

NO. 93900-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

TROY BELCHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES1

 A. Does the Constitution prohibit the involuntary commitment of persons who committed their sexually violent offenses as juveniles and continue to be mentally ill and dangerous?1

 B. Where expert testimony supported Belcher’s commitment on the basis of a mental abnormality and established a nexus between that mental condition and the likelihood of re-offense, does his continued commitment comport with due process?1

 C. Where the State presented reliable evidence that Belcher was both mentally ill and dangerous, does his commitment comport with due process?2

III. COUNTERSTATEMENT OF THE CASE2

IV. ARGUMENT6

 A. Belcher’s Commitment Comports With Due Process6

 B. The State Proved Beyond a Reasonable Doubt That Belcher Suffers From a Mental Abnormality12

 C. The State Proved Beyond a Reasonable Doubt That Belcher Is Likely to Reoffend.....17

V. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Adams v. Bartow</i> , 330 F.3d 957 (7th Cir. 2003)	12
<i>Ake v. Oklahoma</i> , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).....	14
<i>Belcher v. State</i> , No. 41937-8-II, 2013 WL 634536 (Wash. Ct. App. Feb. 20, 2013)	2, 3, 19
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....	9
<i>Hubbart v. Superior Court</i> , 19 Cal. 4th 1138, 969 P.2d 584 (Cal. 1999)	12
<i>In re Barnes</i> , 689 N.W.2d 455 (Iowa 2004)	12
<i>In re Commitment of Adams</i> , 588 N.W.2d 336 (Wis. Ct. App. 1998).....	12
<i>In re Det. of Anderson</i> , 185 Wn.2d 79, 368 P.3d 162 (2016).....	8
<i>In re Det. of Belcher</i> , 196 Wn. App. 592, 385 P.3d 174 (2016)	6
<i>In re Det. of Lewis</i> , 134 Wn. App. 896, 143 P.3d 833 (2006).....	19
<i>In re Det. of Leyva</i> , No. 30853-7-II, 2014 WL 1852740 (Wash. Ct. App. May 6, 2014).....	10
<i>In re Det. of Sease</i> , 149 Wn. App. 66, 201 P.3d 1078 (2009).....	12

<i>In re Det. of Thorell,</i> 149 Wn.2d 724, 72 P.3d 708 (2003).....	6, 12, 13, 19
<i>In re G.R.H.,</i> 711 N.W.2d 587 (N.D. 2006)	12
<i>In re Meirhofer,</i> 182 Wn.2d 632, 343 P.3d 731 (2015).....	19
<i>In re Shafer,</i> 171 S.W.3d 768 (Mo. Ct. App. 2005).....	12
<i>In re Young,</i> 122 Wn.2d 1, 857 P.2d 989 (1993).....	passim
<i>Kansas v. Crane.</i> 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed. 856 (2002).....	6, 13
<i>Kansas v. Hendricks,</i> 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	6
<i>Matter of Paschke,</i> 80 Wn. App. 439, 909 P.2d 1328 (1996)	7
<i>Miller v. Alabama,</i> 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.407 (2012).....	9
<i>Murrell v. State,</i> 215 S.W.3d 96 (Mo. 2007)	12
<i>State v. Benitez,</i> 175 Wn. App. 116, 302 P.3d 877 (2013).....	8
<i>State v. Knippling,</i> 166 Wn.2d 93, 206 P.3d 332 (2009).....	8
<i>State v. McCuiston,</i> 174 Wn.2d 369, 275 P.3d 1092 (2012).....	6, 11
<i>State v. O'Dell,</i> 183 Wn.2d 680, 358 P.3d 359 (2015).....	9, 10

<i>State v. Sweeney</i> , 125 Wn. App. 77, 104 P.3d 46 (2005).....	8
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	9
<i>State v. Weber</i> , 127 Wn. App. 879, 112 P.3d 1287 (2005).....	10

Statutes

RCW 71.09.020(17).....	2
RCW 71.09.020(18).....	7
RCW 71.09.020(8).....	5
RCW 71.09.090	3, 6, 7
RCW 71.09.090(3)(c)	7
RCW 9.94A.525(2)(g)	8
RCW 9A.88.010(2)(c)	8

Other Authorities

Alexander D. Brooks, <i>The Constitutionality and Morality of Civilly Committing Sexually Violent Predators</i> , 15 U. PUGET SOUND L. REV. 709 (1991-92)	13
American Psychiatric Ass'n, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (5th Ed.) (DSM-V)	4, 13
Pac. Juvenile Defender Ctr., <i>Collateral Consequences of Juvenile Delinquency Proceedings in California: A Handbook for Juvenile Law Professionals</i> (Sue Burrell & Rourke F. Stacy eds., 2011)	9

I. INTRODUCTION

Troy Belcher was initially committed as a Sexually Violent Predator (“SVP”) in 2011 by a unanimous jury. In 2015, after a bench trial, at which the trial court carefully weighed the evidence, the court entered detailed findings of fact and conclusions of law determining that Belcher continues to be a sexually violent predator. Belcher’s commitment comports with the Constitution and with the Sexually Violent Predator Act. The State presented ample evidence, and the trial court correctly found, that Belcher is both mentally ill and dangerous. In so finding, the trial court relied on the State’s expert’s comprehensive evaluation of Belcher’s mental condition and his risk to reoffend. That expert considered a variety of relevant factors, including but not limited to actuarial instruments used to assess risk. Belcher’s age at the time of his sexual offenses does not undermine the State’s expert’s diagnosis or assessment of his current risk. Due process does not require the release of sex offenders who are currently both mentally ill and dangerous solely because they committed their offenses as juveniles.

II. COUNTERSTATEMENT OF THE ISSUES

- A. **Does the Constitution prohibit the involuntary commitment of persons who committed their sexually violent offenses as juveniles and continue to be mentally ill and dangerous?**
- B. **Where expert testimony supported Belcher’s commitment on the basis of a mental abnormality and established a nexus between that mental condition and the likelihood of re-offense, does his continued commitment comport with due process?**

- C. Where the State presented reliable evidence that Belcher was both mentally ill and dangerous, does his commitment comport with due process?**

III. COUNTERSTATEMENT OF THE CASE

Troy Belcher has been convicted of two sexually violent offenses as that term is defined in RCW 71.09.020(17) and he has been in continuous secure confinement since the age of 15. When Belcher was 13, he followed 13-year-old L.C. from a park and forced his way into a home where she was babysitting. *Belcher v. State*, No. 41937-8-II, 2013 WL 634536, at *1 (Wash. Ct. App. Feb. 20, 2013). Belcher pushed her up the stairs into one of the bedrooms, pinned her down on the floor, and vaginally raped her. *Id.* He was convicted of Rape in the Second Degree by Forcible Compulsion. CP at 847. At 15, while still on parole, Belcher attempted to rape 13-year-old J.A. CP at 848. Belcher lured J.A. into the woods, offering to show her a shortcut to her friend's house. *Belcher*, 2013 WL 634536, at *2. Once in the woods, Belcher pushed J.A. to the ground, pulled down his pants and straddled her, saying she would not get hurt if she didn't scream. *Id.* J.A. managed to push him off and run away. *Id.* He was convicted of Second Degree Attempted Rape. CP at 848.

Additional allegations not resulting in charges or convictions also came to the attention of authorities. CP at 848-49. Belcher was expelled from middle school after eight female students, ages 11 to 13, reported that he had been sexually harassing them for several months. *Id.* Several reported that Belcher had grabbed their breasts and buttocks. *Id.* In addition, one of Belcher's former girlfriends, H.F., alleged that he had vaginally

raped her, but she had never reported the incident. *Id.* Nor were Belcher's criminal convictions limited to sexual crimes. While at Green Hill School after his 2000 conviction for Attempted Rape, Belcher solicited someone to kill L.C. *Id.* In 2004, Belcher, 19, was charged with Solicitation to Commit Murder in the First Degree and Intimidating a Witness. *Id.* Belcher pled guilty to Intimidating a Witness. *Id.*

Shortly before his scheduled release following his conviction for Intimidating a Witness, the State filed a petition alleging that Belcher was a sexually violent predator. *Belcher*, 2013 WL 634536, at *3. In 2011, he was committed at the Special Commitment Center (SCC) for care and treatment until further order of the court. *Id.* at *4. His commitment was affirmed. *Id.* at *8.

In 2014, Belcher was granted a new trial under RCW 71.09.090 based on an expert opinion that his condition had changed through treatment. Dr. Brian Judd testified at trial. His comprehensive evaluation included four interviews with Belcher between 2011 and 2015 and review of over 3500 pages of information. 2A RP at 352; 3 RP at 566. Dr. Judd concluded that Belcher suffers from a mental abnormality consisting of antisocial personality disorder (ASPD) and high psychopathy. 2B RP at 464; CP at 852-53.

Dr. Judd used both static and dynamic factors as measured by various instruments commonly used by experts in his field to assess risk and concluded that Belcher was likely to commit predatory acts of sexual violence if not confined in a secure facility. 3 RP at 565. In assigning a diagnosis of ASPD, Dr. Judd relied upon the 5th edition of the Diagnostic and Statistical Manual,

or DSM-5. 2A RP at 353. There are seven essential features of an ASPD; Belcher meets six of those. *Id.* at 359-375; CP at 852. Belcher has failed to conform to social norms as demonstrated by his numerous arrests and convictions for sexual misconduct, thefts, solicitation to commit murder, and intimidating a witness. 2A RP at 361. His deceitfulness is “very prevalent throughout” his records. *Id.* at 362-63. He has lied about the facts of his offenses (*Id.* at 365), the number of children he has fathered (*Id.* at 365-66), and his status as a Level 3 offender if released (*Id.* at 366). He is impulsive, making his behavior “very dangerous and unpredictable.” *Id.* at 368-69. He also demonstrates irritability and aggressiveness toward SCC staff. *Id.* at 370-71. Belcher has demonstrated consistent lack of remorse, including lack of remorse for his sex crimes, since adolescence. *Id.* at 373-74. Since his first incarceration, Belcher has denied the impact of his behaviors on his victims, and at times denies that he committed any offenses at all. *Id.* at 375; CP at 852.

Belcher’s ASPD is exacerbated by the presence of a high level of psychopathy as measured on the Hare Psychopathy Checklist-Revised, or PCL-R. 2B RP at 452. Psychopathy, Dr. Judd explained, is “a construct which refers to individuals that have a pattern of conduct which is demonstrated by impulsivity, potential aggressiveness.” *Id.* at 471-72. The PCL-R is “the gold standard for identification of psychopathy.” *Id.* Psychopaths lack remorse and empathy for others. *Id.* While 50-75 percent of persons incarcerated suffer from ASPD, only 20-30 percent meet the criteria for psychopathy. *Id.* at 454. Psychopathy, he explained, appears to “kindle” ASPD (*Id.* at 523), and

psychopaths have a broader range of criminal conduct, are more violent, and tend to re-offend more quickly than those suffering simply from antisocial personality disorder. *Id.* at 454. Such individuals are disproportionately at risk for sexually violent recidivism even in the absence of deviant findings on a penile plethysmograph (PPG) or a polygraph. *Id.* at 523.

Dr. Judd testified that ASPD and psychopathy combine, in Belcher's case, to constitute a mental abnormality. 2B RP at 464, 456-58; *see also* RCW 71.09.020(8). Whether acquired or congenital, both psychopathy and antisocial personality disorder affect the individual's "emotional capacity," or ability to appreciate another person's pain. 2B RP at 458. This means that Belcher often experiences others as objects through which he can achieve gratification. *Id.* at 462-63. This condition affects his ability to inhibit or intervene in his own behavior, in turn predisposing him to reoffend. *Id.* at 458.

After weighing the evidence, including competing testimony from Belcher's expert, the trial judge found that Belcher has a mental abnormality that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. On appeal, Belcher argued that his re-commitment violated due process because it was based on conduct that occurred while he was a juvenile. He also argued that commitment based on the State's expert's diagnosis, and that expert's use of certain actuarial instruments, violated due process. The Court of Appeals affirmed, holding that due process did not prevent the use of juvenile convictions as a basis for commitment, and that a rational trier of fact could find beyond a reasonable doubt that Belcher

continued to meet commitment criteria. *In re Det. of Belcher*, 196 Wn. App. 592, 607, 385 P.3d 174 (2016). This court granted review.

IV. ARGUMENT

A. Belcher's Commitment Comports With Due Process

Washington's SVP statute has been repeatedly upheld against due process challenges because the annual review process serves to identify those persons who are no longer subject to commitment. *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Substantive due process requires that those civilly committed under the sexually violent predator law be both mentally ill and dangerous. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Commitment must be supported by proof that the person has serious difficulty controlling his or her sexual behavior. *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 868, 151 L.Ed. 856 (2002); *Thorell*, 149 Wn.2d 724. Substantive due process requires that the State conduct periodic review of the committed person's suitability for release, and that person's right under RCW 71.09.090 to show his or her condition has "so changed" "provides additional safeguards that go beyond the requirement of substantive due process." *McCuiston*, 174 Wn.2d at 385.

Belcher now seeks to add an entirely new requirement to due process, and in doing so, urges this Court to go where no court has gone before. Belcher argues that due process *also* requires release of a person whom experts have concluded is currently mentally disordered and dangerous simply because all

of his sexually crimes were committed as a juvenile. Pet. at 6, 9. Due process does not require this. The possibility of future confinement as a sexually violent predator is only a collateral consequence of an underlying conviction. *Matter of Paschke*, 80 Wn. App. 439, 444-45, 909 P.2d 1328, 1331 (1996). Belcher has failed to point to a single case in which courts have suggested—much less found—that due process is offended by the fact that an adult may face collateral consequences of juvenile convictions.

The central question before the trial court at the time of a trial under RCW 71.09.090 is whether the person “continues to meet the definition of a sexually violent predator.” RCW 71.09.090(3)(c). Thus, in order to justify continued confinement, the trial court must find that the person “suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). The sex predator statute “is focused on treating petitioners *for a current mental abnormality*, and protecting society from the sexually violent acts associated with that abnormality.” *Young*, 122 Wn.2d at 21 (emphasis added).

Belcher relies heavily on studies involving juvenile brain development and arguments about what the legal consequences of these issues of brain development should be. Pet. at 8. But Belcher was not civilly committed based on his mental condition as a juvenile. As explained further below, Belcher was committed on the basis of overwhelming evidence that he is mentally ill and dangerous *as an adult*. See *infra*, sections B and C. When evaluating a person’s current likelihood of engaging in future acts of sexual violence, experts and the

court can and certainly do consider how that person's brain has changed since he or she was 13 or 15 years old. But it would be absurd to prevent them from also considering a person's relevant sexually violent behavior as a juvenile. This is especially true where a person has been continuously confined since their juvenile offenses occurred.

Moreover, as Belcher acknowledges, this Court recently approved reliance on a juvenile offense as a predicate sexually violent offense, and in doing so, the Court did not express any due process concerns. *In re Det. of Anderson*, 185 Wn.2d 79, 89, 368 P.3d 162 (2016). It would be a remarkable departure from current law to conclude that consideration of juvenile offenses once a person becomes an adult would violate due process. Juvenile offenses are used as predicate offenses in numerous criminal contexts. Juvenile offenses count towards an adult felon's offender score for purposes of increasing punishment for a current adult offense. RCW 9A.94A.525(2)(g). Likewise, a prior juvenile offense can be used as a predicate for a charge of unlawful possession of a firearm, even if the prior juvenile crime has "washed out" for scoring purposes. *State v. Sweeney*, 125 Wn. App. 77, 82-83, 104 P.3d 46 (2005). A juvenile sex offense can be used to elevate indecent exposure from a misdemeanor to a felony under RCW 9A.88.010(2)(c). *State v. Benitez*, 175 Wn. App. 116, 122-23, 302 P.3d 877 (2013). And in some circumstances, an offense committed as a juvenile may be used as a prior "strike" for purposes of the Persistent Offender Accountability Act. *State v. Knippling*, 166 Wn.2d 93, 99-100, 206 P.3d 332 (2009). This Court has upheld Washington's sex offender

registration statute, requiring registration by juvenile sex offenders, against a due process challenge. *State v. Ward*, 123 Wn.2d 488, 512-15, 869 P.2d 1062 (1994). Likewise, noncitizens may suffer serious immigration consequences as a result of their juvenile court involvement, including arrest, detention, and deportation by immigration authorities. Pac. Juvenile Defender Ctr., *Collateral Consequences of Juvenile Delinquency Proceedings in California: A Handbook for Juvenile Law Professionals* 66 (Sue Burrell & Rourke F. Stacy eds., 2011). If a prior offense committed as a juvenile can be considered in all of these contexts, it is unreasonable to suggest that a sexually violent offense committed by a juvenile is an insufficient predicate offense in an SVP proceeding.

Belcher also cites *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2464, 183 L.Ed.407 (2012), and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), in support of his argument that civilly committing Belcher as a sexually violent predator violates due process. Pet. at 7-8. In each of these criminal cases involving the Eighth Amendment, the issue was the defendant's punishment for his youthful crime. In *Graham*, the Supreme Court held that a sentence of life in prison without parole for non-homicide crimes committed when the defendant was 16 years old violated the Eighth Amendment. 560 U.S. at 53-57. In *Miller*, the Supreme Court held that giving juvenile offenders mandatory life-without-parole sentences violates Eighth Amendment. 132 S.Ct. at 2464. In *O'Dell*, this Court held that the sentencing court must exercise its discretion to determine

whether defendant's youthfulness can support an exceptional sentence below the standard range. 183 Wn.2d at 366-67.

Rather than supporting Belcher's argument, these cases only show why his argument is misplaced. First, because civil commitment is not punishment (*Young*, 122 Wn.2d at 25), Belcher's case does not implicate the Eighth Amendment, and Belcher points to no instance in which the holdings of these cases have been extended beyond that context. There are substantial procedural rights afforded to juveniles in Washington that help to guarantee that sufficient safeguards exist to render the results of juvenile proceedings reliable. The due process protections afforded in juvenile proceedings ensure that the fact-finding process is reliable. *State v. Weber*, 127 Wn. App. 879, 890-92, 112 P.3d 1287 (2005).

Moreover, while a criminal prosecution "is backward-looking and metes out an appropriate punishment," a civil commitment proceeding "is forward-looking in order to protect the public." *In re Det. of Leyva*, No. 30853-7-II, 2014 WL 1852740, at *7 (Wash. Ct. App. May 6, 2014).¹ Because Belcher's juvenile history is simply relevant evidence of his mental abnormality and current risk, current brain science should raise a substantive due process issue "only if it reveals that a respondent's inability to control sexual conduct while a juvenile is not relevant to his or her present or future inability to control behavior." *Id.* at *7. But as this Court has held,

¹ As an unpublished case of the Court of Appeals, this opinion is non-binding, to be accorded such persuasive value as the court deems appropriate, pursuant to GR 14.1.

testimony related to prior sexual crimes, “including any juvenile offenses,” is relevant and admissible at trial. *Young*, 122 Wn.2d at 60.

Finally, Belcher’s confinement, unlike a criminal sentence, is subject to annual review, as evidenced by the fact of the trial at issue here: Having participated in treatment after commitment, he was granted a new trial on the basis that he had “so changed” since his 2011 commitment. CP at 337-339. Annual review—and the opportunity to petition for a new trial—will continue for the duration of his commitment, and his commitment will continue only so long as the State is able to continue to show that he is mentally ill and dangerous. *McCustion*, 174 Wn.2d at 385.

Although Belcher’s juvenile sex offenses served as predicate offenses in the SVP proceeding, additional evidence included his conviction for solicitation to murder, his adult behavior while in DOC and at the SCC, and numerous psychological interviews and testing conducted while he was an adult. CP 848-49; Vol. 2A RP at 352, 378; Vol. 3 RP at 566; *see also* Answer to Pet. at 8-9. And although evidence regarding those offenses was admitted at trial because it was highly relevant, Belcher was civilly committed because, as an adult, he *currently* suffers from a mental abnormality that makes him likely to reoffend in the future. CP at 857. To require experts and factfinders to ignore a significant portion of a person’s history—prior acts of sexual violence committed while a juvenile—would eliminate an important consideration that experts use in evaluating current dangerousness. And because Belcher is not prevented from submitting evidence of change,

including change resulting from brain development, or maturation, his juvenile offenses have never been—and will never be—alone dispositive.

B. The State Proved Beyond a Reasonable Doubt That Belcher Suffers From a Mental Abnormality

Belcher argues that due process is not satisfied when the State's expert testimony establishes "only" that Belcher suffers from an Antisocial Personality Disorder. Pet. at 15-19. It is, however, well-established that commitment on the basis of ASPD satisfies the Constitution, which does not require any particular diagnosis for civil commitment. Moreover, it mischaracterizes the diagnosis assigned—that is, ASPD and high psychopathy—which, combined, constitute a mental abnormality.

Commitment based entirely or in part on ASPD has been repeatedly approved by the appellate courts both in this state and around the nation.² What is critical is that the State's expert "adequately explain[] and g[i]ve meaning to [the term 'mental abnormality'] within a psychological context." *Young*, 122 Wn.2d at 49-50. As this Court has noted, "there is no talismanic significance to a particular diagnosis of mental illness. No technical diagnosis of a particular 'mental abnormality' definitively renders an individual either an SVP or not...[I]t is a diagnosis of a mental

² See e.g. *Thorell*, 149 Wn.2d at 728 (upholding commitments of Casper Ross and Ken Gordon, both of whom suffered from ASPD and neither of whom were diagnosed with a paraphilia); *Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003); *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 969 P.2d 584, 599 (Cal. 1999); *In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006); *In re Det. of Sease*, 149 Wn. App. 66, 201 P.3d 1078, 1085 (2009); *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis. Ct. App. 1998); *In re Shafer*, 171 S.W.3d 768, 771 (Mo. Ct. App. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo. 2007); *In re Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004).

abnormality, coupled with a history of sexual violence, which gives rise to a serious lack of control and creates the risk a person will likely commit acts of predatory sexual violence in the future.” *Thorell*, 149 Wn.2d at 762. Nor does it matter that the specific mental condition described by Dr. Judd is not a diagnosis within the pages of the DSM-V. This Court, in *Young*, rejected the argument that a diagnosis, in order to be valid, must appear in the DSM. 122 Wn.2d at 28. What is critical, “is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.” *Id.* (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Sexually Violent Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)).

Commitment under the SVP law requires “proof of serious difficulty in controlling behavior,” sufficient, “when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself,” “to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Kansas v. Crane*, 534 U.S. at 413. But neither the United States Supreme Court nor this Court has ever required any particular diagnosis for commitment. The Supreme Court has acknowledged that psychiatry “is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on

cure and treatment, and on likelihood of future dangerousness.”
Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

The State’s proof in this case satisfied due process. Dr. Judd concluded that Belcher suffers from a mental abnormality consisting of antisocial personality disorder (ASPD) and high psychopathy. 2B RP at 464; CP at 852-53. Dr. Judd explained both what he understood by the term “mental abnormality” (2B RP at 456-58) and why that term applied to Belcher: He suffers from a “congenital or acquired condition” in the form of this combination of an ASPD with high psychopathy. *Id.* This condition “affects his emotional or volitional capacity” by limiting Belcher’s ability “to experience a sense of remorse for his conduct and his behavior, [and] to identify with other people’s feelings and emotions.” *Id.* at 462. Finally, this mental condition predisposes Belcher “to the commission of criminal sexual acts in a degree constituting ...a menace to the health and safety of others” and causes Belcher to have serious difficulty controlling his sexually violent behavior. *Id.* at 462-64. This testimony gave meaning to the term mental abnormality “within a psychological context” as required by *Young*, and provided the trial court a basis to conclude that Belcher has “serious difficulty” controlling his sexually violent behavior.

Belcher makes various misleading assertions in support of his claim that he no longer suffers from any sort of mental disorder. He points to his improved behavior, asserting that he “lived in the least restrictive environment on McNeil Island.” Pet. at 3. He is in fact simply in a “low management” unit at the SCC, and had only moved there three months

before trial. 3RP at 650. And while Belcher's behavior improved in the 25 months before trial, prior to that time he accumulated more than 85 Behavior Management Reports, the majority of those between 2009 and 2013. 2B RP at 526. For example, in early 2013 (3 RP at 711), an SCC staffer had been taken hostage. He ran to the scene, tore off his shirt and, assuming a "fight stance," threw his fists in the air, saying to SCC staff, "[c]ome on mother fuckers let's fight, we're going to do this," repeatedly, unnecessarily escalating an already-tense situation. 2B RP at 403. He admits to having had sex with two female staffers at the SCC, and, in April 2012, was caught in a closet at the SCC with a third—with whom he had previously had sexual relations—under suspicious circumstances. CP at 852; 2A RP at 302-336. And although Belcher's behavior had improved somewhat prior to trial, Belcher has shown improvement for a short period of time, only to then lapse "back into infraction behavior." *Id.* at 653-54.

Belcher also emphasizes that his only sexual convictions occurred when he was a juvenile. Given that Belcher has been in continuous secure confinement since his attempted rape of J.A. in 2000, and that his victims were 13-year-old girls, this is not surprising. *See* 2B RP at 433-34.

Belcher argues that the 2014 penile plethysmograph and polygraph show that "he did not present as a person with deviant sexual interests." Pet. at 3. First, as Dr. Judd pointed out, serial tests over a period of time are more likely to render an accurate result than a single test. 2B RP at 436; 3 RP at 638. Second, there is good reason to be skeptical about the results of both of these tests: Belcher did not show any sexual response—deviant

or non-deviant—to any stimuli at all during the PPG. 2B RP at 432. This is perhaps because he masturbated the day before the test was administered (2A RP at 271; 3 RP at 640), a “countermeasure” that could affect the outcome of the testing. 3 RP at 636-37, 639. Nor was this the first time he had done this; SCC records show that, in 2012, Belcher approached an SCC staffer (with whom he claimed to have had sexual intercourse) asking for some masturbatory stimulus material before he was tested on the following day. 2B RP at 512-14. And while he passed a sexual history polygraph in 2014, a prior polygraph, where he had given substantially similar answers to the same questions, *did* reflect deception. 2B RP at 437-39.

Moreover, clear evidence of two of the most prominent features of his mental disorders—his persistent refusal to accept responsibility for his behaviors and his continuing lack of guilt or remorse for his crimes—are still clearly in evidence. He has consistently minimized the use of force involved in his sexual crimes, in some cases denying those offenses altogether. 2B RP at 484-89, 494. For example, although police reports indicate that Belcher forced his way into L.C.’s house and raped her, Belcher testified they had known each other for months and that the sexual activity was consensual. 1B RP at 191-200. Likewise, although he was convicted of Second Degree Attempted Rape, Belcher testified that he had used no force and that he had known the victim for five to six months. 1B RP at 203; 2B RP at 486. While records show that eight classmates in middle school reported he had grabbed their breasts, Belcher testified that the incident involved only two or three girls, and has insisted that he was

“just playing” and was “set up.” 2B RP at 487. Likewise, there were allegations in 2002 and 2004 that he engaged in sexually coercive behavior with two male residents of Green Hill School (2B RP at 445); he denies these incidents. *Id.* Another girl, H.F., a former girlfriend, alleged that he pushed her into a shed at her home and forcibly raped her (2B RP at 488); Belcher testified that he simply “asked her for sex” and that he was in fact her boyfriend at the time. 1B RP at 188-190.

While Belcher’s opportunities to sexually assault pubescent girls have, since 2000, been limited by his continuous confinement, his mental abnormality remained clearly in evidence at the time of trial, rendering Dr. Judd’s diagnosis appropriate.

C. The State Proved Beyond a Reasonable Doubt That Belcher Is Likely to Reoffend

The State presented reliable evidence that Belcher will reoffend. Contrary to Belcher’s suggestion, a comprehensive risk assessment, such as the one Dr. Judd conducted, considers many factors, including but not limited to static factors as measured by certain actuarial instruments. Belcher’s argument conflates the State’s ultimate burden—that is, to show beyond a reasonable doubt that Belcher is likely to reoffend—with the use of a particular actuarial instrument. Dr. Judd’s risk assessment was not limited to the scoring of a single actuarial instrument any more than the score on that instrument is dispositive of his risk to reoffend.

Dr. Judd testified, based upon his comprehensive evaluation, that Belcher was likely to commit predatory acts of sexual violence if released.

Dr. Judd relied upon the PCL-R as a “foundation” from which to begin his risk assessment. 2B RP at 466. To score the PCL-R, the expert looks at the subject’s lifetime functioning, including juvenile behavior if such records are available. *Id.* at 472. Belcher’s “grandiose sense of self,” his need for stimulation, his pathological lying, and his use of deception to defraud and manipulate others are all characteristic of psychopaths. *Id.* at 471-84. Belcher shows a lack of remorse for his crimes, minimizes the use of force involved in his sexual crimes or, at times, denies those offenses altogether. *Id.* at 484-89. Belcher shows no empathy for his victims, often blaming them for his current dilemma. *Id.* at 494. He has poor behavioral controls, responding to frustration, discipline, and criticism “with violent behavior or with threats and verbal abuse,” and striking out in anger when frustrated. *Id.* at 497. He has had many victims and sexual partners, and has, even when married, engaged and sought to engage in sexual contact with others at the SCC. *Id.* at 498-500. Belcher lacks self-control and judgment, a factor that adds “significantly” to his dangerousness. *Id.* at 511. A score of 30 on the PCL-R is generally regarded as a cutoff for the presence of psychopathy; Belcher scored a 31. *Id.* at 472, 476. Those who suffer from ASPD as well as meeting the conventional criteria for psychopathy are “at disproportionally higher risk” to reoffend as compared to both persons with ASPD or with neither psychopathy nor an ASPD. *Id.* at 524-25; 3 RP at 557.

Dr. Judd also used two actuarial instruments, the Violence Risk Appraisal Guide-Revised, or VRAG-R, and the Sex Offender Risk

Appraisal Guide, or SORAG, as part of his risk assessment.³ 2B RP at 466. Use of such instruments as part of a comprehensive assessment is well-accepted. *Thorell*, 149 Wn.2d at 755. But because actuarials only evaluate a “limited set of predictors,” often involving analysis of small sample sizes, the results “have a variety of potential predictive shortcomings” (*Id.* at 753), and may underestimate the risk of re-offense. *See, e.g., In re Det. of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833 (2006). For these reasons, experts “conside[r] potentially important factors not included in the actuarial measure” (*Thorell*, 149 Wn.2d at 753), such as “dynamic” risk factors identifying the offender as high risk. *In re Meirhofer*, 182 Wn.2d 632, 646, 343 P.3d 731 (2015).

The VRAG was published in 1993, and, with the SORAG, is the “oldest risk assessment instrument that we have.” 2B RP at 536. While some well-accepted actuarial instruments, such as the Static-99, are not appropriate for use on persons who committed their crimes below a certain age, the VRAG-R is appropriate for use with such populations. *Id.* at 468; 3 RP at 660-61. Although designed to assess the risk of all violent recidivism, it is regarded as a useful tool for purposes of assessing the risk of sexual violence as well. 2B RP at 533-34. Because a sexually-motivated offense may be pled down to a non-sexual offense, looking at instruments like the VRAG that measure recidivism in terms of all violence is “a more appropriate way to

³ On appeal from his initial commitment trial, Belcher argued unsuccessfully that the SORAG, which Dr. Judd had used, “is an improper or inaccurate tool to use on those who committed sex crimes as juveniles.” *Belcher*, 2013 WL 634536, at *7.

assess the probability of an individual's future sexual recidivism" than looking at a measure focusing only on "rap sheet sexual recidivism." *Id.* at 535-36.

Belcher's score on the VRAG-R places him between the 95th and 96th percentile compared to the standardization sample. 2B RP at 546. After 12 years of follow-up, 87 percent of those with this score were charged with a violent—including sexually violent—offense. Belcher's score on the SORAG was similar: Of those with the same score as Belcher, 93 percent were re-charged for violent offenses within ten years. 3 RP at 562. Yet even with a score as high as this, this result was simply another "piece of the puzzle." *Id.* at 546. Finally, Dr. Judd considered Belcher's history of non-compliance with supervision, a factor that has perhaps the strongest relationship with sexual recidivism. *Id.* at 553. Belcher has had roughly 85 infractions at the SCC since he arrived in 2007 (2A RP at 369), and more than 50 since his commitment in 2011. Based on all of this information, Dr. Judd concluded, and the trial court correctly found, that Belcher was more likely than not to reoffend.

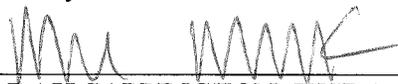
V. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's Order of Commitment.

RESPECTFULLY SUBMITTED this 10th day of May, 2017.

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Attorneys for State of Washington

NO. 93900-4

WASHINGTON STATE SUPREME COURT

In re the Detention of:

TROY BELCHER,

Petitioner.

DECLARATION
OF SERVICE

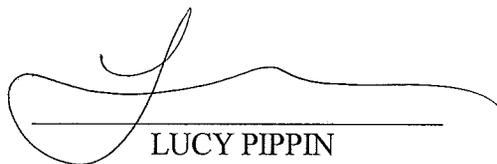
I, Lucy Pippin, declare as follows:

On May 10, 2017, I served via electronic mail a true and correct copy of State's Supplemental Brief and Declaration of Service, addressed as follows:

Travis Stearns
Washington Appellate Project
travis@washapp.org
wapofficemail@washapp.org

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

DATED this 10th day of May, 2017, at Seattle, Washington.


LUCY PIPPIN