred in entering the following Findings of Fact: 7, 8, 9, 10, 12, 14, 16, 17, 18, 19, 20, 22, 23, 27, and 28.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Children are constitutionally different from adults and lack the ability to exercise volitional control, even when they commit serious crimes. Principles of substantive due process prohibit indefinite civil commitment except in the narrowest of circumstances. Due process requires the State to prove that individuals are currently dangerous before they may be indefinitely confined. It is a violation of due process to base indefinite civil commitment upon conduct that occurred when a person was a juvenile, where there are no acts of sexual violence that occurred as an adult. Did the court violate Mr. Belcher's due process rights when it found he met the conditions for continued confinement under RCW 71.09 where the only acts of sexual violence occurred when he was a juvenile?

2. It is insufficient for purposes of RCW 71.09 to simply establish that a person is likely to generally commit a violent offence. Instead, due process requires that the State prove beyond a reasonable doubt that there is a likelihood the person will commit a *sexually* violent offense. Without evidence that juvenile sex offenders commit future sex offences as an adult, the State was only able to establish Mr. Belcher is likely to commit a future offense. Was Mr. Belcher's right to

due process violated where the State only established that he was likely to commit a violent offense?

3. Due process requires the State to prove the detainee has a serious, diagnosed mental disorder that causes him difficulty controlling his sexually violent behavior before he may be committed. Without clear evidence of another mental disorder, evidence that a respondent suffers from anti-social personality disorder cannot support a finding of mental abnormality. Describing a person as having a high level of an anti-social personality disorder or psychopathy does not alter this analysis or satisfy due process as psychopathy is only another way to describe anti-social personality disorder. Mr. Belcher was only diagnosed with an anti-social personality or psychopathy disorder. Was his right to due process violated where the State only established that Mr. Belcher suffered from an anti-social personality disorder and had not acted in a sexually aggressive way as an adult?

4. RCW 71.09 requires that a personality disorder be established through the testimony of a licensed *forensic* psychiatrist or psychologist. It is legally insufficient to prove a personality disorder through the opinion of a licensed psychologist, even one who specializes in forensic science. Did the State fail to present legally

sufficient evidence to comply with RCW 71.09 when it failed to present the expert opinion of a licensed forensic psychiatrist or psychologist to prove Mr. Belcher had a personality disorder?

D. STATEMENT OF THE CASE

Troy Belcher was 13 and 15 years old when he committed the sex offenses for which he was incarcerated. CP 848.[1] All of the other sexual misconduct he has committed occurred when he was a child. *Id.* at 848-49. As a child, Mr. Belcher had no relationship with his biological father. 5A RP 915. His mother who was an alcoholic and physically abusive to him. *Id.* He was moved around a lot, causing school instability and no ability to build relationships with teachers. *Id.* He was forced to support himself and his two younger sisters through drug dealing. *Id.*

Mr. Belcher has been incarcerated since he was 15. He was confined first at Green Hill School and then served 27 months in prison. CP 849. When he was 23, the State moved to confine him indefinitely under RCW 71.09. Dr. Brian Judd testified on behalf of the

[1] There are nine volumes of transcripts. Counsel will reference them by the volume number designated on the cover sheet, along with the page number referenced. E.g., 1A RP 1. References to the clerk's papers will be by page number only. E.g., CP 1. An appendix containing the Court's Findings of Facts and Conclusions of Law is attached.

State in Mr. Belcher's first trial, finding Mr. Belcher suffered from a mental abnormality, specifically Paraphilia NOS (Non-consent). Dr. Judd also diagnosed him with a personality disorder, finding Mr. Belcher met the criteria for Anti-Social Personality Disorder. He was committed after a jury trial on February 11, 2011. CP 847.

Mr. Belcher was granted a new unconditional release trial after the court found he had presented prima facie evidence that his condition had so changed because of treatment that he no longer met the requirements of RCW 71.09. CP 847.

Mr. Belcher waived his right to a jury trial. The court heard that until approximately two years prior to his second trial, Mr. Belcher had a history of rules violations, while in juvenile incarceration, adult prison and at the Special Commitment Center. 2B RP 480. Now 30, he had spent over half his life in custody. CP 848. Mr. Belcher's behavior had changed dramatically as he matured, the misbehavior declining so significantly that he had not received a negative behavior management report in the two years prior to trial. *Id.* at 526. He was treatment compliant and there had been an "absolute" decline in his behavioral problems at the Special Commitment Center. *Id.* at 527. Mr. Belcher passed both polygraphs and penile plethysmograph tests with regard to

his sexual desires and did not present as a person with deviant interests. He was living in the least restrictive environment on McNeil Island. 3 RP 650.

Dr. Judd again testified at Mr. Belcher's second trial but this time did not diagnose him with any type of paraphilic disorder, including the previous diagnosis he had made. 2B RP 430. Dr. Judd found that one of the indicators for ruling out paraphilic disorders was because there is "no current evidence of rape behavior." 2B RP 431-32. Dr. Judd did find Mr. Belcher suffers from an anti-social personality disorder and had a high score on a test for psychopathy.[2] 2A RP 359.

Dr. Judd could not apply any actuarial test to Mr. Belcher's likelihood to commit a violent sexual offense, largely because Mr. Belcher was so young when he committed his offenses. 2B RP 468. Instead, Dr. Judd applied a Violence Risk Appraisal, which does not distinguish between sexual and other violent offenses. 3 RP 675. Dr. Judd found Mr. Belcher's likelihood to commit some new offense was high. 2B RP 546.

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[2] Psychopathy is not defined in the current edition of the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (2013) (Hereafter DSM-5). Instead, it is listed as a synonym for anti-social personality disorder. *Id.* at 659.

The judge found he suffered from a mental abnormality and was likely to commit a sexually violent offense if released to the community. CP 857. The judge ordered continued confinement under RCW 71.09. CP 858.

E. ARGUMENT

Children are constitutionally different. Due process is violated when the State indefinitely detains a person based upon juvenile sex offenses where no evidence of adult sexual violence exists. Because the State is obligated to establish Mr. Belcher is likely to commit a sexually violent offense, the use of diagnostic tools which only predict he is likely to commit a new unspecified offense violates his 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.

The State violates the 14th Amendment of the United States Constitution when it 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). Substantive due process requires that indefinite civil commitment be premised upon a showing of sustained impairment of volitional control. Children are constitutionally different from adults and lack the ability to exercise volitional control, even when they commit serious crimes. *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). An indefinite commitment based upon conduct which occurred when a person was a child is therefore insufficient to satisfy principles of substantive due process.

a. Juveniles are insufficiently developed to exhibit a lack of volitional control.

"[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010). Indeed, "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (*quoting* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)); *see also Miller*, 132

S.Ct. at 2468 ("immaturity, impetuosity, and failure to appreciate risks and consequences" are the "hallmark features" of youth). "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 560 U.S. at 68 (*quoting Roper*, 543 U.S. at 570).

Juveniles tend to be immature, irresponsible and impulsive. *Roper*, 543 U.S. at 569 (*quoting Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). They are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543 U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982).

A juvenile's character is not as "well formed" as an adult's and their traits are "less fixed." *Roper*, 543 U.S. at 570. Accordingly, youthfulness is a mitigating factor at sentencing, sometimes even for persons who were no longer juvenile offenders when they committed their crimes. *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359, 366 (2015). Washington's legislature has recognized that "adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take

these differences into consideration when sentencing juveniles tried as adults." RCW 9.94A.540.

The characteristics which lead to reckless and criminal behavior generally peak at ages 14-15 and gradually resolve until full psychosocial maturity is reached. Laurence Steinberg, et al., *Are Adolescents Less Mature Than Adults?* 64 Am. Psychologist 583, 589-91 (2009). Significant psychosocial maturation takes place in the late teens, with the most rapid improvement in responsibility, perspective and temperance usually coming somewhere between the ages of 16 and 19. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. L. 741, 747-49, 756 (2000). Many teenagers engage in risky, anti-social, and even criminal conduct, but for most of them these behaviors are "fleeting" and "cease with maturity as individual identity becomes settled. Only a relatively small proportion [will] develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570 (*quoting* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence*, 58 Am. Psychologist 1009, 1014 (2003)). "The reality that juveniles still struggle to define their identity means it is less supportable to

conclude that even a heinous crime committed by a juvenile is evidence of irredeemably depraved character." *Id.*

A steady decline in impulsivity begins in adolescence but remains elevated until an individual's mid-twenties. Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 295 (2012). In fact, the brain's frontal lobe, which controls advanced functions including imagination, abstract thought, judgment of consequences, planning and controlling impulses, continues to develop into an individual's early twenties. Michele Deitch et al., *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, The Univ. of Tex. Lyndon B. Johnson School of Public Affairs Special Project Report, 13-14 (2009). Washington recognizes the particular vulnerabilities of youth including "impulsivity, poor judgment, and susceptibility to outside influence" may be considered at sentencing for persons who have been convicted of crimes they committed as young adults. *O'Dell*, 358 P.3d at 364.

This maturation process means that juvenile sex offenders are unlikely to continue to offend as adults. As a result, the United States Department of Justice's Office of Juvenile Justice and Delinquency

Prevention (OJJDP) has recognized that very few juvenile sexual offenders commit new offenses as adults. 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. The psychosocial deficits of adolescence, including poor impulse control gradually resolve upon maturation. *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. *Id.* 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).

"[R]ecidivism rates for juvenile [sex] offenders are significantly lower than for adult [sex] offenders" and the propensity for committing offenses as a youth does not translate into a likelihood to commit future sex offenses as an adult. *Juvenile Male*, 590 F.3d at 940. This Court should doubt whether tools 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) (Reason to doubt whether actuarial tools may be applied when all of an offenders sexual offense occurred prior to adulthood). Because of the lack of any correlation between juvenile and adult sexual offending, basing involuntary commitment solely upon acts committed as a juvenile violates due process.

b. Mr. Belcher has not committed any sexually violent acts as an adult or exhibited any behavior as an adult consistent with sexually violent aggression.

The trial court relied upon Mr. Belcher's history as a juvenile to continue his indefinite confinement. CP 849 (Finding of Fact 7), 855 (Finding of Fact 22). The State's expert based his clinical diagnosis of Mr. Belcher upon Mr. Belcher's "history of conduct when he was last at liberty in the community," "his behavior when he was at least in custody as a juvenile at Green Hill school," "the persistence of the anti-social personality disorder," and "the level of psychopathy that he's *historically* demonstrated." 2B RP 464 (emphasis added). This is an insufficient basis to satisfy constitutional requirements of due process. *See* CP 855 (Finding of Fact 23).

It cannot be overstated that Mr. Belcher's sexually violent acts occurred when he was a juvenile. 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.*

While he was maturing, Mr. Belcher continued to engage in the risky and illegal behavior exhibited in many young persons. He threatened to kill one of his victims and was sentenced as adult, serving time with the Department of Corrections. CP 849. During his initial time at the Special Commitment Center, Mr. Belcher also received a number of behavior management reports. 2B RP 481. The State also introduced evidence of past anger and deception. 2B RP 403, 5B RP 1097.

Mr. Belcher then began to show he had matured. Dr. Judd characterized his behavior since maturation as "an absolute improvement." 3 RP 615. In the two years prior to this trial, Mr. Belcher had not received any Behavior Management Reports. 3 RP

614. He was treatment compliant. 2B RP 527. He was able to identify dynamic risk factors. 3 RP 612. He was housed in the least restrictive living environment at the Special Commitment Center. 3 RP 650.

The evidence the court heard about brain development also supports the conclusion that Mr. Belcher, like almost all other juvenile offenders, is not likely to reoffend as an adult. Dr. Brian Abbot informed the court that "most adult sex offenders do not have a history of offending as juveniles." 5A RP 1027. Child sex offenders grow up and gain "developmental maturity" in the "prefrontal cortex of the brain" which "fully develops in the mid 20's." *Id.* This development may be a "contributing factor to the decreasing rates of sexual recidivism for these adolescents who were followed into their adult years as the brain developed and they gained better impulse control, reason, and judgment skills." *Id.*[3]

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).

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[3] Dr. Judd dismissed the impact of youth on Mr. Belcher's likelihood to reoffend because he had received behavioral management reports after he had turned 25. 6 RP 1168. This argument fails to account for the fluid nature of maturation or the fact Mr. Belcher has received little positive role modeling to base correct behavior upon until later in the maturation process.

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.

c. Mr. Belcher's commitment order should be reversed.

The State failed to demonstrate Mr. Belcher's behavior as a child continues to follow him into adulthood. Mr. Belcher committed sexually violent acts as a child but has never acted in a similar way as an adult. Mr. Belcher's adult behavior is consistent with social science and the overwhelming evidence that children grow out of their criminal behavior, especially sexual offenses. He has matured and is able to act in age appropriate ways. Although the court found the State satisfied all the requirements of RCW 71.09, 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.

a. Due process requires the State to establish Mr. Belcher is likely to commit a violent sexual offense if released.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Indefinite commitment under RCW 71.09 is a restriction on the fundamental right of liberty. *Id.* at 77; *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Principles of substantive due process therefore prohibit indefinite civil commitment except in the narrowest of circumstances. *See Hendricks*, 521 U.S. at 356-57.

This requirement 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." *Thorell*, 149 Wn.2d at 732 (*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)).

Mere dangerousness is insufficient to justify indefinite, involuntary civil commitment. *Hendricks* at 358; *Crane*, 534 U.S. at 412. Commitment premised upon proof of volitional impairment, which increases the risk of future harm, however, can constitute a sufficient basis to civilly curtail one's physical liberty. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412; *Thorell*, 149 Wn.2d at 731-32, 735-36. Volitional impairment means serious difficulty in controlling behavior. *E.g., Thorell*, 149 Wn.2d at 732. The serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. Due process requires the State to prove that an individual is currently dangerous before they may be indefinitely confined. *In re Det. of Young*, 122 Wn.2d 1, 27, 857 P.2d

989 (1993) (*citing Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)); *Foucha*, 504 U.S. 71.

b. The State only established Mr. Belcher was likely to commit a future violent offense.

No reliable scientific instrument exists which can measure the likelihood that a youthful offender will reoffend as an adult. 2B RP 468. Tools normed for adult offenders like the Static-99R are heavily dependent upon past adult conduct to predict future risk and have been rejected for use by courts and the scientific community. 2B RP 486; *see also J.P.*, 339 N.J. Super. at 461. *J.P.* addresses the use of actuarial instruments for sex offenders whose offenses were committed while they were under the age of eighteen. *Id.* at 446. In *J.P.*, the State utilized the Static 99 and the Minnesota Sex Offender Screening Tool-Revised to determine likelihood to reoffend. *Id.* at 450. Although the trial court found these tools reliable, the appellate court found, even though neither the State nor J.P. had specifically articulated whether J.P.'s age should be a factor in determining the accuracy of the diagnostic tools, that there was reason to doubt the effectiveness of actuarial tools as applied to youthful offenders. *Id.* at 455.

Recognizing that social science does not support the theory that juvenile sex offending supports a finding of adult sex offending, here

the State instead attempted to prove Mr. Belcher is likely to commit any violent offense, which could include sex offenses. The State utilized an instrument known as the Violence Risk Appraisal Guide, known as the VRAG-R. 2B RP 466, CP 854 (Finding of Fact 18,19). This tool is not designed to demonstrate that a person is likely to commit a new sexually violent assault. 3 RP 675. Instead, it is designed to predict whether a person is likely to commit any violent offense. 2B RP 536, 545, CP 854 (Finding of Fact 20). Dr. Judd relied upon it to determine "violent recidivism as a general category." 6 RP 1171. As such, Dr. Judd was only able to conclude that Mr. Belcher was "a high risk for violent including a sexually violent recidivism." 2B 546. While this tool is used to predict the likelihood of committing a new violent act, it is unable to distinguish sexually violent acts and is therefore not a predictor of the likelihood to commit a new sexually violent act. 3 RP 675. The VRAG-R does not demonstrate Mr. Belcher is likely to commit a sexually violent offense, but only a future violent offense. As such, it is an incomplete and unreliable tool upon which to base Mr. Belcher's continued commitment.

Indefinite commitment requires a finding a person is likely to "engage in predatory acts of sexual violence if not confined in a secure

facility." RCW 71.09.020(18). 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." *Thorell*, 149 Wn.2d at 732 (*citing Crane*, 534 U.S. at 413). Proof of future likelihood to commit a future violent offense generally is insufficient to satisfy the legal definition or due process requirements of indefinite commitment.

c. The failure to establish Mr. Belcher is likely to commit a sexually violent offense entitles him to relief.

The State failed to establish Mr. Belcher is more likely than not to commit a *sexually violent offense*. Instead, the only evidence the State presented was that Mr. Belcher was likely to commit a violent offense, which could include sexual offenses. 2B RP 536; 546. This fundamental difference leaves proof insufficient to satisfy due process and requires this Court to reverse Mr. Belcher's commitment order.

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

a. Indefinite confinement based upon the diagnosis of a personality disorder violates Mr. Belcher's constitutional right to due process and is insufficient to establish a mental abnormality.

Due process allows involuntary commitment only for those diagnoses which "the psychiatric profession itself classifies . . . as [] serious mental disorders." *Crane*, 534 U.S. at 410. Due process, therefore, requires the State to prove the detainee has a serious, diagnosed mental disorder that causes him difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736, 740-41. A personality disorder, on the other hand, is merely a description of a person's pattern of behavior. "[E]ven when diminished control over one's behavior is a feature of the disorder, having the diagnosis itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time." *DSM-5* at 25. Anti-social personality disorder is simply "too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, the diagnosis must nonetheless be medically justified. *See Crane*, 534 U.S. at 413; *Hendricks*, 521 U.S. at 358 (explaining that states must prove not only dangerousness but also mental illness in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); *Thorell,* 149 Wn.2d at 732, 740-41 (explaining that State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed mental illness that causes him difficulty controlling his behavior).

Without other clear evidence of mental abnormality, "evidence that a respondent suffers from anti-social personality disorder cannot be used to support a finding that he has a mental abnormality." *State v. Donald DD.*, 24 N.Y.3d 174, 177, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014). New York's commitment law is similar to Washington's as it requires a finding that the detained sex offender suffers from "a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not

confined to a secure treatment facility." N.Y. MHY. LAW § 10.03.[4] In *Donald DD.*, the court found anti-social personality disorder "simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case." *Id.* at 190. For this reason, the diagnosis of anti-social personality disorder is fatally "[*in*]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." *Crane*, 534 U.S. at 413.

b. The State failed to establish Mr. Belcher suffered from a mental abnormality.

The court found Mr. Belcher had a current mental health disorder, despite only being presented with evidence on personality disorders. CP 850 (Finding of Fact 10). The essential feature of anti-social personality disorder is a "pervasive pattern of disregard for, and

[4] N.Y. MHY. LAW § 10.03 provides in pertinent part that (e) "Dangerous sex offender requiring confinement" means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility;" (i) "Mental abnormality" means a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."

violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood. *DSM-5* at 659.[5]

A 2002 analysis of mental disorders in prisoners found that 47% of male prisoners and 21% of female prisoners were diagnosed with anti-social personality disorder. Seena Fazel & John Danesh, *Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys*, 359 The Lancet 545 (2002). Dr. Judd believed the number to be much higher, estimating roughly 50 to 75% of prisoners met this criteria. 2B RP 453. Dr. Judd also declared 20 to 30 % of prisoners met the criteria for psychopathy. *Id*. Regardless of whether Dr. Judd is right about the number of prisoner who may be diagnosed with anti-social personality disorder, there is no disagreement that such a diagnosis is an insufficient and unconstitutional basis for confinement under RCW 71.09. 3 RP 583. In fact, Dr. Judd testified that "typically" an anti-social personality disorder would not be enough for commitment. *Id*. Dr. Judd recognized that an "in and of itself" an anti-social personality disorder would not be enough to justify commitment. 3 RP 583.

[5] "This pattern has also been referred to as *psychopathy*, sociopathy, or dyssocial personality disorder." *DSM-5* at 659. (emphasis added).

Because Dr. Judd agrees an anti-social personality disorder is insufficient for commitment, he argued Mr. Belcher suffered from a mental abnormality. 2A RP 358-59, 377, 3 RP 565. Dr. Judd described a classification not found in the scientific literature, describing the mental abnormality as anti-social personality disorder with a "high level" of psychopathy, which the court relied upon for its findings. 2B RP 464, CP 851 (Finding of Fact 12). Dr. Judd based this diagnosis upon a diagnostic instrument known as the PCL-R. 2b RP 464. This check list is designed to rate a person's psychopathy or anti-social tendencies. David M. Freedman, *False Prediction of Future Dangerousness: Error rates and Psychopathy Checklist-Revised.* 1 Journal of the American Academy of Psychiatry and Law 29, 89-95 (March, 2001). The author of this checklist argues that the psychopathy and anti-social personality disorder should be considered as distinct diagnoses, despite the DSM-5's categorization of them as the same. *C.f.*, *DSM-5 with* Robert Hare, *Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion*, Psychiatric Times, February 1996, XIII, Issue 2.

Again, Dr. Judd relied largely on historical information to complete this test, examining Mr. Belcher's "history in the community

as a child", his "behavior as a juvenile at Green Hill", as well as Dr. Judd's diagnosis for an anti-social personality disorder to find Mr. Belcher had a high level of psychopathy. 2B RP 522; CP 851. Dr. Judd described psychopathy as a "construct which refers to individuals that have a pattern of conduct which is demonstrated by impulsivity, potentially aggressiveness." 2B RP 452. This, however, is not distinguishable from anti-social personality disorder.

The court found Dr. Judd's novel diagnosis satisfied the definition of "mental abnormality." CP 849 (Finding of Fact 8). Anti-social personality disorder with "high levels" of psychopathy is not, however, a diagnosis. 2B RP 452. The DSM-5 does not distinguish between anti-social personality disorder and psychopathy. *DSM-5* at 660. Instead, it finds anti-social personality disorder and psychopathy have essentially the same "pattern," describing them as synonyms of each other. *Id.*

More important, a growing body of literature demonstrates that the information provided by the PCL-R on psychopathy is not a good or consistent predictor of sexual recidivism. 5A RP 950. It measures two dimensions, callous unemotionality and anti-social behavior. 5A RP 957. 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.

c. The lack of a factual basis for a finding of mental abnormality requires dismissal.

A finding of anti-social personality disorder with a high level of psychopathy is insufficient to establish a mental abnormality and

violates due process. CP 852 (Finding of Fact 16, 17). Because the State failed to establish a constitutional basis for Mr. Belcher's continued confinement, this Court must find the State has failed to establish Mr. Belcher continues to meet the criteria for total confinement under RCW 71.09 and his due process rights were violated.

4. Even if anti-social personality disorder is sufficient, the State failed to prove Mr. Belcher suffered from an anti-personality disorder because its expert lacked the necessary qualifications.

a. Evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

The evidence presented with regard to a personality disorder was legally insufficient. RCW 71.09.020 provides in relevant part:

> (9) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. *Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.*

(Emphasis added).

If the language of a statute is unambiguous, it alone controls. *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). Consistent with this basic tenet of statutory construction, "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (internal quotations and citations omitted).

The plain and unambiguous language of RCW 71.09.020(9) requires evidence of a personality disorder "must be supported by the testimony licensed forensic psychologist or psychiatrist." The statute does not say "licensed psychologist" or "licensed psychologist who performs forensic evaluations." Instead the Legislature limited the class of persons who can provide such evidence to a narrow subset of professionals: a "licensed forensic psychologist or psychiatrist."

Forensic psychology and forensic psychiatry are subspecialties within the fields of psychology and psychiatry. Each has separate board certification procedures beyond the general field. The American Board of Forensic Psychologists provides board certification in forensic psychology which "has been recognized by judicial decisions, regulations, and statutes in some jurisdictions as the standard of professional competence in forensic psychology." American Board of Professional Psychology,

Forensic Psychology,

http://www.abpp.org/i4a/pages/index.cfm?pageid=3356.[6] Similarly, forensic psychiatry is among the subspecialties for which board certification is provided by the American Board of Psychiatry and Neurology. American Board of Psychiatry and Neurology, Inc., *Taking a Subspecialty Exam*, http://www.abpn.com/become-certified/taking-a-subspecialty-exam.[7] 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.

b. Dr. Judd is not a licensed forensic psychologist or psychiatrist.

The court found Mr. Belcher met the criteria for anti-social personality disorder. CP 14 (Finding of Fact 14). While Dr. Judd is a

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[6] The general requirements for the awarding of the certificate of Forensic Psychology are: (1) satisfactory completion of the credential review process, written examination, oral examination, and vote by the Board to accept the candidate into membership; and (2) absence of prior conduct by the candidate that in the opinion of the Board indicates serious ethical misconduct or unlawful behavior incompatible with the standards of high competence expected for board certification.

[7] Applicants for certification in forensic psychiatry must be certified by the Board in general psychiatry by December 31 of the year prior to the examination administration. All applicants other than those initially admitted during the 'grandfathering period' are required to submit documentation of successful completion of one year of ACGME-accredited fellowship training in forensic psychiatry that did not begin before the time general residency training in psychiatry, including time spent in combined training programs, was completed. The exposure to forensic psychiatry given to psychiatry residents as part of their basic psychiatry curriculum does not count toward the one year of training. All licensing and training requirements must be met by July 31 of the year of the examination.

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 meets its burden of showing Mr. Belcher suffers from a personality disorder. RCW 71.09.020 (9).

Dr. Judd diagnosed Mr. Belcher with an anti-social personality disorder. 2A RP 359. He then argued that because of his high score on a psychopathy test, Mr. Belcher's personality disorder qualified as a mental abnormality. 2B RP 464. Despite its characterization by Dr. Judd, Mr. Belcher's fundamental diagnosis remains a personality disorder. It is insufficient to prove a personality disorder except through the diagnosis of a licensed forensic psychologist or psychiatrist. The State did not provide any such evidence. As such, the State failed to prove Mr. Belcher suffered from a personality disorder.

c. The State failed to prove Mr. Belcher should continue to be involuntarily confined.

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.

F. CONCLUSION

Mr. Belcher's indefinite commitment requires reversal on four independent grounds.

First, reliance upon youthful sexual offenses to establish indefinite confinement violates due process. The State violated Mr. Belcher's right to due process when they only proved he had committed sexual offenses as a juvenile.

Second, Mr. Belcher's due process rights were violated when the State only presented evidence Mr. Belcher was generally likely to commit a future offense and not that he was likely to commit a sexually violent offense.

Third, where the State seeks to establish a person suffers from a mental abnormality to satisfy RCW 71.09, it is constitutionally insufficient to rely upon anti-social personality disorder.

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

psychiatrists 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 16th day of November 2015.

Respectfully submitted,

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APPENDIX A

STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT

In re the Detention of: TROY BELCHER, Respondent.	NO. 07-2-02187-7 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF COMMITMENT

This matter was tried to the Court on February 3 - 6 and February 10 - 11, 2015, pursuant to RCW 71.09.090, to determine whether the Respondent, Troy Belcher, should be civilly committed as a sexually violent predator (SVP). The Court heard the testimony of the following witnesses: Troy Belcher (by videotaped deposition and live testimony); Rolando Beltran (by videotaped deposition); Jeffrey Cutshaw; Dr. Brian Judd; Beverly McKown; J.R.; Elva Espinosa; Kristina Sparks; Shannon Bowen; and Dr. Brian Abbott. Having considered this testimony and the exhibits entered into evidence, the Court now enters the following:

I. FINDINGS OF FACT

1. On December 6, 2007, the State filed a petition alleging that the Respondent, Troy Belcher, is a sexually violent predator as defined in RCW 71.09.020(18). The Court found probable cause to support the petition and Respondent was detained pending trial. Following a jury trial, Respondent was formally committed under RCW 71.090.020 on February 3, 2011. Respondent has been totally confined at the Special Commitment Center (SCC) since 2007. Respondent petitioned for and the Court granted an Unconditional Release trial.

2. In order to involuntarily civilly commit Mr. Belcher under RCW 71.09, the State must prove beyond a reasonable doubt that he is a sexually violent predator. The term "sexually violent predator" is defined in RCW 71.09.020(18) as a person who: 1) has been convicted of or charged with a crime of sexual violence; and 2) suffers from a mental abnormality or personality disorder; and 3) the mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

3. Mr. Belcher was born on December 13, 1984, and is now 30 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 in Clark County on October 15, 1998. Rape in the Second Degree is, by definition, a sexually violent offense. Mr. Belcher's victim, L.C., was a 13-year-old girl. On November 10, 1998, Mr. Belcher received a manifest injustice sentence and was committed to the Department of Juvenile Rehabilitation for 65 weeks. At trial, Mr. Belcher did not contest the existence of this conviction, nor that this conviction constitutes a Sexually Violent Offense under RCW 71.09.020(17).

4. While still on parole for Rape in the Second Degree by Forcible Compulsion, Mr. Belcher committed his second sexually violent offense. On December 19, 2000, Mr. Belcher was convicted of Attempted Rape in the Second Degree in Cowlitz County. Mr. Belcher's victim, J.A., was a 13-year-old girl. On January 17, 2001, Belcher received a manifest injustice sentence and was committed to the Department of Juvenile Rehabilitation for 256 weeks. At trial, Mr. Belcher did not contest the existence of this conviction, nor that this conviction constitutes a Sexually Violent Offense under RCW 71.09.020(17).

5. In addition to Mr. Belcher's sexual offenses, there are additional allegations that came to the attention of authorities, although no charges or convictions arose from these

allegations. One allegation was sexual harassment against a number of schoolmates while Mr. Belcher was in middle school. On March 27, 1998, Mr. Belcher was expelled from McLoughlin Middle School in Vancouver, Washington after eight female students between the ages of eleven and thirteen years old reported that Mr. Belcher had been sexually harassing them over the past several months. Several of the girls reported that Mr. Belcher had grabbed their breasts and buttocks. Additionally, H.F, a former girlfriend of Mr. Belcher, alleged that he vaginally raped her. This incident was never reported to the police

6. While incarcerated at Green Hill School, Mr. Belcher solicited someone to kill one of his former victims, L.C. On October 8, 2004, Belcher was charged in Lewis County Superior Court with Solicitation to Commit Murder in the First Degree and Intimidating a Witness. On November 19, 2004, Belcher pled guilty to Intimidating a Witness. The court sentenced Mr. Belcher to 27 months in prison and 9 to 18 months of community custody.

7. As to Mr. Belcher's convictions, the Court does find, beyond a reasonable doubt, that he has been convicted as well as charged with two crimes of sexual violence; and the predicate conviction requirement under the sexually violent predator statute has been satisfied.

8. The Court next considered whether Mr. Belcher suffers from a mental abnormality or a personality disorder. The term "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 as a menace to the health and safety of others." The term "personality disorder" is defined, in pertinent part, as an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture. The Court finds, beyond a reasonable doubt, based on the expert psychological testimony presented at trial that Mr. Belcher does suffer from a mental abnormality; and that his mental condition causes him

serious difficulty in controlling his sexually violent behavior. For this determination, the court relied upon expert testimony from the State's retained expert, Dr. Brian Judd.

9. Dr. Judd is a licensed psychologist and certified sex offender treatment provider in Washington who specializes in the evaluation of sex offenders. In 2007, Dr. Judd evaluated Mr. Belcher in advance of his 2011 initial civil commitment trial. In 2007, Dr. Judd diagnosed Mr. Belcher with Paraphilia Not Otherwise Specified (Non-Consent) and Antisocial Personality Disorder. It was Dr. Judd's opinion in the initial commitment trial that Mr. Belcher's Paraphilia Not Otherwise Specified (Non-Consent) met the definition of a mental abnormality as defined in RCW 71.09.020(8).

10. Dr. Judd indicated that, under the statute, it was necessary to determine if Mr. Belcher had a current mental disorder. Dr. Judd reviewed over 3789 of pages of materials and interviewed Mr. Belcher on December 10 and 19, 2014. Additionally, Mr. Belcher participated in a specific issue polygraph with regard to his masturbatory practices on December 21, 2014. Dr. Judd considered Mr. Belcher's mental state, the crimes that had occurred and the crimes that he was responsible for, his general mental capacity and whether there existed a mental disorder. Dr. Judd evaluated Mr. Belcher using the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the Hare Psychopathy Checklist Revised (PCL-R), as well as the Violence Risk Appraisal Guide-Revised (VRAG-R) actuarial instrument.

11. Whether Mr. Belcher suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior and makes the person likely to engage in predatory acts of sexual violence, if not confined to a secure facility, requires the Court to determine if there is a diagnosis of a mental condition currently existing and whether this condition creates a serious risk of re-offense.

12. Based on his current evaluation and the publication of the DSM-V, Dr. Judd no longer diagnoses Mr. Belcher with Paraphilia NOS (Non-consent). He provisionally diagnoses other Specified Paraphilic Disorder (Non-consent), and Rule-Out Other Specified Paraphilic Disorder (Non-Consent), In Remission. The provisional diagnosis means that some historical evidence of the condition remains, however not enough is present to justify a current diagnosis. The Rule Out diagnosis in remission means that the diagnosis remains a consideration but there is no information at this time to justify the diagnosis. Moreover, Dr. Judd recognizes the significance of the fact that Mr. Belcher's last Behavioral Management Report (BMR) was in 2009, and, more generally, that his behavior has improved. If Mr. Belcher continues his good behavior for another two or three years, it could warrant a modification of his PCL-R score. The court recognizes this as a fact of significance. Dr. Judd also opined that Mr. Belcher continues to meet criteria for Antisocial Personality Disorder with the presence of high levels of psychopathy which meets the definition of a mental abnormality as defined in RCW 71.09.020(8).

13. The essential features of Antisocial Personality Disorder include a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: 1) Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; 2) Deceitfulness, as indicated by repeatedly lying, use of aliases or conning other for personal profit or pleasure; 3) Impulsivity or failure to plan ahead; 4) Irritability and aggressiveness as indicated by repeated physical fights or assaults; 5) Reckless disregard for the safety of self or others; 6) Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; 7) Lack of remorse, as indicated by being indifferent to or rationalizing have hurt, mistreated, or stolen from another.

14. Dr. Judd opined that Mr. Belcher met five of the seven criteria. Dr. Judd noted that Mr. Belcher has been convicted of two acts of sexual violence and although these crimes occurred almost 15 years ago, Mr. Belcher continues to lack remorse for these acts. Mr. Belcher rationalizes his behavior and refuses to admit that he committed any inappropriate sexual crimes to this day. Mr. Belcher remains in denial regarding his sexual criminal history. In addition, Mr. Belcher has been deceitful to this Court, his treatment providers, and Mr. Minnich who performed a number of the polygraph tests.

15. Of great concern for the Court, was Mr. Belcher's deceitfulness regarding his relationship with fifteen year old J.R. and his relationship with H.D, the mother of J.R. Despite Mr. Belcher testifying under oath that J.R. is his daughter and representing to the SCC that she was his daughter, J.R. is neither his biological or legal daughter. The mother of J.R. is a former SCC staff member who had a sexual history with Mr. Belcher and was caught in a janitorial closet with Mr. Belcher at the SCC. Mr. Belcher's testimony regarding the closet incident with H.D. does not coincide with the actual events as depicted in the videotape shown for the Court. The Court believes Mr. Belcher has not accurately or truthfully disclosed his relationship with J.R. or the closet incident with H.D, the former SCC staff member and mother of J.R.

16. Dr. Judd opined to a reasonable degree of psychological certainty Mr. Belcher's Antisocial Personality Disorder along with the high levels of psychopathy meets the definition of "mental abnormality" as defined in RCW 71.09.020(8). The Court found that although Dr. Judd's diagnoses have changed, Antisocial Personality Disorder with High Levels of Psychopathy is still a valid diagnosis under the statute.

17. Regarding Antisocial Personality Disorder with High Levels of Psychopathy, the State must not only prove that Mr. Belcher suffers from a mental disorder but that the condition constitutes a mental abnormality as defined under RCW 71.09. Dr. Judd opined that Mr. Belcher does suffer from Antisocial Personality Disorder with High Levels of

Psychopathy, which is a mental disorder as defined by the DSM-5, and he is impaired by that disorder. Additionally, Dr. Judd testified that Mr. Belcher's diagnosis met the definition of mental abnormality, as defined under the statute, that being 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.

18. In order to qualify as a sexually violent predator, the Court must also determine whether the mental abnormality and personality disorder make the person more likely than not to commit predatory acts of sexual violence if not confined to a secure facility. To make that determination, the State's expert, Dr. Judd relied on a risk assessment using actuarial and dynamic tools. The actuarial instruments examine static factors, and specifically look at the statistics related to recidivism.

19. In assessing Mr. Belcher's risk, Dr. Judd anchored his opinion in a statistically-derived actuarial instrument, and empirically validated risk factors. The actuarial instrument used by Dr. Judd to assess Mr. Belcher's likelihood of recidivism is called VRAG-R. The VRAG-R was standardized on 1,261 offenders and demonstrates a comparable or greater predictive validity than other measures. Actuarial instruments in this field are all constructed in the same general manner. Groups of sex offenders are studied to determine which reoffended after their release from custody. Using statistics, the factors most associated with an increased risk to reoffend are identified and weighted. The instruments allow persons such as Dr. Judd to determine which group of offenders in each study Mr. Belcher most closely resembles, and the recidivism rate for that group. Scoring on the VRAG-R yielded a score of 32 placing Mr. Belcher at the 95.5 percentile compared to the standardized sample. Seventy-six percent of individuals with similar scores recidivated at 5 years of time at risk and 87 percent recidivated at 12 years of time at risk.

20. In addition to the actuarial risk assessment tools, Dr. Judd looked at other factors empirically associated with risk, but that the tools may not adequately take into account. One such factor is Mr. Belcher's level of psychopathy. Psychopathy is measured using the Hare Psychopathy Checklist Revised 2nd Edition (PCL-R). Dr. Judd has been trained in the PCL-R by Dr. Hare. Out of a total possible score of 40, Mr. Belcher received a score of 31. This score is significant as several studies show a much higher risk of general and sexual recidivism with PCL-R scores of higher than 25. Dr. Judd opined that although this score was given to Mr. Belcher over two years ago, prior to his improved behavior, there is no basis for medication of his pro-rated score of 31. PCL-R items are rated on the basis of the person's lifetime functioning as revealed by evaluations of the assessment data. Items should not be rated solely or primarily on the basis of present state or relatively recent behavioral history. Modifications of scores may be considered if the individual demonstrates persistent and convincing changes in behavior that have occurred over the last 5 to 6 years.

21. Finally, Mr. Belcher does not have the protective factor of having a realistic release plan. Mr. Belcher does not have a job, transportation or any form of sex offender treatment lined up in the community should he be released. The Court is extremely concerned that the only person fully committed to him is fifteen year old J.R. who cannot provide him with any financial, housing, or transportation support. It is unclear as to whether Mr. Beltran, the landlord of the apartment Elva Espinoza has rented for Mr. Belcher and the one person who has offered him a second chance in the community, would continue to rent to Mr. Belcher if he was released. Mr. Belcher failed to fully disclose his sexual criminal offenses to Mr. Beltran who testified he does not rent to Level 3 sex offenders. It is also unclear from the testimony how long Ms. Espinoza, a former SCC staff member, who is not working and is on the wait list to attend college, will be able to afford the rent of this apartment.

22. The Court also accepts the concern, as presented by Dr. Judd, that future acts of sexual violence would be predatory by Mr. Belcher. Predatory is defined as acts directed toward: A) strangers; B) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or C) with persons of casual acquaintance with whom no substantial personal relationship exists. From Mr. Belcher's past history of sexual misconduct, it is clear that his activities were predatory. He stalked a babysitter to the home she was babysitting children at and raped her and he lured a classmate into the woods in an attempt to rape her.

23. The Court accepts the evaluations and conclusions of the State's expert, Dr. Judd, and finds that Mr. Belcher is a sexually violent predator, as is defined under the statute.

24. The Court considered the testimony of Dr. Brian Abbott. Dr. Abbott is a clinical psychologist who testified on behalf of Mr. Belcher. Dr. Abbott's narrow view of the facts and circumstances surrounding Mr. Belcher's relevant psychological issues appeared biased and lacked credibility. The Court was not swayed by Dr. Abbott's opinions and did not find his ultimate conclusions logical or persuasive.

25. As whether Mr. Belcher suffered from a diagnosis, Dr. Abbott opined that Mr. Belcher did not suffer from any mental abnormality or personality disorder and has never suffered from one. In other words, Dr. Abbott believes despite Mr. Belcher's initial commitment in 2011, he believes the statutory requirements have never been met for Mr. Belcher to have been civilly committed. This opinion conflicts with Dr. Abbott's recent written testimony to this Court that indicated Mr. Belcher had previously met the definition of a Sexually Violent Predator, but had undergone a significant change in his mental condition through positive response to continuing participation in treatment, and consequently no longer met the definition of a SVP. Dr. Abbott's opinions have been inconsistent over a very short

period of time in the present case, and seem to change depending on Mr. Belcher's legal position, rather than psychological or other forensic issues.

26. Dr. Abbott did not diagnose Mr. Belcher with any mental abnormality or personality disorder, and he opined that it was unnecessary to conduct a risk assessment. Dr. Abbott opined he typically never evaluates an SVP without also conducting a risk assessment.

27. Dr. Abbott opined that Mr. Belcher is not an SVP because he has not reoffended since he was committed and he has improved his behavior at the SCC thereby reducing his Behavior Management Reports (BMR) and Incident Reports. Although the Court acknowledges and commends Mr. Belcher's improved behavior at the SCC, the Court does not accept and rejects the assertions of Dr. Abbott. In particular, the fact that Mr. Belcher has been in the SCC and has not offended is of little value in the analysis. While incarcerated at the SCC, Mr. Belcher has not been exposed to meaningful opportunities to assault women or children who refused his sexual advances. And, the fact that he has, only relatively recently, significantly reduced behavioral infractions at the SCC is of limited value to the analysis of the totality of Mr. Belcher's lifetime behaviors and psychological problems. More persuasive is the fact that Mr. Belcher has reoffended when in the community on parole and that he continues to fail to be transparent and truthful in his treatment, his relationships, his interactions with people outside of the SCC, and with the SCC facility and staff. As an example, Mr. Belcher misrepresented the nature of his criminal history to Mr. Beltran, a prospective landlord, told Mr. Beltran that he would share the residence with an adult woman (when he intended to live there by himself), and withheld his status as a Level 3 sex offender when he had experienced difficulty obtaining housing at other residences that were aware of his sex offender status. When Mr. Beltran became aware of Mr. Belcher's withholding of information, Mr. Beltran expressed some uncertainty as to whether he would allow Mr. Belcher to live at the prospective residence, consistent with his practice of not renting to Level 3 sex offenders. Mr. Belcher's

deception extended to his interactions with the SCC, his testimony to this Court, and during his treatment. At least some of the deception concerned maintaining a sexual relationship with one or more SCC staff members during a time that Mr. Belcher claims to have been in sex offender treatment. When the level of deceit perpetrated by Mr. Belcher on a regular basis is this pervasive, even in treatment settings, it is very unlikely that treatment has mended the psychological issues that led to Mr. Belcher's commitment as a SVP in 2011.

28. In conclusion, the Court finds that the State has proven beyond a reasonable doubt that all elements of the sexually violent predator statute have been met as to Mr. Belcher. He does meet the definition of a sexually violent predator pursuant to RCW 71.09 *et. seq.*

II. CONCLUSIONS OF LAW

1. The Court has subject matter and personal jurisdiction in this matter.

2. Each of the findings of fact enumerated herein have been proven beyond a reasonable doubt.

3. The Respondent's conviction for Rape in the 2nd Degree by Forcible Compulsion constitutes a sexually violent offense, as that term is defined in RCW 71.09.020(17).

4. The Respondent's conviction for Attempted Rape in the 2nd Degree by Forcible Compulsion constitutes a sexually violent offense, as that term is defined in RCW 71.09.020(17).

5. The Respondent suffers from a mental abnormality as that term is defined in RCW 71.09.020(8).

6. The Respondent's mental abnormality causes him serious difficulty controlling his sexually violent behavior.

7. The Respondent's mental abnormality makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility.

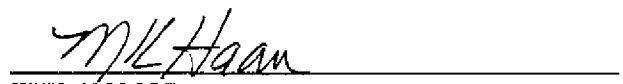
8. The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(18).

9. The Court's oral ruling on February 11, 2015, is incorporated herein by reference.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, Troy Belcher, is a sexually violent predator as defined in RCW 71.09.020(18). Having so found, the Court therefore ORDERS that the Respondent be committed to the custody of the Department of Social & Health Services for continued placement in a secure facility for control, care, and treatment until further order of this Court.

DATED this 20th day of April, 2015.

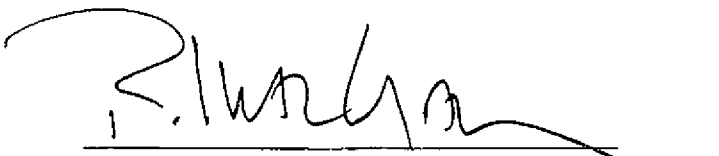


THE HONORABLE MARILYN HAAN
Judge of the Superior Court

Presented by:
ROBERT FERGUSON
Attorney General

JEREMY BARTELS, WSBA #36824
ROSE MCGILLIS, WSBA 34469
Assistant Attorneys General
Attorneys for Petitioner

Approved as to form:



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Attorneys for Respondent

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

IN RE THE DETENTION OF	)	
	)	
	)	
TROY BELCHER,	)	NO. 47328-3-II
	)	
	)	
APPELLANT.	)	

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