Juvenile Law Reader

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"Juvenile Sex Offender Registration Does No Good, Only Harm"

-- Mark McKechnie, YRJ Executive Director

Expert Tells Oregon Legislature:

Juvenile Sex Offender Registration Does No Good, Only Harm

By Mark McKechnie, YRJ Executive Director

On September 18, 2013, Elizabeth Letourneau testified to a joint meeting of the House and Senate Judiciary Committees of the Oregon Legislature. Dr. Letourneau, a professor of psychology and Director of the Moore Center for the Prevention of Child Sexual Abuse at Johns Hopkins University, has conducted or reviewed the major research on the impacts of sex offender registration laws for juvenile offenders on public safety and on the youth themselves.

Dr. Letourneau has led five federally funded research studies on the impact of juvenile sex offender registry laws, and this research has led to the following conclusions:

" (A) Sexual recidivism rates for youth who sexually offend are low.

(B) Sexual recidivism risk for youth who sexually offend is similar to that of other delinquent youth.

(C) Registration of juveniles fails, in any way, to improve community safety.

(D) Registration is associated with unintended and impactful

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consequences on the adjudication of youth." (Affidavit of Dr. Letourneau)

She told the joint committee: "So far, not one single evaluation of registration or notification has identified any community safety effect for these policies when these policies are applied for juveniles." She later added that "there is no shred of evidence that supports them [registration and notification requirements for juveniles]."

Dr. Letourneau also stated that there is no deterrent effect to juvenile registration, meaning that none of the evidence in any of the studies indicates that the threat of registration has any effect on preventing first-time offenses. She went on to say that there are effects of registry laws on juveniles, but they tend to be unintended and undesirable effects.

Registration laws have a "Scarlet Letter Effect," according to Dr. Letourneau. They lead the public to fear registrants and also tend to mean that registered individuals are more likely to be arrested, but not necessarily convicted, for new offenses.

These adverse social and legal consequences tend to cause harm to youth in terms of their physical and mental health. Dr. Letourneau said that these effects are particularly concerning when considered alongside the lack of any positive public safety effect found to result from juvenile registry laws.

Dr. Letourneau explained that these conclusions stem from numerous research studies conducted in various states, comparing those with registry laws to those without, and comparing periods before and after states have adopted juvenile registry laws.

Dr. Letourneau said that some youth are indeed at high risk for reoffending, but that high-risk youth are not more likely to reoffend than not. That is, among youth evaluated to be high risk according to accepted risk assessment tools, 50% of them do not reoffend. She also explained that the high risk group comprises the smallest group of youth who have sexually offended. She cited the research of Michael Caldwell, who found that youth with a sex offense are no more likely to commit subsequent sexual offenses than are youth with histories of non-sex offenses.

Letourneau said that Dr. Caldwell's findings call into question the idea that youth with a history of a sex offense should be treated substantially differently than other youth offenders with non-sexual offense histories. She said that interventions designed for other types of delinquent behavior can be as effective for youth with sexual offenses as the treatments that are specific to sexual offending. She noted that Multi-Systemic Therapy (MST) has been adapted to work with youth who have a sexual offense history and their families. She said that three randomized clinical studies have shown the effectiveness of MST in working with this population and that the Washington State Institute for Public Policy has also found MST to be cost-effective by reducing future felony offenses by youth who receive MST.

Dr. Letourneau said that youth who have sexually offended have some different risk factors than the general population, but she said that youth with sex offense histories are generally a "less delinquent" group than youth who have committed other types of delinquent offenses. Her hypothesis for this is that there is a

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Queries regarding contributed articles can be addressed to the editorial board.

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lower threshold for the types of sexual behaviors that lead to intervention by the juvenile justice system, versus other types of offenses that may need to be repeated or more serious before formal court involvement occurs.

A detailed discussion of these conclusions can be found in the exhibits posted on the Oregon Legislature's web site:

Affidavit OF Elizabeth J. Letourneau, Ph.D., Associate Professor, Department of Mental Health Director, Moore Center for the Prevention of Child Sexual Abuse Johns Hopkins Bloomberg School of Public Health https://olis.leg.state.or.us/liz/2013I1/Downloads/CommitteeMeeting-Document/30208

Does Sex Offender Registration and Notification Work With Juveniles? By Elizabeth J. Letourneau https://olis.leg.state.or.us/liz/2013I1/Downloads/CommitteeMeetingDocument/30406

The archived audio recording (which requires the Real Audio Player) of the hearing can be found at: http://www.leg.state.or.us/listn/archive/archive.2013i/HJUD-201309181401.ram ●

Oregon's Public Safety Destiny

In the Hands of Our 36 Counties

By Shannon Wight, Deputy Director, Partnership for Safety and Justice

Earlier this year, Oregon legislators gave counties a rare opportunity to shape the future of the state when they passed a significant public safety reform package. The goal was to reduce the size and cost of the state prison system by making smart investments in local interventions that reduce crime and violence.

House Bill 3194, the public safety reform package, is projected to save $300 million over the next five years. But here's the catch: To realize those savings, Oregon's 36 individual counties have to make the right choices about how to reshape their local public safety systems.

Will counties build the infrastructure needed to put this funding to work? Or will counties miss an opportunity to create the vibrant communities we all want to live in?

In Oregon, each county will receive a portion of $15 million allocated for the 2013-15 biennium. Those checks are just beginning to be sent out now. There are no strings attached to the initial two years of funding — that's so counties can develop a plan that makes sense for their individual needs.

Multnomah and Lane counties engaged in extensive conversations and planning with public safety system stakeholders. Other counties have not engaged in such a thoughtful process. Most won't be receiving nearly the same amount of money and may not think it worth the investment of time. But over the next two years counties that implement smart approaches to crime will be building the foundation for safer

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communities and future state funding, which should be much greater in subsequent years.

When it comes to building safe, healthy communities, most people have a shared understanding that there are many important pieces of the puzzle: local law enforcement, the courts, community corrections, victim services and re-entry programs, and front-end prevention efforts such as addiction treatment and mental health services. Prison beds, while needed at times, are extremely costly and don't necessarily bring positive outcomes for individuals or community safety.

Around the country, the process of slowing prison growth and investing in more local and less costly forms of accountability and crime prevention — which Oregon is doing through HB3194 — is known as "justice reinvestment." Numerous states are currently implementing similar pieces of legislation, among them Texas, Georgia and Delaware.

Justice reinvestment is providing an opportunity for Oregon to choose a smarter public safety path — one that relies less on costly and often ineffective prison beds and more on local interventions proven to work. While allowing counties to make these choices without guidelines may be respectful of individual county circumstances, it's also risky given that each county's individual success is critical for the state to reach that $300 million of projected savings. For example, investing heavily in local jail beds isn't a forward thinking replacement for growing our state prison system. Yes, we need the ability to provide jail sanctions, but without strengthening addiction and mental health treatment and re-entry services, we will not address the root causes and break the cycle of crime.

Oregon's public safety destiny is in the hands of our 36 counties. County commissioners and Local Public Safety Coordinating Councils should prioritize prevention-oriented investments so that we not only realize the $300 million of prison savings but also strengthen our communities.

(This article originally appeared on OregonLive.com. It is reprinted here with the permission of the author.) ●

The Nuts and Bolts of House Bill 3194

By Shannon Wight, Deputy Director, Partnership for Safety and Justice, with assistance from Policy Intern, Gina Anzaldua

(The following is an excerpt from the Summer 2013 issue of ***Justice Matters****.)*

Oregon continues to move away from our over-reliance on incarceration as our primary public safety tool and toward investing in things we know reduce crime: addiction treatment and mental health programs, re-entry support, and other prevention oriented programs.

The real impact of HB 3194 will be seen over time as the reforms go into effect.

The final bill is 30 pages long and investment dollars are specified in separate funding bills. Below is a summary of the public safety reforms and reinvestments that were part of HB 3194.

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Sentencing Reforms

Probation instead of prison for some felony marijuana offenses

Changes sentencing guidelines for certain marijuana possession, delivery, and manufacture offenses so that most people who are charged with these crimes will receive probation instead of prison time. Currently, the average length of stay in prison for these offenses is 17.8 months.

Probation instead of prison for felony driving while suspended or revoked

Changes the classification of these offenses so that most people convicted will receive probation instead of prison time. Currently, the average length of stay in prison for these offenses is 16 months.

Creates the misdemeanor crime of Harassment for "sexting"

Currently when youth under 18 are charged with sexting, the Measure 11 child pornography statute is used. The intent of this is to allow law enforcement to use a less serious charge to hold youth accountable.

Increases transitional leave period from 30 to 90 days prior to discharge from prison

DOC's transitional leave program provides resources and support to incarcerated individuals as they prepare to re-enter the community. Under this measure, DOC will identify people who are eligible for this program and help them create a transition plan. For those whose plan is approved, DOC may grant a transitional release up to 90 days prior to the person's discharge date. *It's important to note that people convicted of Measure 11 crimes and those who were sentenced before 1989 are not eligible for transitional leave.*

Earned Discharge for Probation and Post-Prison Supervision

Authorizes earned time credits while on probation or post-prison supervision for successful completion of terms of supervision, up to maximum of 50 percent of supervision period, but not less than six months. Impact is unknown, but it is anticipated to result in fewer people on supervision. Counties cannot lose funding for reducing their supervision caseload.

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Ballot Measure 57 Changes

Changes were made to Ballot Measure 57, a ballot measure that passed in 2008 that increased sentences for some drug and property crimes. The changes made this session will sunset (return to longer sentence time), on July 1, 2023. Also note that the changes below are to the presumptive or likely sentence, but do not bind the hands of the judge. Individual circumstances can be taken into account for either decreasing or *increasing* the presumptive sentence.

Shorter prison sentence for robbery in the third degree

Reduces the presumptive prison sentence for this offense from 24 months to 18 months.

Shorter prison sentence for identity theft

Reduces the presumptive prison sentence for this offense from 24 months to 18 months.

Probation instead of prison for certain drug trafficking crimes

Repeals part of Measure 57 so that people convicted of these crimes can

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receive probation in lieu of prison time.

Permits judge to impose lesser sentence for certain drug trafficking crimes

This provision repeals a prohibition on these downward departures for certain crimes.

Other Changes

Risk and needs assessment for people on probation

Requires the use of a risk and needs assessment if requested by the probation officer.

Re-entry and other specialty courts

Establishes framework for counties that choose to use grant funding for re-entry courts. Establishes the Oregon Criminal Justice Commission as the clearinghouse for information on best practices for specialty courts.

Task Force and Outcome Measurement

Establishes the Task Force on Public Safety

This group will be responsible for reviewing the implementation of HB 3194, studying conditional release hearings for Measure 11 youth, and reviewing the cost-reduction proposal submitted by the DOC as required by the bill. The task force will be made up of 13 members, including two senators and two representatives, a community corrections director and a victim services provider. The Oregon Supreme Court Chief Justice will appoint two members and the governor will appoint one county commissioner, district attorney, criminal defense attorney and one law enforcement representative. The task force is required to submit a report to the Legislature by October 1, 2016.

Charges various agencies with collecting and analyzing corrections data, reviewing evidence-based standards, conducting program evaluations, and reporting relevant findings to the legislature

Agencies include the Criminal Justice Commission, Department of Corrections, Department of Administrative Services and the Oregon Judicial Department. Included in their tasks are:

- Developing evidence-based standards for specialty courts
- Identifying the margin of error in prison forecasts
- Collecting data on recidivism, per the new definition of recidivism in the bill
- Creating 10-year fiscal impact statements for bills that create a new crime
- DOC to report on solutions to control costs by five percent over a 10-year period

Reinvestment

Savings created by HB 3194 are expected to reach over $300 million

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over the next five years. What to do with those savings is a core value of the "Justice Reinvestment" approach Oregon embraced with technical support from the Pew Public Safety Performance Project. A primary goal of the reform was to rely less on prison beds and more on community-based sanctions for holding people accountable. These sanctions are effective and far less costly than prison beds, but resources had to be allocated for counties to expand existing capacity to manage a greater number of people being managed locally.

Partnership for Safety and Justice, along with allies, pushed to have funding for victim services through the Oregon Domestic and Sexual Violence Services Fund considered as part of important reinvestment for the reforms.

$10 - $15 Million to Establish the Justice Reinvestment Grant Program

Administered by the Criminal Justice Commission, this program will provide grants to counties that establish a process to assess offenders and provide a continuum of community-based services that reduce recidivism and decrease the county's utilization of prison beds. The grant funds must be used on community-based programs. The measure does not specify a funding level for the grant program, but legislative leadership has agreed to provide a minimum of $10 million from the General Fund for the 2013-15 biennium, with the possibility of an additional $5 million in the February 2014 session. (This program will also be supplemented with $5 million from federal grant money.)

Image courtesy of Pong / FreeDigitalPhotos.net

$17 Million for Community Corrections

This is an 18% increase in General Fund support for community corrections. HB 3194 brought the baseline Community Corrections budget up from the $197.4 million provided in the DOC to $215 million for the 2013-2015 biennium. This amount reflects the legislatively mandated cost study conducted by DOC in 2012.

$5 Million for Jail Support

Allocated directly as a result of passage of HB 3194 to help counties that are struggling with public safety resources.

$4 Million in additional General Fund dollars for Oregon Domestic and Sexual Violence Services Fund

Funding for community-based programs that provide services to victims of domestic and sexual violence is doubled with the $4 million investment. (Total funds for the biennium are $8.4 million.)

$3 Million to support Oregon State Troopers

$2.9 Million to Public Defense Services

This will help reduce caseload for juvenile defense lawyers.

$1 Million to Establish the Oregon Center for Policing Excellence

The center, which will be housed within the Department of Public Safety Standards and Training, will develop and promote updated skills in policing with the aim of making law enforcement more effective and efficient.

(HB 3194 became effective on July 25, 2013. The changes to Measure 57 crimes, transitional leave, reentry court, and the Justice Reinvestment Grant Program sunset July 1, 2023. Please note: some of the information in this article may change as more information becomes available regarding how the bill will actually be implemented.) ●

Case Summaries

By Hannah Truitt and Arianna DeStefano, YRJ Law Clerks

Dept. of Human Services v. A.R.S., 258 Or App 624 (2013)

This appeal from a review hearing is the third in a series of Court of Appeals' decisions involving this family. Mother and child argued that the juvenile court should have dismissed wardship at the review hearing because the facts that had given rise to jurisdiction had been ameliorated by mother's progress. They also assert that the court incorrectly determined that mother had not made "sufficient progress to allow child to return to her care within a reasonable time." Lastly, they claim that the court erroneously overruled the child's objection to being removed from the United States and sent to Mexico based on a claim that this action would violate the Fourteenth Amendment to the United States Constitution. Child additionally claims that the court erred when it determined that it would be in the child's best interest to continue wardship.

At the review hearing, DHS acknowledged that mother had made some positive changes however insisted that her lack of stable housing and tumultuous relationship with a partner provided evidence that she could not be a resource to A.R.S. at this time. Furthermore, DHS asserted that they were unable to adequately determine mother's progress and compliance with the court ordered services (i.e. counseling). Thus, the juvenile court determined that the above described circumstances when viewed in totality, justified DHS's continued involvement and wardship over A.R.S..

Upon review, the court determined that DHS held the "burden to prove, beyond a preponderance of the evidence, that the factual bases for jurisdiction persisted to a degree that they posed a current threat of serious loss or injury that is reasonably likely to be realized." In light of this burden, the court went on to review the facts of the case to determine whether they supported a finding that Mother's residential instability and choice of partners created a current risk of harm to A.R.S. which thus justified DHS continued wardship. In regard to the residential instability claim, the court went on to find, "[a]lthough there is evidence that mother lived in multiple residences in the year preceding the review hearing and that she was considering a move from her housing at the time of the hearing to be closer to the child, or if allowed by the court, into grandmother's home, there is not sufficient evidence that those circumstances posed a current risk of harm to child that was not speculative." Thus, DHS's claim supporting continued wardship based on residential instability was insufficient.

Additionally, the court made a similar determination in regard to Mother's relationship with Antonio. The court held, "[g]iven that there was no evidence that Antonio had a history of violence or that mother should, for some other reason, have forseen that he otherwise presented a safety risk, and further that mother ended the relationship and immediately left the home, any conclusion that child was at risk because of [M]other's choice of Antonio is speculative." Furthermore, the court determined that Mother's choice of partner in

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Antonio did not establish a pattern of risky partner choices that would rise to the level that the court would infer that Mother's choices in partners created a risk of harm to A.R.S..

The court held "there is insufficient evidence in the record from which a reasonable factfinder could conclude, by a preponderance of the evidence, that the totality of the circumstances exposed child to a current risk of serious loss or injury that was reasonably likely to occur." Thus, the court reversed the juvenile court's error in its denial of appellant's motion to dismiss wardship. The case is therefore remanded back to the juvenile court with instructions consistent with the court's decision to dismiss wardship.

Dept. of Human Services v. K.H., 258 Or App 523 (2013)

Mother seeks reconsideration based on the factual findings of the court that:

"(1) the juvenile court took judicial notice of the record of the permanency hearing in denying mother's request for a hearing; and (2) the juvenile court relied upon the record of the prior permanency hearing in ruling that the department had met its evidentiary burden under ORS 419B.366. Mother also asks us to reconsider our determinations that the July 19, 2012, hearing satisfied the hearing requirement in ORS 419B.366 and that the Department of Human Services (DHS) met its evidentiary burden to prove all four elements of guardianship."

Here, the court granted reconsideration based on the earlier statement that the juvenile court took "judicial notice of the permanency hearing record." The court acknowledges its misstatement that the juvenile court took "judicial notice" and instead correctly identifies that the juvenile court merely considered the record of the permanency hearing. (emphasis added).

The court goes on to hold that regardless of the above discussed misstatement, the change did not affect the larger disposition of the case. Mother asserted that this court's determination that E could not be returned to her in a reasonable time was based solely on the affidavit by DHS's counsel. Instead the court concludes that, in determining "reasonable time," the court also considered mother's "offer of proof and the trial court file" in addition to the affidavit. Thus, the court held that the misstatement in regard to "judicial notice" did not change the conclusion that mother was incorrect in asserting that the decision was based solely on the affidavit. Instead the reasonable time determination was based on a myriad of adequate evidence in the record.

Reconsideration allowed; former opinion modified and adhered to as modified.

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Dept. of Human Services v. L. A. S., 259 Or App 125 (2013)

Mother appeals the juvenile court's decision to change the plan from reunification to adoption for her two children. She argued that the juvenile court lacked the authority to change the permanency plans for her children from reunification to adoption. As relevant in this case, ORS 419B.476(2) provides that, at a permanency hearing, if the permanency plan is reunification, the court shall "determine whether DHS has made reasonable efforts to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home."

Mother's appeal challenged the court's conclusion that she had not made sufficient progress by advancing two alternative arguments. First, she argued that the state had failed

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to prove that she had not made sufficient progress for the children to be safely returned at the time of the permanency hearing. Second, she argued that, even if the state proved that she had not made sufficient progress at the time of the permanency hearing, it failed to prove that she had not made sufficient progress for the children to be returned home within a reasonable period of time.

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The Court rejected mother's first argument – that the state had failed to prove that she had not made sufficient progress at the time of the permanency hearing – because it was unpreserved. Though at the time of the hearing mother had demonstrated some of her progress, she did not assert that she was ready for the children to return to her care immediately. Instead, she had asked for a "90-day extension" to show that she could continue to make progress.

The Court also rejected mother's second argument – that the state had failed to prove that she had not made sufficient progress for the children to be returned home within a reasonable period of time – because even assuming that the state was required to prove that fact, it presented sufficient evidence to do so.

Mother argued that *Dept. of Human Services v. D. H. L.,* 251 Or. App. 787, 284 P3d 1233, *adh'd to on recons,* 253 Or. App. 600, 292 P3d 565, *rev. den.,* 351 Or. 649 (2012) was wrongly decided. In *D.H.L.*, the Court held that "there is no statutory requirement under ORS 419B.476 or any other authority that requires the juvenile court to find that a parent cannot be reunited with the child within a reasonable time before the court changes the plan from reunification to adoption." The state responded to mother's argument by reiterating that there was no such consideration requirement, and that "because the court was not required to make that finding, whether there [was] evidence to support it is irrelevant."

The Court declined to revisit D.H.L, because the juvenile court in this case had considered whether mother made sufficient progress for the children to be returned within a reasonable period of time, and determined that she had not. The court's determination was supported by the record, including mother's longstanding history of substance abuse, difficulty establishing a stable life style, and longer term therapy being recommended. Though mother had made some progress, it was not reasonable to wait to change the permanency plan.

The Court affirmed the juvenile court's decision.

Dept. of Human Services v. S. D. I., 259 Or App 116 (2013)

Mother appealed the decision of the juvenile court to take jurisdiction over her daughter, A. The juvenile court asserted jurisdiction pursuant to ORS 419B.100(c), because mother had been absent from A's life for several years, and there was a risk that A would be psychologically damaged if immediately returned to mother's custody without a transition process. On appeal, mother advanced three arguments: (1) the juvenile court erred in admitting the opinion testimony of A's caseworker that it was likely that A would be

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psychologically damaged if she were immediately transferred to mother's custody, (2) the state presented insufficient evidence to prove its factual allegation that mother required the assistance of DHS to establish a meaningful relationship with A, and (3) even if the evidence was sufficient to prove that factual allegation, the state failed to prove that immediately transferring A to mother's custody would endanger A's welfare.

In response, the state argues that the juvenile court properly admitted the opinion testimony of the case worker, who was testifying as an expert. Secondly, there was evidence on the record that mother had no contact with A for several years and needs DHS assistance to establish a meaningful relationship with A. And lastly, the juvenile court did not err when it asserted jurisdiction over A with respect to mother because A was at risk of psychological harm if she were to be placed with mother without a managed transition.

The Court sought to confront the question before them: whether the state presented sufficient evidence to establish that A's "condition or circumstances [were] such as to endanger [her] welfare," ORS 419B.100(1)(c). More specifically, the Court addressed the question of whether A's immediate transfer to mother's custody would create a risk of "serious loss or injury" to A that was reasonably likely to be realized. *A.F.*, 243 Or. App. at 386.

The Court reviewed the standard of *A.F.*, and its predecessors: for a juvenile court to take jurisdiction over a child on the grounds that the child is endangered, the state must establish that the child is at risk of a certain severity of harm and that there is reasonable likelihood that the risk will be realized. In order to do so, the state must present evidence about both the severity of the harm and the likelihood that it will occur. *See State ex rel. Dept. of Human Services v. D.T.C.,* 231 Or. App. 544, 554, 219 P3d 610 (2009) (father's drinking, which frightened his children and caused him to be mean and controlling, was "not ideal parenting," but was "not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship").

The Court assumed without deciding that the juvenile court did not err in admitting the caseworker's testimony, and that the state proved mother, if granted custody of A, would transfer A to her custody in a manner that would "create a risk of psychological or emotional adverse impact to [A]." Nevertheless, the Court concluded that the state failed to establish that such a transfer would give rise to a serious loss or injury to A. By that regard, the state failed to establish that the severity of potential harm was such that juvenile court jurisdiction was justified.

Photo © Helene Souza

Under the totality of the circumstances, the Court determined that the state had failed to establish an immediate transfer of A into mother's custody would create a threat of serious loss or injury and, even assuming that such a transfer could create a threat of some harm, the state failed to establish that the relevant harm was sufficient to justify juvenile court jurisdiction.

The Court reversed the juvenile court's decision. ●

Public Defense Services Commission

Budget Building for 2015-17

By Nancy Cozine, Executive Director, Office of Public Defense Services

The Public Defense Services Commission (PDSC) is beginning budget development for the 2015-17 biennium. Much like past biennia, the base budget will be calculated to determine what is needed to continue services as they are currently provided. This is called "current service level" (CSL). The agency will also submit policy option packages, or POPs.

In order to build POP requests that accurately capture providers' most pressing needs, the PDSC, in collaboration with OCDLA, is undertaking a multi-stage approach to collecting provider suggestions. At the OCDLA Management Conference in October 2013, providers spent 90 minutes working with professional facilitators to create a list of needs. A summary of what contractors were asked to consider, along with their suggestions, is included below.

Over the next four months, PDSC and OCDLA representatives will be meeting with providers in regional groups across the state. Those are being scheduled as follows:

December:	Eastern Oregon
January:	Central Oregon Southern Oregon Tri-County North Coast
February:	Willamette Valley

During these regional meetings, providers will focus on prioritizing their needs so that complete package suggestions can be created and presented for the Commission's consideration, and public comment, at the PDSC meeting in April 2014. If you have an idea regarding the needs in your area, please share them with your contract administrator so that they can be included in the discussion.

Learn more about who we are and what we do at: www.youthrightsjustice.org

Summary from PDSC Meeting on October 25, 2013, Salishan Lodge, Oregon

Chair Ellis invited Tom Crabtree (public defender scribe), Jim Arneson (law firm scribe), and Jennifer Nash (consortia scribe) to present information about the work of each group.

Each group was asked to consider five challenges for public defense providers as a starting point for the process:

- Providing zealous and effective client centered representation
- Effective quality assurance practices including recruitment, training, mentoring, supervision, performance reviews, and procedures for corrective actions
- Case assignment protocols that match seriousness of case types to the skills and experience of the assigned attorney, and ensures balanced and manageable workloads
- Information systems that support effective management and provider work and to assist with documenting and evaluating case outcomes
- System and community engagement that furthers understanding and appreciation of public defense providers and assists policy makers with substantive and budgetary decisions that support public defense providers and the work that they do

Public Defender Group - Tom Crabtree

- Develop a normalized set of workload standards for all provider types to promote global system efficiencies
- Identify and recruit new champions for public defense in the Legislature
- Restructure contracts to ensure office stability during fluctuating caseloads, as when payments are reduced by 10 cases, there is no correlating cost savings in the office
- Ensure equal access to eCourt data, and provide assistance in preparing for eCourt implementation
- Develop mobile computing capability in jails, courts, and DHS settings

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- Improve data collection and retention
- Digital storage of files in a searchable format
- Optimized case management systems
- Mandatory technology training for attorneys and staff
- Mentoring and co-counseling programs for all young attorneys
- Recommended ratios of attorneys to investigators and support staff
- A flexible workload cap
- Regular meetings with other Oregon public defender administrators
- Management training on issues unique to public defenders, including performance appraisals with meaningful data for objective measurements, systemized regular reviews, and use of a client satisfaction survey system

Private Law Firms - Jim Arneson

- Assistance with recruitment or advancement of lawyers in smaller communities and smaller firms, including financial incentives for attorneys in smaller or rural areas, with a bonus for staying long enough to become an experienced resource in that community.
- OPDS assistance with PLF dues, continuing legal education courses, etc.
- Assistance in developing lawyer talent:
  - o An exchange program or buddy firms to help small firm lawyers get the experience necessary to meet OPDS minimum qualification standards or relaxing the qualification standards
  - o Allow attorneys to become qualified through alternative experiences
  - o Provide incentives (perhaps CLE credit) for experienced attorneys who volunteer to mentor newer attorneys
- Expanded provider lists in border counties
- OPDS assistance negotiating a more uniform method of accessing jails and correctional facilities, as each firm spends significant time getting approval to visit the various state and local institutions

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- More training on managing problem clients, clients with or without mental health problems, and crisis management
- Ready access to the appellate division's outlines and case briefs in order to familiarize themselves with recent case law
- OPDS bargaining for bulk IT functions, such as West Law and LexusNexus, Microsoft or other software, case management software, especially eCourt data if that could be pushed into a case management system
- Creation of an RFP to secure regional or county dedicated training programs to provide standardized training to all providers and staff.

Consortia group - Jennifer Nash

- Consortia workgroup to share information, gather and analyze data, and improve performance and quality of representation statewide
- OPDS assistance with the efficient gathering and analysis of data
- Consortia education outreach to the bench, the bar, and the legislature about the advantages of the consortia model, especially in juvenile dependency cases where consortia attorneys bring experience in other areas of the law that can be helpful, there are reduced

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conflicts, and a decentralized delivery system

- Formal mentorship program and experienced-based compensation
- Financial assistance with PLF, bar dues, CLEs, etc.
- Loan forgiveness programs for private attorneys who provide public defense as a portion of their workload. ●

Juvenile Court Judge Finds

Pennsylvania Juvenile Sex Offender Registration Law Unconstitutional Under State and Federal Law

(Reprinted with Permission from a Blog Post by the Juvenile Law Center on November 7, 2013.)

In a landmark ruling for Pennsylvania, **York County Court of Common Pleas Judge John C. Uhler ruled on November 4, 2013 that Pennsylvania's recently enacted law requiring that juveniles convicted of sexual offenses be subjected to lifetime sex offender registration violates their rights under various provisions of the Pennsylvania and United States Constitutions, as well as Pennsylvania's Juvenile Act.** (Read Judge Uhler's opinion here.)

In the final hours of 2011, and as a means to retain maximum federal funding, the Pennsylvania legislature hastily passed the law in order to come into compliance with the federal Adam Walsh Act. In doing so, the legislature incorrectly treated youthful offenders the same as adult sex offenders. As such, youthful offenders would be subject to the same requirements as adults under the Sex Offender Registration and Notification Act (SORNA).

> The belief that 'sex offenders are a very unique type of criminal' is not supported with respect to juvenile offenders. The Court finds that juvenile sex offenders are different than their adult counterparts ... that the rate of recidivism of juvenile sex offenders is low.
>
> - Judge John Uhler, Court of Common Pleas, York County, PA

Rooting his opinion in the still-prevailing principles of the juvenile justice system, Judge Uhler refused to permit the legislature to impose disproportionate lifetime penalties for acts committed as a child. Judge Uhler wrote: "As is all too common with juvenile sex offenders, their lives too have been marred by tragedies, traumas, addictions, abuse, and personal victimization. **Fortunately, as is also common with juvenile offenders, they have demonstrated a great capacity and willingness to rehabilitate and make better lives for themselves.**

"Since the Commonwealth enacted its first Juvenile Court Act in 1901, followed by the Juvenile Court Act of 1972 ... the overarching goal of Pennsylvania's Juvenile Court system has been to protect the public 'by providing for the supervision, care, and rehabilitation of children who commit delinquent acts through a system of balanced and restorative justice'," he continued. The belief that 'sex offenders are a very unique type of criminal' is not supported with respect to juvenile offenders. The Court finds that juvenile sex offenders are different than their adult counterparts ... that the rate of recidivism of juvenile sex offenders is low."

Praising the decision, Juvenile Law Center's Marsha Levick, who argued the case in court, noted, "Kids are different. As recognized by the US Supreme Court and as dictated by research, children may not be punished like adults in our justice system. As a court of second chances, juvenile court cannot impose lifetime penalties on children who we know are uniquely capable of turning their lives around and contributing to their communities."

Because the law was passed so quickly, and without proper discussion regarding juveniles, the legislature did not consider well-established

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research findings pertaining to the underlying causes, low recidivism rates, and successful rehabilitation of youthful sex offenses. The law unfairly, unnecessarily, and permanently branded youth as sex offenders for life, severely limiting their chances of becoming productive members of society – the exact opposite goal of Pennsylvania's Juvenile Act.

"This decision confirms that SORNA is extraordinarily punitive, especially when applied to children, whose offense patterns are starkly different than predatory adult sex-offenders," says Riya Saha Shah, Staff Attorney at Juvenile Law Center. "It is our hope that this decision will result in similar findings across the Commonwealth. The vast and onerous registration requirements are nearly impossible to navigate, even for an adult. **To impose this punishment on children is to set them up for failure - a failure that will lead to mandatory years of incarceration under the statute."**

Image courtesy of Naypong/FreeDigitalPhotos.netFreeDigitalPhotos.net

Judge Uhler banned application of the law both retroactively and prospectively, immediately declassified as 'sex offenders' the seven petitioners who brought the challenge, and ordered the State Police to immediately remove the seven children from the state registry.

"When people hear that someone is a "sex offender," they naturally assume that the person is a danger to society. In the case of children, all of the research studies prove that this is just not true," says Aaron Marcus, Assistant Defender, Defender Association of Philadelphia. "We agree that children who act out sexually should be held accountable, but they should also get treatment. All children deserve a chance to grow up and move on with their lives."

Two additional cases are pending in Lancaster and Monroe counties regarding the SORNA registration requirements now required by Pennsylvania law.

Petitioners were represented by Marsha L. Levick and Riya Saha Shah from Juvenile Law Center; Barbara Lee Krier and Anthony J. Tambourino from the York County Public Defender Office; and private attorneys Korey Leslie, Tracey McPate, and Kurt Blake. The Defender Association of Philadelphia appeared as *amicus curiae.* ●

Case Summaries

Following summaries by Christa Obold-Eshleman, YRJ Attorney

State v. N.R.L., 354 Or 222, 311 P3d 510 (2013)

This case presented the issue of "whether Article I, section 17, of the Oregon Constitution, which requires a trial by jury in 'all civil cases,' applies to a restitution determination in a juvenile delinquency proceeding." The Oregon Supreme Court held that "a restitution determination under ORS 419C.450 is not civil in nature and that Article I, section 17, therefore does not require a jury trial."

The youth had been adjudicated delinquent for second-degree burglary and first-degree criminal mischief for entering a warehouse and damaging property. The youth filed a motion for a jury trial under Article I, section 17, as to the amount of restitution, arguing that recent constitutional and statutory amendments have fundamentally transformed juvenile restitution into a civil recovery device. The juvenile court denied the motion and ordered restitution of $114,071.

The Oregon Supreme Court first addressed the differences between juvenile delinquency and adult criminal cases, given that its previous caselaw on Article I, section 17, had been in the context of adult criminal cases. The court found that "restitution in a juvenile proceeding constitutes a sanction for conduct that is criminal in nature. Accordingly, * * * may be understood * * * as an 'aspect of criminal law.'"

The Court next analyzed whether the changes in the law since *State v. Hart*, 299 Or 128, 699 P2d 1113 (1985), meant that restitution was now "better understood as a means of compensating or restoring the person that the juvenile has injured." Unlike at the time of *Hart,* Article I, section 42 of the Oregon Constitution, and ORS 419C.450 now remove all discretion from the juvenile court judge as to the imposition of or amount of restitution, and provide that the victim has a right to the full amount of their economic damages. ORS 147.500 to 147.550 provide a mechanism for the victim to enforce this right. The court noted, however, that the victim cannot directly assert a claim against the juvenile offender, but only a claim "that the trial court did not properly discharge its constitutional obligations," so "is not analogous to a private right of action."

The court went on to state that the fact that restitution is no longer flexible, nor explicitly tied to goals of rehabilitation, does not change its fundamentally penal nature, in spite of the blurring of lines between civil and criminal law. The court noted that Article I, section 42 does not distinguish between juvenile and adult proceedings, defining "criminal defendant" to include "an alleged youth offender in juvenile court delinquency proceedings," and "convicted criminal" to include "a youth offender in juvenile court delinquency proceedings." The court concluded that the legislature "determined that a mandatory rather than a discretionary restitution regime would better serve the penal ends that it wished to achieve." The Supreme Court affirmed the circuit court and Court of Appeals.

State v. J.N.S., 258 Or App 310, 308 P3d 1112 (2013)

This case addresses 1) the meaning of "enters or remains unlawfully in a building with intent to commit a crime therein" in the definition of burglary under ORS 164.215; 2) the meaning of the "pyrotechnic" exclusion from the definition of "destructive device" under ORS 166.382 and 166.384.

Youth and a companion broke into and entered a vacant house with the intent of "hanging out" inside. Once inside, the youth formed the intent to take a key he found inside, and did take the key. They were arrested

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as they left the house. Police found a tennis ball packed with smokeless gunpowder and a Pixie Stick fuse in youth's bag, which youth admitted making. An explosives expert testified that the ball would have been incendiary or explosive, and could have inflicted cuts or burns on people within a 6 to 8 foot radius, but was at the very low end of explosive devices. Youth said that if he decided to light it, he planned to do it outside in an open area, and that his purpose in making it was to create a "visual display," "[l]ike a bright flash," "that would be cool to look at." The juvenile court adjudicated the youth delinquent for burglary in the second degree, possession of a destructive device, manufacture of a destructive device, and third-degree theft.

The Court of Appeals first addressed the burglary charge, and followed the Oregon Supreme Court's interpretation of the "enters or remains unlawfully" language from *State v. White*, 341 Or 624, 639-40, 147 P3d 313 (2006). The Court of Appeals held:

> "second-degree burglary may be committed in two alternative ways: (1) entering a building unlawfully with the intent to commit a crime therein; or (2) entering a building lawfully, but then remaining unlawfully--*viz.*, failing to leave after authorization to be present expires or is revoked--with the intent to commit a crime therein. In either case, burglary requires criminal trespass *for the purpose of committing a crime*. Thus, the proper focus is on the defendant's intent at the initiation of the trespass. If the trespass begins when a defendant *enters a building*, then we ask whether the defendant possessed the requisite criminal intent at the time of the unlawful *entry*. If the trespass begins when a defendant *remains in a building* after authorization has expired or has been revoked, then we ask whether the defendant possessed the requisite criminal intent at the time of the unlawful *remaining*."

Because the youth's intent to steal had been formed only *after* unlawfully entering the house, the court found that it did not fall within the burglary statute, and reversed with instructions to enter an adjudication for second-degree criminal trespass.

The court then examined whether the youth's tennis ball device was a "pyrotechnic" device excluded from the definition of "destructive device" under ORS 116.382(2)(a). The court first found that:

> "'destructive device[s]' include 'bomb[s]' that have 'an explosive or incendiary component,' but do not include 'any device which is designed primarily or redesigned primarily for use as a * * * pyrotechnic * * * device.' Therefore, even if a device is a 'bomb' with an 'explosive or incendiary component'--as the state argues the tennis ball device is--it is not a 'destructive device' if it is 'designed primarily' for use as a 'pyrotechnic' device."

Applying the definition of "pyrotechnic" from *State ex rel. Juv. Dept. v. Garrett*, 193 Or App 629, 631, 91 P3d 830 (2004), the court found: "'The critical inquiry thus becomes whether the tennis ball device was "'designed primarily * * * for use' in 'providing a visible or audible effect.'" The court then held that the term "designed" means "the designer must *subjectively* intend or plan that the device will be employed principally for the purpose of providing a visible or audible effect." (Emphasis added.)

Because the juvenile court had erroneously applied the law, the Court of Appeals found that factual issues remained unresolved regarding whether the tennis ball fell under the pyrotechnic exclusion. The court reversed the adjudications for possession and manufacture of a destructive device, and remanded for a new adjudication on those counts. ●

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Following summaries by YRJ

State v. Algeo, 354 Or 236, 311 P3d 865 (10/31/13)

This petition for review was filed by a crime victim, who alleged that the trial court had violated her right to "receive prompt restitution." Article I, section 42(1)(d) Oregon Constitution. Petitioner had been hit by defendant's car while crossing a street. Defendant pleaded guilty to one count of DUII and two counts of Assault IV. The trial court had applied a contributory negligence analysis, because the petitioner had been jaywalking at the time of the crime, and awarded petitioner 10 percent of her economic damages in restitution to be paid by the defendant.

On review, the Petitioner did not contest the trial court's determination that she was 90 percent responsible for the injuries she suffered, but instead argued that the Court should determine the 10 percent award violated petitioners constitutional rights under Article I, section 42(1)(d) and that the Court had authority to consider whether the trial court committed statutory error under ORS 137.106(1)(a). ORS 137.106(1)(a) requires that the defendant pay the "full amount" of economic damages resulting from the crime.

The Court declined to address petitioner's claim of statutory error, holding that "the legislature has limited direct review under ORS 147.535 (3) to considering whether the trial court had committed *constitutional* error" [emphasis in original]. Analyzing the history of the adoption of Article 1, section 42, the Court found that the voters did not intend to require restitution to incorporate the concept of repayment "in full" of economic damages, but rather intended to create a procedural right that would ensure victims receive the amount of restitution to which they were entitled. Thus, the Court held that Article I, section 42(1)(d) does not grant petitioner a right to restitution in the full amount.

United States v. Bahr, 730 F3d 963 (9th Circuit, 9/16/13)

The Oregon defendant in this case had previously been convicted of third degree rape and required to complete a sex offender treatment program, including providing a full disclosure polygraph. Bahr was advised by the trial court in that case that if he did not fully disclose he would be subject to revocation of his supervised release and incarceration. Bahr was not guaranteed immunity for any disclosures. Bahr participated in the full disclosure polygraph, and completed a treatment workbook and disclosed numerous other incidents of sexual contact with minors.

Subsequently, Bahr was convicted of two counts of possession of child pornography. The state included Bahr's polygraph and treatment disclosures in the pre-sentence investigation report for the pornography case. Bahr's motion to suppress the disclosures was denied. On appeal the Ninth Circuit held that even though Bahr had not asserted his privilege against self-incrimination at the time of the polygraph and treatment disclosures, his Fifth Amendment right was self-executing because its assertion was "penalized so as to foreclose a free choice." The disclosures were, thus, unconstitutionally compelled and to use such disclosures in a later, unrelated criminal proceeding is also unconstitutional.

Vasques v. Rackacuckas, 734 F3d 1025 (9th Circuit 11/5/13)

In two class actions challenging a California state court default judgment and injunction obtained by the state against the Orange Varrio Cypress Criminal Street Gang and its members and associates seeking to abate gang activity under public nuisance statutes, the 9th Circuit panel held that the scope of the state court injunction was extraordinarily broad and that *some* adequate process to determine gang membership was required. The panel affirmed the district court's issuance of declaratory and injunctive relief barring enforcement of the state court order against the plaintiffs. The panel went on to hold that if the defendants propose a procedure constitutionally sufficient to determine which members of the plaintiff class are members of Orange Varrio Cypress Criminal Street Gang against whom the Order may be enforced, the district court will consider modifying the federal injunction. ●

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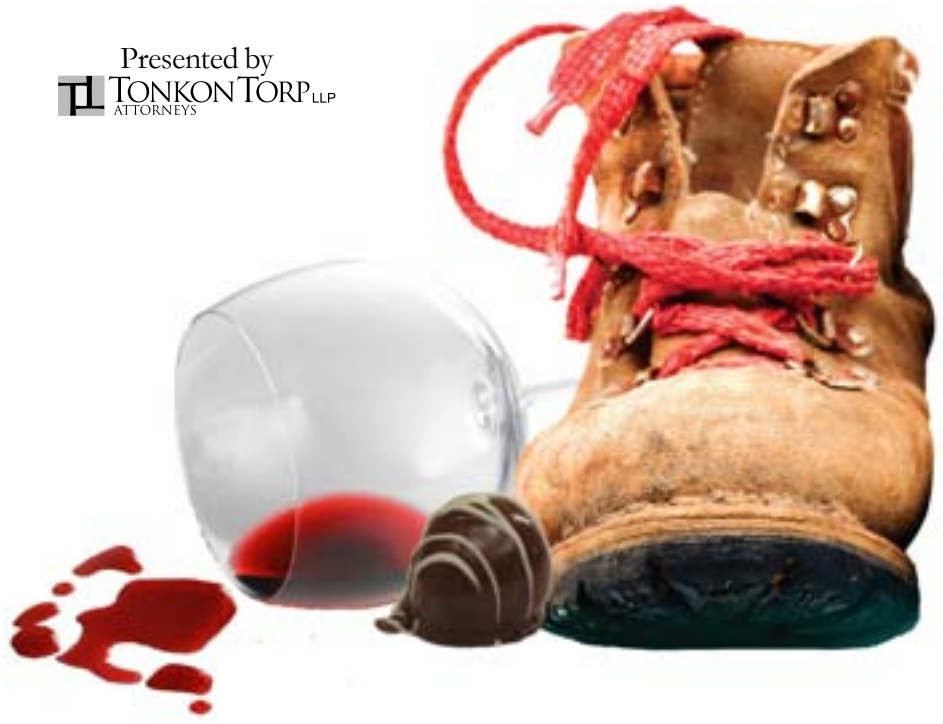

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