Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW

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"Exclusionary discipline, disproportionality and the involvement of law enforcement in school matters all contribute to the phenomenon now known as the School-to-Prison Pipeline."

— Mark McKechnie, YRJ Executive Director

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Oregon's New Approach to Juveniles Adjudicated of Sex Offenses

By Mark McKechnie, YRJ Executive Director

The passage of HB 2320 was like a trip from Portland to Salem via Madagascar--long and meandering, with some predictable and some surprising challenges. In the end, HB 2320, when it was signed into law by the Governor on August 12, 2015, removes the automatic requirement that juveniles adjudicated of a felony sex offense in Oregon have to register as sex offenders unless and until such time that they are relieved of the requirement.

Who the bill affects and who it was intended to affect is an interesting story, as well. Clearly, the intent was to remove the requirement for juveniles who will be adjudicated after the effective date. Arguably, the intent of the bill was also to benefit juveniles who had been adjudicated before the effective date, but were still under the jurisdiction of the court (typically, those still under the supervision of the county juvenile department and/or the Oregon Youth Authority).

In reality, the bill impacted both of these groups and every other juvenile on the registry – at least temporarily.

An interesting confluence of factors, including the volume of amendments and the speed at which they were being developed, added and changed, led to a very significant drafting error is Section 8 of the bill, amending ORS 181.809.

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The bill changed this:

181.809 Reporting by sex offenders adjudicated in juvenile court. (1) Unless the juvenile court enters an order under ORS 181.823 or 181.826 relieving a person of the obligation to report as a sex offender, subsections (2) to (4) of this section apply to a person:

(a) Who has been found to be within the jurisdiction of the juvenile court under ORS 419C.005, or found by the juvenile court to be responsible except for insanity under ORS 419C.411, for having committed an act that if committed by an adult would constitute a felony sex crime; or

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(b) Who has been found in a juvenile adjudication in another United States court to have committed an act while the person was under 18 years of age that would constitute a felony sex crime if committed in this state by an adult….

To this:

181.809 Reporting by sex offenders adjudicated in juvenile court. (1) Unless the juvenile court enters an order under ORS 181.823 or 181.826 relieving a person of the obligation to report as a sex offender, subsections (2) to (4) of this section apply to a person:

(a) Who has been ordered under section 31 of this 2015 Act to report as a sex offender; or

(b) Who has been found in a juvenile adjudication in another United States court to have committed an act while the person was under 18 years of age that would constitute a felony sex crime if committed in this state by an adult….

In other words, no one who has been adjudicated in a juvenile court in Oregon of a felony sex crime has to register unless and until they have a hearing before the court on the registration issue. These hearings will happen anywhere from several months to several years after adjudication. Thus, as of this writing, not one of these hearings have occurred. This does not "wipe the slate clean," however.

Discussions are underway to develop a fix for consideration by the 2016 Legislature. Until that time, juveniles who are already registered remain on the list maintained by the Oregon State Police. While the language in HB 2320 inadvertently had the effect of removing the reporting requirement, it did not require the State Police to remove anyone from the registry. Arguably, the effect of this error is that a person previously ordered to report who fails to register under ORS 181.809 after August 12, 2015, and who has not been ordered by a court to do so under Section 31 (as of this writing, not one of these hearings has occurred), has a very good defense against a charge of failure to register, which is a Class C Felony.

Now that we have addressed the intended and inadvertent changes to 181.809, let's review the new provisions in HB 2320, section 31.

Section 31 requires the court to hold a hearing within six months prior to the termination of juvenile court jurisdiction and consider whether the imposition of sex offender registration on a youth offender is warranted. The youth "has the burden of proving by clear and convincing evidence that the person is rehabilitated and does not

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Youth, Rights & Justice
401 NE 19th Ave., Suite 200
Portland, OR 97232
(503) 232-2540
F: (503) 231-4767
www.youthrightsjustice.org

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pose a threat to the safety of the public. If the court finds that the person has not met the burden of proof, the court shall enter an order requiring the person to report as a sex offender under ORS 181.809." Section 31, Sub. (3)(b) Section 31 also outlines a variety of records that the court shall review and criteria that the court may consider in making this determination, many of which are not validated indicia of the risk to commit a new sex offense. Never forget: when handling these cases that the purpose of sex offender reporting "is to assist law enforcement agencies in preventing future sex offenses." ORS 181.814(1)

Section 31 also provides for the appointment of counsel for youth to represent them at one of these "Section 31" hearings when the youth is deemed financially eligible. The statute allows the appointment of counsel to continue after adjudication/disposition until the conclusion of the hearing to consider the question of registration or the appointment or reappointment of counsel at a later time.

One of the more concerning provisions to attorneys for youth, as well as treatment providers and, likely, some juvenile justice professionals, is the provision in subsection 6 of Section 31:

"(a) In a hearing under this section, the juvenile court shall review:…

(B) All examination preparation material and examination records from polygraph examinations conducted by or for the treatment provider, juvenile department or Oregon Youth Authority."

This language was part of the negotiations with the Oregon District Attorneys Association, and a difficult compromise on this issue allowed the bill to pass. Advocates and treatment professionals, nonetheless, are concerned about the potential impact of providing such detailed information to the court and whether it may have a chilling effect on the treatment process itself.

Should the court decide at the conclusion of the hearing that the youth has not met the burden and is ordered to register, the youth will still be eligible to apply for relief under ORS 181.823. The court's findings may indicate the criteria that the youth may need to address or remedy in the future in order to successfully petition for relief.

The most important and lasting effect of HB 2320 will be that youth adjudicated in Oregon on or after August 12, 2015, may never have to register as sex offenders, unlike the more than 3,000 youth who have been subject to automatic registration over the last two decades.

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New Law Clarifies Legislative Intent Regarding Adoption Selection

By Mark McKechnie, YRJ Executive Director

Our organization, called Juvenile Rights Project at the time, worked with a group of four legislators in 2007 to pass several child welfare reforms. Three of those legislators, Rep. Wayne Kreiger and Senators Kate Brown and Jeff Kruse, still serve the state as elected officials today. Among the changes enacted that year were bills:

• to require the Department of Human Services to make diligent efforts to place children in foster care with relative caregivers and to place siblings in foster care together in the same home (SB 414);

• to empower the court to order placement with a parent, a non-relative foster provider or a relative foster care provider (SB 409); and

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• to change the definition of foster home to include the home of a person related to the child by blood or marriage and to require DHS to adopt payment standards for foster parents who are relatives (SB 282).

In 2010, the intent of these changes was apparently misconstrued by the Department when it established new adoption rules that excluded consideration of a current, non-relative foster parent—specifically, a "current caretaker" who has cared for a child for 12 consecutive months or longer—when one or more relatives was being considered to adopt the child. All of the 2007 legislation listed above focused on foster placement, not on the selection of an adoptive home. Nonetheless, the Department has argued that their rule changes resulted from the 2007 legislation.

The Department's definition of relative in the rule was broad and included more distant blood and legal relatives, including those who had never met, let alone cared for, the child. Under pressure to do so, DHS added a narrow exception to this rule, but the exception could only be requested by a DHS manager.

Since this change, only a very small number of non-relative current caretakers have been considered by adoption committees when a relative of the child or the child's sibling was also being considered.

Youth, Rights & Justice (still JRP at the time) submitted extensive comments on the proposed rules. Besides the narrow exception process and other minor changes, the rules remained in place until 2015. The Oregon Legislature passed SB 741 with unanimous votes in the House and Senate and Governor Brown signed the bill into law on July 27, 2015. Here is a brief summary of the changes made in SB 741.

The Emergency Clause makes sections one through five of the bill effective September 1, 2015. Members of the Senate Human Services and Early Childhood Committee added amendments to effect the changes in DHS rule so that current caretakers would be considered once again in cases that were already in process. The first five sections therefore go into effect sooner:

Section 1 amends ORS 419B. 090, a policy statement regarding the purposes of Oregon's juvenile dependency system, and adds language to

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state that the policy of the state of Oregon is to safeguard and promote each child's relationships with adults with whom a child develops healthy emotional attachments (in addition to siblings, grandparents and other relatives).

Section 2 adds a definition of "current caretaker" to ORS 419A. 004, adopted from the definition in DHS rules. A current caretaker is a foster parent "Who has cared for the ward, or at least one sibling of the ward, for at least the immediately prior 12 consecutive months or for one-half of the ward's or sibling's life where the ward or sibling is younger than two years of age." Subsection (9)(b)

Section 3 updates a cross-reference due to a change in numbering in Section 2.

Section 4 amends ORS 109.309 directs the Department of Human Services to adopt rules regarding tion 5 requires that rules adopted for home studies and placement by DHS "(b) Safeguard a child's rights under ORS 419B.090 (3) by considering a child's relatives and current caretaker as having equal status and priority as prospective adoptive parents in the consideration of each of the relative's and current care taker's respective abilities to meet the child's individual needs for safety, attachment and well-being; and (c)

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Give a child's relatives and current caretaker a greater weight in the consideration of suitability as prospective adoptive parents as compared to the department's consideration of other persons seeking to adopt a child who are not relatives or current caretakers."

The following sections are effective January 1, 2016:

Section 6 amends ORS 419B.349, regarding the court's authority to order a placement when it finds that it is in the child's best interests. The court may direct the department to place or maintain the child or ward in foster care with "a foster care provider who is or has been a current caretaker for the child." Subsection 2 limits this authority when the effect of the order would be to prevent the placement of the child with "a person who has been selected by the department to be the adoptive parent, when the selection has become final after the expiration of any administrative or judicial review procedures under ORS chapter 183" under ORS 419B.440(2)(c).

Section 7 amends ORS 419B.440 requires DHS to file a report with the court when the agency has removed or plans to remove a child or ward from a foster home if the child has resided in the placement for 12 consecutive months or was placed in the home pursuant to a permanent foster care agreement. The reporting requirement does not apply if the removal was made following a founded allegation of abuse or neglect by the foster care provider; when the removal was made to address an imminent threat to the health or safety of the ward; when the "agency has placed the child or ward with a person who has been selected by the department to be the adoptive parent, when the selection has become final after the expiration of any administrative or judicial review procedures under ORS chapter 183" or when the removal was made at the request of the foster provider.

Photo By Jake Stimpson CC by 2.0

Section 10 requires the court to hold a review hearing within 10 days of the report made under ORS 419B.440(1)(c), i.e., the new reporting requirements added in Section 7 of the bill.

Sections 8, 9 and 11 make additional updates to cross-references in ORS 419B. 443, 446 and 470, respectively.

Sections 12 thru 14 include an emergency clause and specify the operative date of Sections 1-5 as September 1, 2015, and the operative date of Sections 6-11 as January 1, 2016.

The bill was carried to passage on the Senate floor by chief sponsor, Sen. Chip Shields, and on the House floor by co-sponsor, Rep. Duane Stark. Both legislators have fostered children in Oregon's child welfare system. Other sponsors included Senators Olsen (chief co-sponsor), Gelser, Johnson, and Monnes Anderson, as well as Representatives Olson and Williamson. ●

VIEW FROM THE BENCH

The Honorable Lindsay R. Partridge, Marion County Circuit Court Judge

1. How long have you been a judge on the juvenile law bench?

I have presided over the Marion County Juvenile Court since July 1, 2013. Prior to taking the bench in 2012, I worked as an attorney in juvenile court for about 10 years.

2. What has surprised you most since joining the juvenile bench?

How difficult it is to try to manage so many different community partners in developing options for families and children. One that has been reinforced to me is the people engaged in the juvenile system really are committed to improving the lives of children and families.

3. If you could change one (or more than one) thing, what would it be?

I have many but I'll address three. First, we need a better system to match appropriate services for children and parents. There are a myriad of service providers that want to help children and parents, but often the identification of available services and then the referral process to obtain those services is overwhelming. Second, we have a crisis regarding mental health services for children and our community needs to find better options. Third, we need evidence based data to evaluate the effectiveness of the various services providers. Do we have any idea which service providers actually provide effective services to child and/or parents? I don't – I only know anecdotally which programs I think are effective – but that's based on my personal belief as opposed to any actual data.

4. What practices do you observe (and encourage others to emulate) from the most effective lawyers?

The best attorneys are on time and prepared for court. They tell the judge what they want the judge to do and why the judge should do it. Some attorneys come to court and simply criticize caseworkers or probation officers and never offer solutions to problems.

Effective attorneys also learn how to tell their clients what they need to hear, rather than what they want to hear. As an attorney, I often did my most difficult negotiating with my client. To work effectively with a client you must show them empathy, respect and patience. Often it is emotionally exhausting to demonstrate that type of compassion. That's why not all attorneys are well-suited for juvenile work.

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Legislative Wrap-Up 2015

By Mark McKechnie, YRJ Executive Director

The 2015 Oregon Legislative Session was unusual in many ways, not the least of which was the resignation of a four-term governor and succession by the Secretary of State, who happens to also be a former juvenile defense attorney. The Democrats held significant majorities in both the House and Senate and were able to pass several of their priorities, from gun control legislation, to paid family leave, to funding for Legal Aid from unclaimed class-action awards.

It also appears that legislators of both parties were less inclined to create new criminal or juvenile offenses or increased sentences after the hard-fought compromises in 2013 which have helped to keep prison growth in check in Oregon (so far). Fewer bills were introduced to add crimes or increase sentencing and even fewer passed into law.

While they often attract little to no media attention and less partisan debate, there was no shortage of interesting policy proposals related to juvenile dependency and delinquency and other issues related to children, youth and families. This is not intended to be an exhaustive or authoritative list, but here are some of the new laws that have gone into effect or will do so by January 1, 2016, passed by the Oregon Legislature in the session that ended in July, about which juvenile practitioners should know.

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Bill	Brief Description	Effective
HB 2313	After the original bill, which would have given the Department of Corrections broad access to confidential juvenile records for offenders in its custody, died in committee, juvenile system representatives worked with the Department of Corrections to develop a compromise on access to records under limited circumstances. HB 2313 became the vehicle to amend ORS 419A.257 to allow juvenile departments or the Oregon Youth Authority to release confidential records regarding: "(3)(a)A person who was transferred to the physical custody of the authority under ORS 137.124 and is subsequently transferred to the physical custody of the Department of Corrections under ORS 137.124 or 420.011 or any other statute; or (B) A person committed to the legal and physical custody of the Department of Corrections while the person is under the jurisdiction of the juvenile court under ORS 419C.005, including but not limited to a person in the legal custody of the authority." The final language is consistent with the original intent of the bill so that the DOC can provide continuity of medical, mental health or other services to persons who are transferred directly from the supervision or custody of a juvenile department or the youth authority.	6/22/15
HB 2320	This bill does a number of things related to adult and juvenile sex offender registration and modifies or cleans up bills passed previously in 2011 and 2013. Juvenile practitioners should note that this new law ends the automatic registration of juvenile sex offenders going forward. For more information on this change, see the article in this issue.	8/12/15
HB 2889	Requires Department of Human Services to ensure child 12 years of age or older in custody of department for at least six consecutive months is entitled to assistance to establish savings account at financial institution.	1/1/16
HB 2890	Requires Department of Human Services to ensure that substitute care providers for child or ward in care or custody of department provide opportunities to participate in at least one extracurricular activity and apply reasonable and prudent parent standard in determining participation.	1/1/16
HB 2908	According to the Senate Judiciary Staff Measure Summary, HB 2908: "Brings Oregon law into compliance with HR 4980, the federal Preventing Sex Trafficking and Strengthening Families Act of 2015. Specifies ward may be placed with fit and willing relative as option for permanency plan. Requires local citizen review board in dependency cases to include in findings and recommendations the steps Department of Human Services has taken to ensure that substitute care provider of child or ward 16 years of age or older in permanency plan of "another planned permanent living arrangement" is following reasonable and prudent parent standard and providing ongoing opportunities for child to participate in age-appropriate or developmentally-appropriate activities. Requires such description be included in six-month agency reports and in court's findings for continuation of substitute care. Defines "age-appropriate or developmentally appropriate activities." Defines "another planned permanent living arrangement." Defines "reasonable and prudent parent standard." Changes "independent living" to "successful adulthood." Requires inclusion of document describing rights and signed acknowledgment of copy of documents and explanation by ward within case plan." *Wrap-Up Continued on next page »*	10/1/15

Bill	Brief Description	Effective
HB 3014	Changes definition of "grandparent" in laws [ORS 419B.875(7)(f) and ORS 419B.876(6)] pertaining to notice to grandparents of juvenile dependency hearings regarding grandchildren, and that authorize grandparents to request visitation or other contact or communication with grandchildren when grandchildren are in legal custody of Department of Human Services. The amendments apply to juvenile dependency proceedings pending or commenced on or after the effective date.	1/1/16
HB 3391	Authorizes Attorney General to file action on behalf of Department of Human Services employee for stalking citation or stalking protective order upon request that has been approved in writing by Director of Human Services or designee and sets forth sufficient facts and evidence, and that in opinion of Attorney General is likely to succeed. Prohibits action from including request for certain damages, attorney fees and costs.	7/6/15
SB 222	Extends sunset on provision authorizing Department of Human Services to appear as party in juvenile court proceeding without appearance of Attorney General. The bill also establishes a Task Force on Legal Representation in Childhood Dependency "to recommend models for legal representation in juvenile court proceedings that will improve outcomes for children and parents served by the child welfare system, to ensure that parties in juvenile court cases are prepared to proceed and to enable courts to resolve juvenile court proceedings as quickly and efficiently as possible."	7/27/15
SB 475	Provides that students in youth care center within detention facility are to receive educational services through Juvenile Detention Education Program.	7/6/15
SB 553	Imposes limits on instances when student in fifth grade or lower may be subjected to out-of-school suspension or expulsion from school. See article in this issue.	7/1/15
SB 556	Prohibits use of expulsion to address truancy in Oregon public schools.	7/1/15
SB 741	Directs Department of Human Services to adopt administrative rules for home studies and placement reports in adoption proceedings that require that equal consideration be given to relatives and current caretakers as prospective adoptive parents, and that greater consideration be given to relatives and current caretakers as compared to other persons who are not relatives or current caretakers. See article in this issue for more information.	7/27/15
SB 5533	Public Defense Services budget.	7/1/15

The Oregon Legislative Information System was fully operational for the 2015 session. If you are interested in reading any particular bill, staff measure summaries, fiscal impact statements, written testimony submitted, committee witness lists, or viewing committee hearings or floor votes from the recent session, go to https://olis.leg.state.or.us/liz/2015I1 .

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In addition, the Department of Human Services received funding for the 2015-17 biennium to support guardianship assistance for children who are not eligible for Title IV-E funding. The eligibility for guardianship assistance for children placed with a relative caregiver is described in OAR 413-070-0917(2). The amended rules can be accessed at: http://www.dhs.state.or.us/policy/childwelfare/drafts/413-070%2020150814.pdf

* * *

Clackamas District Attorney John Foote has been very critical of Oregon's juvenile justice practices and those of the Annie E. Casey Foundation and the Juvenile Detention Alternatives Initiative (JDAI), in particular. Multnomah County has been a JDAI site for two decades and became a model host site where jurisdictions from around the country come to learn about JDAI. Data show that Multnomah County has dramatically reduced its use of pre-adjudication detention while its rates of juvenile arrests remained significantly below state and national averages.

Mr. Foote submitted several bills seeking changes in Oregon's juvenile delinquency statutes. Proposals included an expansion of pre-adjudicated detention (HB 2904); an introduction of determinate, minimum sentencing into the juvenile code (HB 2905); a change to statutes related to evidence-based programs (HB 2906); and a change in the definition of recidivism for youth offenders (HB 2907). Only HB 2907 received a hearing. It was opposed by the Clackamas County Board of Commissioners; Black Male Achievement Portland; Coalition for Communities of Color; Oregon Juvenile Department Directors Association, the Partnership for Safety and Justice, Children First for Oregon and Youth, Rights & Justice. Many opponents noted that the bill would likely exacerbate existing racial disparities in juvenile justice data (and, presumably, policy decisions based upon the data) by counting youth as recidivists when they had more than one referral to the juvenile court and/or arrest without ever having any juvenile court adjudication. This would have served to magnify the effect of racial disparities in arrest rates that currently exist. Testimony from Clackamas County pointed out that recidivism definitions based upon arrest data may be more likely to reflect "police behavior, community priorities, and funding," rather than being a reliable indicator of youth offending behavior.

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The 2015 Oregon Legislative Session resulted in many positive policy developments. Not every good bill passed, but many bad ones failed, as well. The Legislature was also able to allocate funding increases for most state services, including "current service level" inflationary increases for public defense providers and some additional funds to reduce disparities among different provider types paid from the public defense account.

The Oregon Legislative Information System was fully operational for the 2015 session. If you are interested in reading any particular bill, staff measure summaries, fiscal impact statements, written testimony submitted, committee witness lists, or viewing committee hearings or floor votes from the recent session, go to https://olis.leg.state.or.us/liz/2015I1 . ●

Visit us online at :
www.youthrightsjustice.org

We Can't Do It Alone

Thoughts from the 4th National ABA Parent Attorney Conference and the 16th National ABA Conference on Children and the Law

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Professor Marty Guggenheim opened the Parent Attorney conference with some stark statements:

- "We are the world's leader in destroying families."
- "We create 60,000 legal orphans per year."
- "Creation of a legal orphan is unconstitutional."

Dr. William Bell, Executive Director of Casey Family Programs, followed Professor Guggenheim and continued in the same vein, reminding the audience that forcibly removing children from parents breaks forever the physical bond between parents and children. He suggested that the only way to prevent the "inhumane practice" of forcible removal is to "bring others along with us." Judges, social workers, lawyers, and agency directors must come together to reframe our mindsets to accommodate a broader definition of the best interests of a child.

For two days in July, over 200 parents' attorneys converged in Washington D.C. to discuss new and innovative ways to represent child-welfare-involved parents. Many of the sessions focused on the practice of dependency law, making legal arguments on behalf of parents, but a number of sessions focused on the human component of our practice: taking care of ourselves and serving our clients with compassion and empathy.

Photo by ClleSuns92 CC by 2.0

We learned how to use the ADA to advocate for the rights of parents with disabilities and their children. Carrie Lucas, of the Center for the Rights of Parents with Disabilities, provided valuable practice tips: screen every parent client for a disability, document the disability by gathering records, request reasonable modifications early and often, and if modifications are not made, ask the court to order appropriate individualized services. The National Council on Disability's Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children is a valuable resource for attorneys.

We were taught how to distinguish

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medical child abuse from the actions of a protective and assertive parent of a medically fragile child. One speaker was a mother of a child with complex medical needs who faced an allegation of medical child abuse and had all of her children removed for the better part of a year. She discussed why it is necessary that these cases are managed by a team: parents, teachers, service providers, and doctors working together to provide care for a medically fragile child.

And we learned about working with immigrant families. Did you know that the Immigration and Customs Enforcement Parental Interests Directive requires that ICE arrange for detained parents' participation in court-proceedings, facilitate parent-child visitation as ordered by the court, and refrain from transferring detainees away from the location of the child welfare proceeding? Every ICE field office has a designated parental interest directive contact to provide assistance to parents' attorneys.

Parent representation experts from across the country repeatedly reminded us that we can't do this work in a vacuum. We must change public policy and develop community partnerships to support the defense of families. Advocates from New York, Michigan, Vermont, Washington, and California described the advantages of multidisciplinary, team-based representation for parent clients.

Utilizing the skills of social workers and parent mentors empowers parents and allows families to build on their strengths. Team-based representation has been shown to prevent removals and reduce time to reunification which, in turn, reduces trauma for children and saves money on foster care. Professor Vivek Sankaran of the University of Michigan described how to use data to persuade courts and policy-makers that the foster care system is inherently risky and not a safe solution. And Dr. Bell emphasized the importance of moving the affected voices to the center of the conversation by allowing parents and children to share their stories.

The National Conference on Children and the Law followed the Parent Law Conference and kicked off with The Juvenile Law Center's Bob Schwartz challenging attorneys to rethink the concept of "justice for children" to include advocacy for preventative services, strong and supported families, and independent and zealous legal representation. The second plenary speaker, Regina Calcaterra, attorney and author of Etched in Sand, shared her own harrowing story of homelessness and surviving the wild mood swings of an abusive mother while she and her four siblings were forced to fend for themselves. Her story offers a remarkable perspective, from the point of view of a child, on sibling attachment, the child welfare system, the limitations of foster care, and the power of resilience.

The diverse group of workshops for children's advocates ranged from the ethics of representing young children to how to use data to improve and assess the quality of legal representation. However, the importance of strong, independent and client-driven advocacy for all children was emphasized in every workshop I attended. Attorneys for children should do more than participate in the case; they should be directing the litigation from the shelter hearing through permanency.

We learned about the unique difficulties faced by boys in talking about stressful issues and experiences. Attorneys from the Children's Law Center in New York offered gender-guided approaches to overcoming some of the common difficulties encountered when interviewing boys. The video, The Mask You Live In (https://www.youtube.com/watch?v=hc45-ptHMxo), provides a brief but powerful look at boyhood in America.

In a workshop entitled "Working with immigrant families: consulates, caselaw and cultures", advocates discussed California's Reuniting

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Immigrant Families Act which adds deportation and detention to the list of compelling reasons for determining that a termination petition would not be in the best interests of a child. Jorge Tuddon-Meza, an attorney with the Mexican Consulate, described the many services the Consulate provides in cases involving dual-national children including relative search, home study coordination and placement follow-up, and guidance on proper service.

And, we were challenged by Leslie Heimov and Nancy Asparturian, managing attorneys at the Los Angeles Children's Law Center, to take risks, to argue more, and to contest long-standing beliefs that the agency charged with keeping children safe acts in the best interests of children. The speakers reminded us that our role as child advocates is to protect our clients from the overreaching acts of the state. Ms. Heimov and Ms. Asparturian referenced findings by MIT researcher Dr. Joseph Doyle that children on the margin of out of home placement do much better remaining in the home with supportive services in place. (To see Dr. Doyle's seminal work go to http://www.mit.edu/~jjdoyle/fostercare_aer.pdf). We also learned that zealous advocacy starts at the front end of the case; that best practice dictates investigation even before the shelter hearing commences. Because children who have been removed tend not to reunify, the initial shelter hearing must be more than a court's rubber-stamp of agency action.

For four incredible days, those of us attending the conference studied new and innovative practice techniques, strategies for system improvement, and how to take care of ourselves so that we can consistently deliver the quality of representation needed by our clients. At times, I was overwhelmed by the complexity of our work and by the nearly insurmountable obstacles faced by some of the parents and children involved in this difficult system. But, I was repeatedly reminded just how important our work is to our clients, our communities and to future generations. We must continue to advance access to justice for parents and children and to re-frame the narrative of families within the child welfare system. But, we can't change this system by standing alone. Dr. Bell was absolutely right when he said "Influence, partnership, and collaboration are the currency of our success." ●

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CASE SUMMARIES

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Dept. of Human Services v. M.E.M., 271 Or App 856 (2015)

On June 17, 2015 the Court of Appeals issued an opinion in *Dept. of Human Services v. M.E.M.*, 271 Or App 856 (2015), in which the Court reversed the trial court's denial of a motion to set aside a default jurisdictional judgment as to Mother. In this case, the default "Judgment of Jurisdiction and Disposition" was entered by the trial court following a status hearing in which Mother appeared by phone, but did not attend the status hearing in person. Mother's trial attorney filed a motion to set aside the default

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asserting that Mother did appear and participate in the hearing and that any failure to personally appear was due to good cause or excusable neglect. Mother's trial attorney filed a declaration asserting that Mother had appeared personally at several prior hearings, that she had been mistaken about the date of this proceeding, and that, in any event, she did appear by phone.

On appeal, Mother argued that the juvenile court lacked authority to enter a default judgment as a punitive measure when Mother appeared by phone and through counsel. DHS conceded that, in the "unique circumstances presented by this case", the juvenile court erred in denying mother's motion to set aside the jurisdiction judgment. The Court of Appeals concurred with the parties, reversed the denial of the motion to set aside, and remanded for further proceedings.

Dept. of Human Services v. M.A.H., 272 Or App 75 (2015)

On June 24, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. M.A.H.*, 272 Or App 75 (2015), in which the Court reversed the jurisdictional judgment as to Mother because, at the time of trial, there was not a current threat of serious loss or injury to Mother's 21-month-old child M.

The juvenile court found jurisdiction as to Mother under ORS 419B.100(1)(c) on the basis of mental health and emotional abuse. The jurisdictional trial was held in November 2014, four months after the removal of M from mother's care. The trial was twice set over, at the request of DHS, over Mother's objection. At the trial, DHS contended that (1) Mother's suggestion, made to the Father and Grandmother before M was born, that she might harm her unborn child, (2) Mother's act of leaving M alone in the car for 20 minutes at the store when M was nine months old, and (3) concerning texts and voicemails from Mother to Grandmother and Father, left during the month or two preceding removal, demonstrated that Mother posed an ongoing risk to M.

The Court of Appeals, finding the evidence insufficient to support a conclusion that the danger to M, if any, which existed at the time of removal continued to be present at trial four months later, relied on the following: (1)The record contains no evidence that would permit the conclusion that M was harmed by Mother's conduct in any nonspeculative way, (2) This is not a case where evidence of Mother's prior mental health issues are alone sufficient to support an inference of her present condition, (3) The history of Mother's mental health issues do not support the conclusion that, at the time of trial, Mother's mental health condition posed a serious threat to M given that Mother was participating in therapy and doing well, that Mother had an adequate long-term therapy plan, and that the expert psychologist's only concern was that Mother's mental health issues may put M at risk of harm—in the form of verbal abuse—in the future if Mother did not continue counseling.

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Dept. of Human Services v. D.L.O., 272 Or App 166 (2015)

On July 1, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. D.L.O.*, 272 Or App 166 (2015), in which the Court agreed with DHS' concession that, due to a time lapse of approximately six months between the evidentiary jurisdictional hearing and the trial court's entry of the jurisdictional and dispositional judgment, the evidence in the record was insufficient to establish jurisdiction. In this case, Mother appealed the jurisdictional and dispositional judgment over her child T, arguing that, at the time of the jurisdictional judgment, there was no current threat of harm to T. DHS conceded that, due to the lapse of time between the evidentiary hearing, held in March 2014, and the jurisdictional and dispositional judgment, entered in September 2014, the record was insufficient to establish that, at the time of the jurisdictional judgment, T's conditions and circumstances were such as to endanger her welfare. The Court of Appeals agreed with DHS, accepted DHS' concessions, and reversed the jurisdictional and dispositional judgments.

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Dept. of Human Services v. D.M.H., 272 Or App 327 (2015)

On July 15, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. D.M.H.*, 272 Or App 327 (2015) in which the Court reversed the trial court's denial of parents' motion to dismiss jurisdiction and terminate wardship over their daughter H. The trial court considered parents' motion dismiss at a permanency hearing. The Court of Appeals found the evidence in the record insufficient to support a finding that "H's conditions or circumstances at the time of the hearing gave rise to a current threat of serious loss or injury that was likely to be realized." When a parent moves to dismiss the juvenile court's jurisdiction, DHS bears the burden of proving continued jurisdiction is warranted. In this case, DHS "failed to present evidence at the hearing of the original bases for jurisdiction—the threat of serious loss or injury—in order to meet that burden" and the trial court appeared to have ruled based on an understanding of facts established during the initial jurisdictional hearing, not evidence presented during the hearing on the motion to dismiss. As a result, the Court of Appeals found the trial court erred in denying the motion to dismiss jurisdiction and terminate wardship.

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Dept. of Human Services v. J.C.H., 272 Or App 413 (2015)

On July 22, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. J.C.H.*, 272 Or App 413 (2015), in which the Court affirmed the trial court's termination of father's parental rights to three of his four children. Father makes two arguments: first, that, on de novo review, the juvenile court erred in terminating his parental rights because the evidence was insufficient to establish the statutory requirements by clear and convincing evidence and second, that his parental rights cannot be terminated on grounds extrinsic to those proved at the jurisdictional hearing because to do so deprives father of constitutionally adequate notice as to his actions required to end DHS involvement. The juvenile court found jurisdiction on exposing the children to domestic violence, allowing unsafe individuals in the home and failing to supervise the children and maintain community standards of cleanliness in the home. The TPR petition asserted eleven bases for termination including exposure of the children to domestic violence, failure to maintain a suitable or stable living situation, failure to learn or assume necessary parenting and/or housekeeping skills, failure to protect the children from sexual abuse, and physical and emotional neglect of the children. On appeal, father argued that the juvenile court was precluded from termination because the grounds on which father's rights were terminated were not contained within the jurisdictional petition and therefore adequate notice was not provided to the father. The Court of Appeals did not address the merits of father's argument, instead finding that five of the allegations contained in the TPR petition are "materially indistinguishable from the grounds on which the court asserted jurisdiction over the children." In addition, the Court concluded that the DHS proved those five allegations by clear and convincing evidence and those allegations were sufficient to terminate parental rights.

Dept. of Human Services v. M.P.-P., 272 Or App 502 (2015)

On July 22, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. M.P.-P.*, 272 Or App 502 (2015), in which the Court reversed the termination of parental rights of mother to her son J because the state failed to prove that termination was in J's best interest. In this case, at the time of the TPR trial, J was nearly 10 years old, had been in and out of the dependency system several times, and was currently placed in stranger foster care. There was no permanent adoptive placement identified, and there was "overwhelming evidence regarding J's strong attachment to mother." The Court found, on de novo review, mother to be an unfit parent and that integration of J in to mother's home is improbable within a reasonable time. However, the Court reversed the termination on best interest grounds and indicated that "an arrangement that accommodates a continuing relationship with mother would serve J's best interest." In its opinion, the Court emphasized that the facts establishing mother's unfitness do not include abuse of J and that the DHS caseworker testified to mother's "positive" and "nurturing" relationship with J.

Dept. of Human Services v. K.M.J., 272 Or App 506 (2015)

On July 22, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. K.M.J.*, 272 Or App 506 (2015), in which the Court affirmed the juvenile court's

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denial of mother's motion to set aside a termination judgment due to excusable neglect. In this case, in October 2013, mother received notice of a TPR hearing scheduled for March 6 & 7 of 2014. The notice required personal appearance and informed her that failure to appear could result in a TPR judgment. Before the TPR hearing, mother moved to Washington, failed to maintain contact with her attorney, and did not have contact with her children for three months. On February 24, 2014, mother sent letters to the court, her caseworker, and attorney and informed them of her move, provided her new address, confirmed the time and location of the TPR hearing, and requested that the TPR hearing be moved to Washington because she lacked a car and a phone. Mother's attorney responded to the letter, indicated that the hearing could not be moved to Washington, and requested that she contact him immediately. Mother did not respond. At the TPR hearing, mother's attorney moved to withdraw, the court denied the motion, and mother's attorney advocated for mother throughout the trial. The day after the hearing, mother contacted DHS and was informed of the termination judgment. Mother's attorney then moved to set aside the TPR judgment on the ground of excusable neglect. The trial court denied the motion and, on appeal, mother argues that she was denied effective assistance of counsel during the hearing and that she established excusable neglect sufficient to set aside the judgment. DHS argued that mother failed to preserve her inadequate counsel claim because she did not raise this issue in her motion to set aside the termination judgment. The Court, citing to *DHS v. T.L.*, 269 Or App 454 (2015), concurred. Furthermore, the Court concluded that mother did not establish excusable neglect because she cut off contact with her attorney and DHS months before the hearing, she did not respond to DHS' evidence that the agency could have provided a bus pass or gas voucher, she failed to indicate that if the TPR hearing was rescheduled she may have been able to attend, and, as a result of her failure to maintain contact with her attorney, she lacked the knowledge that she may have been able to appear by phone.

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Dept. of Human Services v. J.L.M., 272 Or App 566 (2015)

On July 22, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. J.L.M.*, 272 Or App 566 (2015), in which the Court reversed the jurisdictional judgment over the child based on mother's narcolepsy and parents' substance abuse and lack of appreciation of the risks it posed to the child. In their

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appeal, parents argued that the state failed to present legally sufficient evidence to establish that, at the time of the trial, the alleged condition and circumstances presented a risk of harm to the child of the type which warranted jurisdiction. The state responded that evidence of mother's narcolepsy, in combination with father's potential impairment from methamphetamine use, together create a risk of harm to the child. The Court, finding DHS "has presented no more than generalized assumptions that the alleged conditions and circumstances created a risk of harm of the type required for jurisdiction", reversed the jurisdictional judgment.

Dept. of Human Services v. C.A., 272 Or App 569 (2015)

On July 22, 2015, the Court of Appeals issued an opinion in *Dept. of Human Services v. C.A.*, 272 Or App 569 (2015) in which the Court reversed the jurisdictional judgment based on allegations of father's substance abuse and that father "does not have sole legal custody of the child" and therefore "cannot protect the child from mother's neglectful behavior". On appeal, father does not dispute the factual bases of the allegations regarding substance abuse and lack of a custody order. Instead, he argues that the state failed to present legally sufficient evidence that, at the time of the jurisdictional hearing, the alleged conditions and circumstances presented an actual risk of harm to the child of the type required for jurisdiction. The Court of Appeals agreed with father, holding that DHS failed to prove that father's substance abuse presented a nonspeculative risk of harm to the child, that the evidence doesn't support a finding that mother is seeking contact with the child or that, should she attempt to do so, father wouldn't be able to protect, and that there is no indication that a combination of the allegations presents a nonspeculative risk.

Dept. of Human Services v. M.E.M., 271 Or App 856 (2015)

On June 17, 2015 the Court of Appeals issued an opinion in *Dept. of Human Services v. M.E.M.*, 271 Or App 856 (2015), in which the Court reversed the trial court's denial of a motion to set aside a default jurisdictional judgment as to Mother. In this case, the default "Judgment of Jurisdiction and Disposition" was entered by the trial court following a status hearing in which Mother appeared by phone, but did not attend the status hearing in person. Mother's trial attorney filed a motion to set aside the default asserting that Mother did appear and participate in the hearing and that any failure to personally appear was due to good cause or excusable neglect. Mother's trial attorney filed a declaration asserting that Mother had appeared personally at several prior hearings, that she had been mistaken about the date of this proceeding, and that, in any event, she did appear by phone. On appeal, Mother argued that the juvenile court lacked authority to enter a default judgment as a punitive measure when Mother appeared by phone and through counsel. DHS conceded that, in the "unique circumstances presented by this case", the juvenile court erred in denying mother's motion to set aside the jurisdiction judgment. The Court of Appeals concurred with the parties, reversed the denial of *Dept. of Human Services v. K.L.*, 272 Or App 216 (2015), in which the Court affirmed the trial court's jurisdiction by default as to Mother and Father over their 16-year-old son. Parents argued that they were not properly served with summons under 419B.823 because service was not attempted by one of the specific methods listed in ORS 419B.823(1) to (4) and, consequently, the court's order of alternative service under ORS 419B.823(5) was impermissible. Therefore, parents argued, DHS did not serve them with summons using any methods authorized by ORS 419B.823 and, hence, the

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Juvenile Law Resource Center

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juvenile court erred in entering the jurisdictional judgment. DHS argued that ORS 419B.823 only requires that service is "in a manner reasonably calculated to apprise the person served" of the juvenile court proceeding and, that in this case, because DHS posted the summons on the door to parents' home, emailed the summons to father, and mailed summons to parents' home, service was proper. The Court of Appeals noted that whether parents received constitutionally adequate notice is a fact-specific determination and the test is whether the methods DHS used to serve parents were "reasonably calculated to apprise them of the proceeding". In this case, the Court determined that, taken together, the methods that DHS used to serve parents met the due process standard articulated in ORS 419B.823.

Dept. of Human Services v. B.M.C., 272 Or App 255 (2015), in which the Court vacated a judgment granting DHS' motion to set aside guardianship of O, the child in the case, and vacated a permanency judgment which continued a plan of permanent guardianship of O. Both judgments were vacated for lack of standing. In this case, in May 2014, based on DHS' motion, the trial court granted guardianship of O to maternal grandparents. DHS drafted the judgment which was then entered by the court. The judgment terminated DHS custody, dismissed DHS as a party, and required that the ward not be placed outside the guardian's physical custody without express approval of the court. One week after the court entered the guardianship judgment, DHS filed a motion to set aside the guardianship and, without prior approval from the juvenile court, removed O from the guardians care and placed O with paternal grandparents. Mother objected, arguing that a new dependency petition was required. The court granted the motion and entered the order to set aside on October 15, 2014. A permanency hearing followed; at that hearing, the court changed the plan to establish guardianship with paternal relatives. The permanency hearing judgment was entered on October 14, 2014.

On appeal, appellants argued that, because the juvenile court judgment establishing guardianship dismissed DHS as a party, the court lacked jurisdiction to consider and grant DHS' motion to set aside and the proper procedure was for a DHS to file a new petition. DHS conceded that it was no longer a party to the dependency proceeding but argued that it has a due process right to seek relief from the order dismissing it as a party to the proceeding. The Court of Appeals rejected DHS' argument because the state has "no entitlement to due process or standing to challenge the application of a state statute to it on constitutional grounds" and concluded DHS did not have standing to bring the motion to set aside the guardianship and that DHS was not a party at the time the permanency judgment was entered.

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Oregon Enacts Additional School Discipline Reform in 2015

By Mark McKechnie, YRJ Executive Director

Youth, Rights & Justice, with the help and support of a number of legislators and advocacy groups, introduced and passed two school discipline bills in the last two regular sessions of the Oregon Legislature. HB 2192 was passed in 2013 and went into effect July 1, 2014. That bill shifted the focus of discipline policies generally from exclusion to inclusion. It also removed Oregon's zero tolerance law, mandating a one-year expulsion for possession of "dangerous or deadly weapons" other than firearms or explosive devices (which are addressed by federal law).

SB 553 builds upon the foundation of the first bill but focuses specifically on elementary grades and specific behaviors. In the 2013-14 school year, nearly 8,000 elementary students were suspended or expelled from Oregon public schools. The vast majority (71%) were excluded for "disruptive behavior." Numerous studies have found that discipline for subjective infractions, including disruption, willful defiance and threatening behavior, lead to disparities disproportionately impacting students of color, students with disabilities and other vulnerable and marginalized groups.

Exclusionary discipline, disproportionality and the involvement of law enforcement in school matters all contribute to the phenomenon now known as the "School-to-Prison Pipeline." In 2011, 85% of youth admitted to all OYA programs or facilities had a history of school suspension and expulsion. This includes 24% of youth who had seven or more school suspensions or expulsions. Exclusion has also been found to correlate with much higher rates of school dropout.

Effective July 1, 2015, SB 553 requires Oregon public schools to restrict the use of out-of-school suspension and expulsion for students in Grade 5 and below. Schools may only exclude an elementary school student under very limited circumstances:

A. when the student causes serious physical harm to a student or school employee through non-accidental conduct;

B. when an administrator determines that the student's behavior poses a direct threat to the health or safety of students or school employees; or

C. when required by law. ORS 339.250(2)(d)

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In the cases of A and B, the school is not required to exclude the student from school if the administrator determines that alternative forms of discipline are adequate and appropriate to deal with the behavior. When federal law requires an expulsion, the district superintendent retains discretion to "Modify the expulsion requirement for a student on a case-by-case basis." ORS 339.250(7)(c)(B)

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In addition the new law requires schools to take steps when elementary school students are suspended so that the behaviors can be reduced or avoided in the future and so that the amount of time the student misses academic instruction is minimized. The bill does not prescribe specific strategies for accomplishing this requirement, but instead allows individual schools and districts to determine their own procedures to comply with this requirement. ORS 339.250(2)(e) The maximum period of suspension remains 10 days per episode.

Finally, SB 553 also defines "suspension days" for the purpose of counting and reporting. Exclusion that lasts more than half of the scheduled day is reported as a full day of suspension or expulsion. ORS 339.250(10) Schools have not consistently counted partial day exclusions as suspensions, and this may mean that schools do not provide adequate notice to parents and students or provide accurate data to state and federal agencies. The new language clarifies how suspensions should be recorded.

Sponsors of SB 553 included: Senator Gelser (Chief); Senators Devlin, Roblan and Rosenbaum; and Representatives Keny-Guyer and Komp. Groups that supported SB 553 included: Black Male Achievement Portland (City of Portland Office of Equity and Human Rights); Children First for Oregon; Northwest Health Foundation; Oregon Alliance for Education Equity (Representing Adelante Mujeres, ACLU Oregon, APANO, Chalkboard Project, Centro Cultural of Washington County, Coalition of Communities of Color, The Education Trust, NAACP Eugene-Springfield, Salem/Keizer Coalition for Equity, Portland Teachers Program, REAP, Salem-Keizer NAACP, and Stand for Children); Oregon Juvenile Department Directors Association; Oregon School Boards Association; and the Portland Parent Union. ●

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Case Summaries

Ohio v. Clark, __ U.S. __ , 135 S.Ct. 2173 (2015)

By Anne Haugard, YRJ Law Clerk

The Supreme Court held that a three-year-old's statement to his preschool teachers, identifying his caretaker as his abuser, was non-testimonial and admissible at trial, despite the toddler's unavailability for cross-examination. The toddler, L.P., arrived at his preschool with what appeared to his teachers to be a bloodshot eye and red marks on his body. L.P. initially denied anything having happened, then admitted that he fell. Finally, when confronted by the school's lead teacher, L.P. "said something like, Dee, Dee." L.P. stated that "Dee is big" and when the lead teacher lifted L.P.'s shirt, more marks were discovered. The child abuse hotline was called and authorities were alerted. L.P.'s younger sister had also suffered severe abuse, including ripped out pigtails and a burned cheek.

Justice Alito authored the majority opinion, with Justices Scalia, Ginsburg, and Thomas concurring. L.P.'s statements to his teachers "clearly were not made with the primary purpose of creating evidence for [the] prosecution." The primary purpose test, a creation of *Crawford v. Washington* and its progeny, asks "whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'create an out-of-court substitute for trial testimony.'" The Confrontation Clause of the Sixth Amendment does not apply to statements unless those statements were made with the primary purpose of being testimonial.

To determine whether L.P.'s statements were testimonial, the court looked to the presence of an ongoing emergency, the questioning by school personnel (rather than law enforcement), and L.P.'s age. The teachers asked L.P. what happened not in anticipation of prosecution but to save and protect L.P. from imminent harm. This is unlike police interrogation occurring several days after the fact. Though the defendant argued that mandatory reporting laws make teachers act in the role of law enforcement officials, the court did not accept this argument. Those "statutes alone can

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not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Finally, the court found that "statements by very young children will rarely, if ever, implicate the Confrontation Clause." Children at such a young age do not understand the criminal justice system and it is highly unlikely that they would intend their statements to be substitutes for trial testimony. The court looked to old common law, finding that children's hearsay was commonly admissible due to their incompetency to stand witness at trial.

In their concurring opinions, Justices Scalia, Ginsburg, and Thomas expressed concern that the dicta in the majority's opinion seeks to overturn Crawford and return the Confrontation standard to that of the broad "reliability" in *Ohio v. Roberts*. The court has also left unanswered the question of whether or not statements made to private parties invoke the Clause in the same manner as statements made to law enforcement officials.

Full text of decision at: http://www.supremecourt.gov/opinions/14pdf/13-1352_ed9l.pdf

Kingsley v. Hendrickson, ___ U.S. ___, 135 S.Ct. 2466 (2015)

By Afton Coppedge, YRJ Law Clerk

A pre-trial detainee, Kingsley, brought a 42 U.S. Code § 1983 action against Wisconsin county jail officers alleging, inter alia, that they used excessive force against him in violation of his Fourteenth Amendment rights. The United States District Court for the Western District of Wisconsin entered judgement on a jury verdict in the officers' favor.

On appeal, Kingsley argued that the jury instruction was erroneous because it did not adhere to the proper standard for judging a pretrial detainee's excessive force claim—objective unreasonableness. The United States Court of Appeals for the Seventh Circuit affirmed the district court's holding that the law required a subjective inquiry into the officers' state of mind (i.e. whether the officers intended to violate, or recklessly disregarded, Kingsley's rights). *Kingsley v. Hendrickson*, 744 F.3d 443 (7th Cir. 2014). Kingsley filed a petition seeking certiorari, which was granted.

The question before the Court was whether, to prove an excessive force claim, a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable.

The officers conceded that they intended to use the force that they used; the parties disagreed about whether the force used was excessive. While detained in the county jail, Kingsley was told by multiple officers to remove a piece of paper covering the light fixture above his bed. He refused. The next day, after refusing again, the jail administrator told Kingsley that officers would remove the paper and that he would be moved to a receiving cell in the interim. Four officers approached the cell, told Kingsley to stand with his back to the door, and keep his hands behind him; he refused. The officers handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands cuffed. Parties differ as to whether petitioner resisted an attempt to remove the handcuffs, but agree that one officer placed his knee on Kingsley's back and Kingsley used "impolite language" to tell him to get off. Parties dispute whether the officers then slammed petitioner's head into the concrete bunk, but agree that Kingsley was ultimately tasered and left handcuffed alone in the cell for about 15 minutes before the handcuffs were removed.

The Court considered the legally requisite state of mind, identifying two questions. The first concerned the officer's state of mind with respect to his physical acts – with respect to the bringing about of certain physical consequences. The second question concerns the officer's state of mind with respect to whether his use of force was "excessive." The first question was undisputed. As to the second, there was dispute as to whether to interpret the officer's physical acts as involving force that was "excessive." The Court concluded that the relevant standard is **objective unreasonableness**, and thus the officer's state of mind is not a matter that a plaintiff is required to prove.

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With respect to the objective standard, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable. Objective reasonableness turns on the "facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The court must make the determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with hindsight vision. *Id.* Further, a court must account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," and appropriately defer to the "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 540, 547, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979).

The court may consider a number of factors that may bear on the reasonableness or unreasonableness of the force used, including: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. See, e.g., Graham, 474 U.S. at 396. These factors are to illustrate the types of objective circumstances potentially relevant to a determination of excessive force; it is not an exclusive list.

Photo by Zach Baranowski CC by 2.0

Several considerations led the Court to conclude that objective unreasonableness is the appropriate standard for a pretrial detainee's excessive force claim. First, it is consistent with precedent. The Court has held that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." Id. at 395, n. 10. Punishment is not required for plaintiff to prevail on a claim that his due process rights were violated; a pretrial detainee can prevail providing only objective evidence that the governmental action is not rationally related to a legitimate objective or that it is excessive. Second, the objective standard is workable. It is consistent with the jury instruction used in several Circuits. Additionally, many facilities, *including the facility at issue here*, train officers to interact with detainees as if the officer's conduct is subject to an objective reasonableness standard. Finally, the use of an objective standard adequately protects an officer who acts in good faith. The court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer, and must take account of the legitimate interests in managing a jail.

The court next considered the lawfulness of the jury instruction given, in light of the adoption of the objective standard. The district court instructed the jury that to find that the officers used "excessive force," defined as "force applied recklessly that is unreasonable in light of the facts and circumstances of the time." The Court held that the instruction was erroneous because the word "reckless" suggests a need to prove that the

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officers acted with a certain subjective state of mind. Further, "reckless[s] disregard[d]" of Kingsley's safety listed as an additional element suggests the jury should weigh officers' subjective reasons for using force and subjective views about the excessiveness of the force.

The decision of the Court of Appeals was vacated, and remanded for proceedings.

Full text of decision at: https://scholar.google.com/scholar_case?case=18340296987794069026&hl=en&as_sdt=6&as_vis=1&oi=scholarr

State v. Nacoste, 272 Or App 460, (2015)

By Joshua Olmsted, YRJ Law Clerk

Defendant, Jesse Nacoste, appeals a judgment of the Marion County Circuit Court finding him guilty of one count of sexual abuse in the second degree for committing statutory rape by having sex with 16-year-old K. Defendant, who was 25 years old, met K at her friend's house, they began a relationship and K eventually moved in with defendant. At the time K was on runaway status and was also on probation for a juvenile adjudication; and had a warrant out for her arrest on a probation violation. Their relationship ended after a physical altercation that eventually led to a conviction for fourth-degree assault against defendant that he did not appeal. After the incident, K went to her grandmother's house, K's family notified police and K was taken to the Marion County Juvenile Department by Salem Police Officer Asay. After leaving K in the care of the juvenile department, Asay asked staff members to encourage K to report the assault. After a visit with family at the juvenile department, K disclosed to a juvenile department staff member that defendant had assaulted her. The staff member informed DHS as well as officer Asay that K was willing to file a report. K disclosed information about the assault and the sexual relationship K had with defendant.

Before trial, defendant moved to admit evidence of K's juvenile adjudications, the fact that she did not discuss the assault until she was in custody, and other facts related to her juvenile record. Defendant sought to question K in order to demonstrate K's "bias and motivation" for testifying under OEC 609-1 and *Davis v. Alaska*, 415 U.S. 308. In response to defendant's motion, the state conceded that K did have prior adjudications for disorderly conduct and for giving false information to a police officer, but argued that they were not criminal convictions under OEC 609(6) and were not admissible for impeachment purposes. The state argued that no aspect of K's juvenile history would be admissible to show bias or motive, and requested that the court bar defendant from questioning K regarding probationary status or prior adjudications. The trial court ruled in favor of the state, granting the state's request, clarifying that it would be permissible to elicit the fact that K was taken to detention based on her status as a runaway, but it would not be permissible to elicit the fact that her continued detention was due to juvenile delinquency. Defendant also moved to introduce extrinsic evidence of incidences of K lying about her age through character witnesses, the trial court deemed this information inadmissible under OEC 608(2), though mentioned, the court of appeals declined to rule on the matter, focusing solely on her incarceration status at the time.

The Court of Appeals held that the trial court erred in excluding evidence that K was in juvenile detention for delinquency matters at the time she incriminated defendant and at the time she was testifying. The Court outlined that defendant's right to impeach a witness for bias or interest is protected under the Oregon and US Constitutions, citing Davis as well as *State v. Hubbard*, 297 Or 789, 688 P2d 1311 (1984). The court, citing *State v. Calderon*, 237 Or App 610, 615, 241 P3d 335 (2010), stated that: "A party is entitled to make an 'initial showing of [a witness's] bias or interest.'" After outlining that "one well-recognized category of bias evidence is evidence that a witness has a reason to curry favor with the prosecution, or is under the influence of the prosecution, because of the witness's own criminal conduct or custody status," the court held that a defendant is entitled to explore that bias even if the witness is a juvenile "whose juvenile adjudications might otherwise be confidential or inadmissible." The court found that by precluding defendant from eliciting evidence regarding

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K's adjudications, the trial court "prevented defendant from making an initial threshold showing of the reasons that K would have for currying favor with the state," and that it was legal error that required reversal. The court found that K's credibility was "central to the jury's assessment of defendant's 'mistake of age' defense." The court disagreed with the state's contention that defendant had sufficient alternative possible routes to demonstrating potential bias that K might have held at trial. The court also rejected the state's argument that the fact that K's state of incarceration at the time did come out at trial was sufficient, stating that it "does not lead to the conclusion that the jury had an adequate opportunity to assess K's credibility…because the trial court's ruling prevented defendant from cross-examining K" and being able to establish a potential link between K's custody status and credibility.

Full text of decision at: http://www.publications.ojd.state.or.us/docs/A153242.pdf

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State v. Delong, 357 Or 365, ___ P3d ___, (2015)

By Joshua Olmstead, YRJ Law Clerk

Defendant appeals a denial of his motion to suppress evidence found through a search of his car during a traffic stop. Defendant was pulled over for failing to wear a seatbelt, after failing to produce a driver's license the officer placed him in handcuffs and moved him to his police car to ask identifying questions. Without having read defendant his Miranda rights, the officer asked defendant: "'if there was anything we should be concerned about' in his car." Defendant told the officer "no" and invited the officer to search his vehicle. (While defendant contests that he "volunteered" that the officer search his car, he did concede that consent was voluntary). Upon searching the vehicle, the officer found a fanny pack with methamphetamine and drug paraphernalia, at which point he read defendant his Miranda rights and formally placed him under arrest. The trial court refused to suppress the evidence of the search; however, the court of appeals reversed the decision, holding that the officer violated Article I, section 12 of the Oregon Constitution by failing to read defendant his Miranda rights, and that the physical evidence found in the car "derived from" that violation.

On review, the State conceded that the officer's question was in violation of Article I, section 12; however, the State argued that due to the nature of defendant's statements, the invitation to search was sufficient to attenuate the taint of the Article I, section 12 violation. In evaluating whether the physical evidence was the direct result of the Miranda violation, the court relied on the 3-factor test laid out in *State v Unger*, 356 Or 59, 333 P3d 1009 (2014) looking at: (1) the illegal conduct that comprised the stop or search, (2) the character of the consent, and (3) the causal relationship between the two. The court characterized the officer's violation as minor, given the short period of 2-3 minutes between detaining defendant and defendant's invitation to search. The court, while acknowledging that it was the unlawful question from the officer that prompted the invitation, held that the consent was volitional

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because the officer's prompting was "open-ended" and "more benign" than examples of other cases where evidence was suppressed in consent searches. The court differentiated traditional examples of evidence exclusion under Miranda on the fact that defendant in this case was not in the stationhouse and "subjected to the sort of extended questioning that caused the Court to require Miranda warnings."

Full text of decision at: http://www.publications.ojd.state.or.us/docs/S062176.pdf

Kirkpatrick v. County of Washoe, ___ F3d ___, (9th Cir. July 10th, 2015)

By Joshua Olmsted, YRJ Law Clerk

Father, on behalf of himself and his child B.W., appealed a grant of summary judgment in favor of the defendants, Washoe County, Nevada and three of its social workers, in a 28 U.S.C. section 1983 claim. On July 15, 2008, mother gave birth to B.W. in a Reno hospital, mother admitted to using methamphetamine throughout the pregnancy, and B.W. tested positive for methamphetamine. Mother already had two other children in the custody of the Washoe County Department of Social Services (WCDSS). Mother admitted that she would likely be unable to care for B.W. One of the workers placed a "hold" on B.W. effectively preventing her from being discharged from the hospital. Ellen Wilcox, the caseworker assigned to work with B.W., conferred with her supervisor, Linda Kennedy, who then authorized Wilcox to take custody of B.W. when the hospital discharged B.W. A day after B.W. was taken into the custody of the WCDSS, a hearing was held where it was determined that B.W. should remain in protective custody.

While it was suspected at the time of B.W.'s birth that Kirkpatrick, the father, might be the biological father, paternity was not determined with certainty until after B.W. had been removed from care and after the judicial hearing. The 9th circuit began by outlining the case for a violation of the 14th amendment rights of the father. The court stated that the applicable standard for a parent is that the 14th amendment: **"guarantee[s] that parents and children will not be separated by the state without due process of law except in an emergency."** Because father did not confirm his paternity before WCDSS assumed custody, the court upheld summary judgment for WCDSS and the social workers, stating that: "Kirkpatrick lacked a cognizable liberty interest in his relationship with B.W."

While the 9th circuit rejected the claims of the father, they overturned summary judgment on behalf of B.W. on the grounds that her removal from the hospital violated her 4th amendment right against unlawful seizure. The district court had ruled that the complaint was only on behalf of the father; however, the 9th circuit disagreed with this reading of the complaint. While the court acknowledged that the complaint was unclear as to whether it applied only to the father or both the father and B.W., they stated that the lower court should have requested a rule 12(e) motion for a more definite statement.

Next, the court examined whether the defendants were entitled to

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qualified immunity on B.W.'s claims. Looking first at whether "the official violated a statutory or constitutional right" the court elaborated the standard for whether government officials can take custody away from a parent as laid out in *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001) ("Government officials are required to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.'") The officials of the WCDSS did not obtain any judicial authorization to take custody of B.W. Looking at the question of whether B.W. was in immediate danger; the court held that because B.W. was in the secure care of the hospital staff, and that the officials could have obtained a warrant without any risk of harm to B.W. that the 4th amendment rights of B.W. were violated. The court noted that this analysis does not change simply because B.W. was only 2 days old at the time of the unlawful seizure.

Next, the court had to determine whether this constitutional right was "clearly established" at the time of the officials' conduct in order to waive qualified immunity. The court relied entirely on the case of *Rogers v. Cnty. Of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007), decided only a year before the events of this case. *Rogers* held that: "a child could not be removed from the home without prior judicial authorization absent evidence of 'imminent danger of serious bodily injury and [unless] the scope of the intrusion is reasonably necessary to avert that specific injury.'" The court noted *Rogers* dealt with taking children out of the home itself (in that case, holding that despite unsanitary conditions and neglectful care, a warrant was still required), and that this case was even more clear cut, stating that: "the fact that B.W. was in the hospital arguably should have made it more apparent to a reasonable social worker that she was not 'likely to experience serious bodily harm in the time that would be required to obtain a warrant.'" *Rogers* at 1294. The Court rejected the argument that the WCDSS workers could have seen Nevada State law as authorizing the seizure of B.W.

Finally, the Court ruled on whether the County itself was entitled to summary judgment. The court examined testimonial evidence from the social workers and the supervisor involved in the case and found that it was the established custom of the WCDSS to almost never obtain warrants when taking custody of children. Neither the case worker nor the supervisor involved in B.W.'s case was familiar with the process for obtaining a warrant. The supervisor confirmed that this was the case even when it was clear that a child was not in imminent danger. The court found that the county: "had an unofficial, unconstitutional custom of taking custody of children under non-exigent circumstances without obtaining prior judicial authorization." Because of these testimonial findings, the 9th circuit overturned summary judgment and remanded the case for further discovery to be presented to a jury.

Full text of decision at: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/10/12-15080.pdf

People v. Ackley, 149479, 2015 WL 3949236 (Mich June 29, 2015)

By Ricky Tucker, YRJ Law Clerk

Defense counsel's theory was that an accidental short-fall caused the child's death rather than shaken baby syndrome or abusive head trauma (SBS/AHT). Counsel's expert, Dr. Hunter, explained that there was a religious-like divide within the medical community about the proper categorization of the injuries in question, namely, whether the injuries were indicative of a short-fall or SBS/AHT. Dr. Hunter fell into the latter camp and consequently advised counsel that he was not appropriate for the defense. Dr. Hunter recommended Dr. Shuman, who was better suited for the defense due to a higher likelihood of a short-fall diagnosis. Counsel never read any medical articles about the controversy; never contacted Dr. Shuman or any other expert; continued to seek Dr. Hunter's advice despite repeated warnings that he was ill-suited for the job; relied only on Dr. Hunter

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in trial preparation; and provided Dr. Hunter with incomplete case materials leaving out critical information. Further, despite the admission of an affidavit of Dr. Spitz, who opined that he would have testified that the injuries were likely caused by an accidental "mild impact," counsel never contacted Dr. Spitz.

The trial court held that counsel's failure to obtain a suitable expert was objectively unreasonable and that such failure constituted prejudicial error. The Michigan Court of Appeals reversed, reasoning that the failure constituted a strategic decision and that it had no prejudicial effect on the outcome.

The Michigan Supreme Court reversed, reasoning that counsel's failure was objectively unreasonable. The issue was whether counsel's decision not to consult a second expert constituted trial strategy or was an objectively unreasonable failure. An attorney's decision in selecting an expert is trial strategy only if (1) the decision was made after thorough investigation of the law and facts; or (2) the decision was reasonable and made investigations unnecessary. Here, there was no thorough investigation nor was there any reasonable decision that made investigation unnecessary. Counsel knew that the prosecution's expert testimony required a response and the court even granted funding for counsel to obtain expert assistance. Despite this, counsel confined his search to only Dr. Hunter against repeated warnings by Dr. Hunter that he was not the best person for the defense. Further, counsel ignored Dr. Hunter's referral to a more appropriate expert and did not conduct independent investigations of the core controversy around which the case revolved. Thus, counsel's failure to investigate and to attempt to secure an appropriate expert witness was objectively unreasonable.

The Michigan Supreme Court further held that the prejudice from counsel's failure warranted relief. The issue was whether there would have been a reasonable probability that the outcome would have been different but for counsel's failure. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Here, the absence of expert testimony was critical since the prosecution had a formidable team of five experts. Further, Dr. Spitz's affidavit showed that an appropriate expert was available to rebut the prosecution's theory. The Michigan Supreme Court found that the strength and multitude of the prosecution's experts were not so overpowering so as to render counsel's failure harmless. Thus, counsel's failure to adequately prepare undermined the court's confidence in the outcome.

Full text of decision at: http://courts.mi.gov/Courts/MichiganSupremeCourt/oral-arguments/2014-2015/Pages/149479.aspx ●

Turnaround Looms In Federal Funding To Prevent Child Abuse

Read the full story from the August 19 posting on citylimits.org here:

http://citylimits.org/2015/08/19/turnaround-looms-in-federal-funding-to-prevent-child-abuse-neglect/?utm_content=buffer9918a&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer&utm_source=Rise+August+24+2015+1&utm_campaign=RISE+8%2F24%2F2015&utm_medium=email

Photo by Jeff Kubina CC by 2.0

Save The Date

Juvenile Law Training Academy
OCDLA
October 19, 2015
Oregon Garden Resort
https://www.ocdla.org/seminars/shop-seminar-2015-juvenile-law-training-academy.shtml

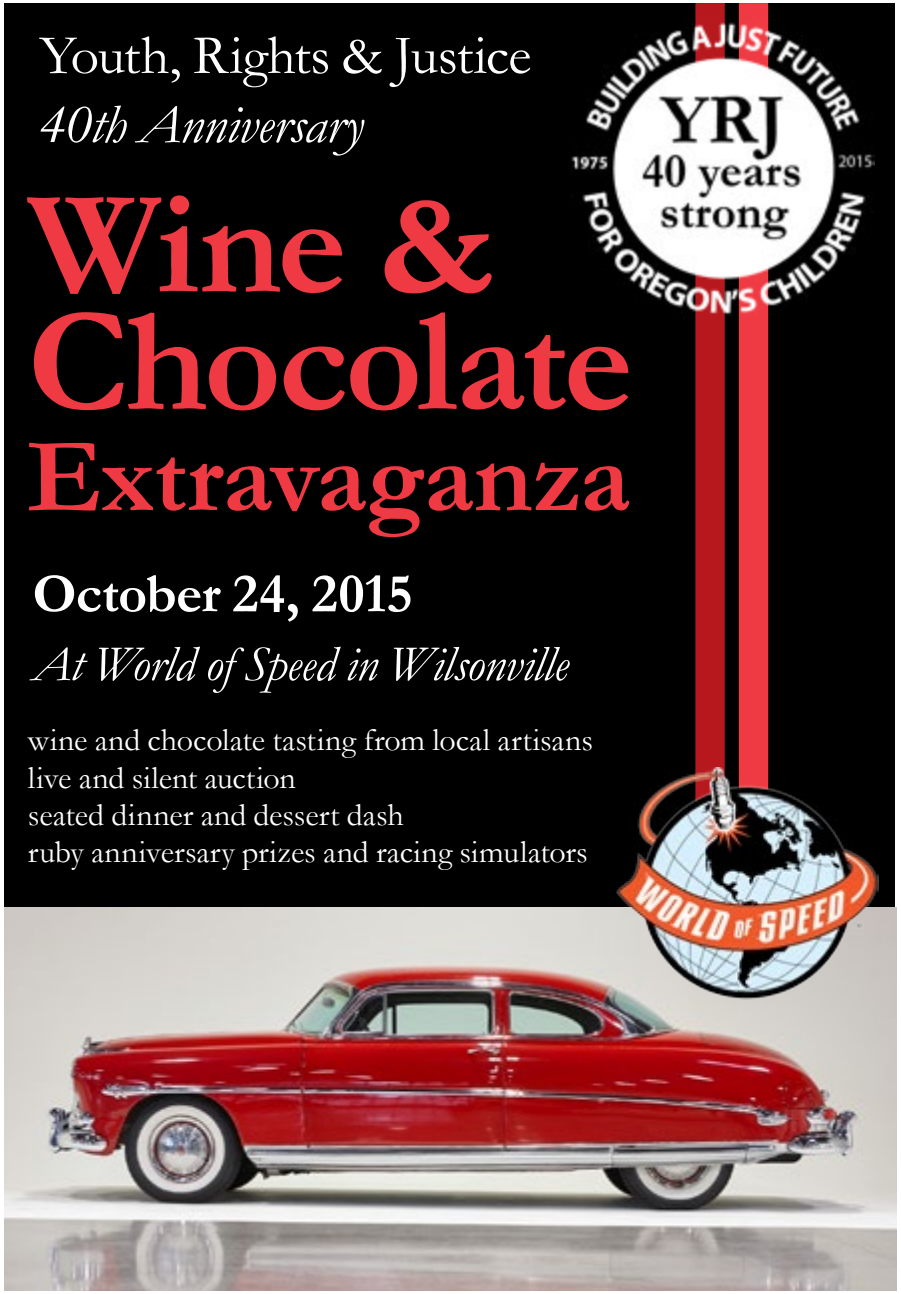
Public Defense Management Seminar
OCDLA & Office of Public Defense
October 22-23, 2015
Sunriver Resort
https://www.ocdla.org/seminars/shop-seminar-2015-public-defense-management.shtml

Black Lives Matter
Charles Ogletree, Professor, Harvard Law School
OCDLA Seminars
November 11, 2015 in Portland
November 12, 2015 in Eugene
https://www.ocdla.org/seminars/shop-seminar-2015-black-lives-matter.shtml

YRJ 40TH ANNIVERSARY WINE & CHOCOLATE EXTRAVAGANZA
October 24, 2015
World of Speed
Presented by Tonkon Torp
Tickets $150. Register at:
https://jrplaw.ejoinme.org/MyEvents/EventHome/tabid/670773/Default.aspx
Or contact Janeen Olsen:
503-232-2540 x231
janeen.o@youthrightsjustice.org

Please join us for an evening of wine, chocolate, race cars and competitive giving at the World of Speed! We are raising funds for the work ahead in the next year:
- **Monitoring implementation of new school discipline laws** and enforcing these reforms through our SchoolWorks program. We will protect students from unlawful discipline and defend their right to an education.
- **Ending the indiscriminate shackling of youth**—a practice that unnecessarily traumatizes children in our community.
- **Ensuring every child in Oregeon who needs one has a competent and effective lawyer.**

With your help, we can build a just future for all of Oregon's children.



NCJFCJ
est. 1937
NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES
WWW.NCJFCJ.ORG

RESOLUTION REGARDING SHACKLINGOF CHILDREN IN JUVENILE COURT

Whereas, the NCJFCJ defines shackles to include handcuffs, waist chains, ankle restraints, zip ties, or other restraints that are designed to impede movement or control behavior; and

Whereas, shackling of children in court may infringe upon the presumption of innocence, undermine confidence in the fairness of our justice system, interfere with the right to a fair trial, impede communication with judges, attorneys, and other parties, and can limit the child's ability to engage in the court process; and

Whereas,research in social and developmental psychology suggests that shackling children interferes with healthy identity development; and

Whereas, placing children in shackles can be traumatizing and contrary to the developmentally appropriate approach to juvenile justice; and

Whereas, placing children in shackles can negatively influence how a child behaves as well as how a child is perceived by others; and

Whereas, shackling promotes punishment and retribution over the rehabilitation and development of children under the court's jurisdiction; and

Whereas,shackling is contrary to the goals of juvenile justice, as defined in the Juvenile Delinquency Guidelines to implement a continuum of effective and least intrusive responses to reduce recidivism and develop competent and productive citizens; and

Whereas, continued attention and consistent judicial leadership is necessary to ensure that policies regarding shackling continue to be upheld regardless of changes in leadership or administration; and

Whereas, judges have the ability to advance and maintain policies and practices that limit the use of restraints or shackles.

BE IT THEREFORE RESOLVED AS FOLLOWS:

The NCJFCJ supports the advancement of a trauma-informed and developmentally appropriate approach to juvenile justice that limits the use of shackles in court.

The NCJFCJ calls for judges to utilize their leadership position to convene security personnel and other justice system stakeholders to address shackling and to work together to identify ways to ensure the safety of children and other parties.

The NCJFCJ encourages judges and court systems to continually review policies and practices related to shackling children.

The NCJFCJ supports a presumptive rule or policy against shackling children; requests for exceptions should be made to the court on an individualized basis and must include a cogent rationale, including the demonstrated safety risk the child poses to him or herself or others.

The NCJFCJ believes judges should have the ultimate authority to determine whether or not a child needs to be shackled in the courtroom.

Adopted by the NCJFCJ Board of Directors during their meeting July 25, 2015 in Austin, Texas