Juvenile Law Reader

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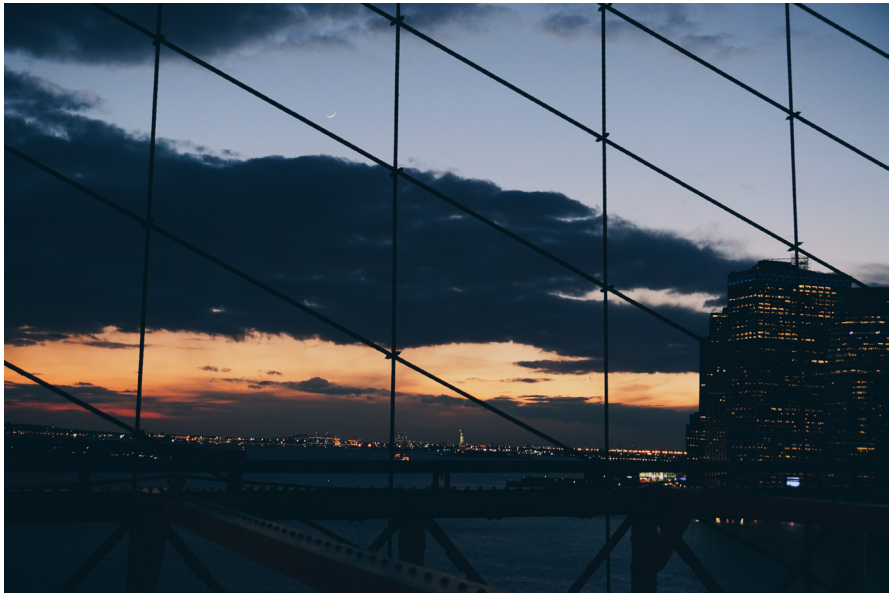
"We need to give kids a second chance, rather than locking them up and throwing away the key."

Sweeping Juvenile Justice Reform Goes to Gov. Brown for Signature

SB 1008: Establishes process for 'Second Look' hearings, eliminates mandatory adult sentencing and life sentences for juveniles



Picture by Steven Arenas, courtesy of Pexels

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SENATE MAJORITY OFFICE

Oregon State Legislature
State Capitol
Salem, OR

NEWS RELEASE

May 24, 2019

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Measure 11 reform goes to Gov. Kate Brown for signature

SB 1008: Establishes process for 'Second Look' hearings, eliminates mandatory adult sentencing and life sentences for juveniles

SALEM – Oregon is on the verge of sweeping bipartisan Measure 11 reform that will give youth offenders a fair opportunity for redemption and rehabilitation.

Both chambers of the Oregon Legislature have voted with two-thirds majorities that youth who have taken the wrong path can get back on track through rehabilitation, rather than turning them into hardened criminals through a lifetime of incarceration and strict mandatory minimum sentences that do more harm than good. Senate Bill 1008 – which passed on the House of Representatives floor last night and now will go to Gov. Kate Brown for her signature – will right those wrongs in Oregon's criminal justice system.

"The Oregon Constitution is very clear that we must have a justice system focused on fairness and not vindictiveness," said Sen. Floyd Prozanski (D-Eugene), a chief proponent of the bill. "When we lock up kids for mandatory minimum sentences, we turn those young people into more serious future offenders by keeping them in the company of adult convicts. Mandatory minimum sentences are turning kids who get into trouble into lifelong criminals, rather than rehabilitating them."

The bill has several elements that will help juveniles who have committed offenses rehabilitate and get a second chance at a productive life. Among those elements, the bill:

- Eliminates the automatic waiver of kids into the adult justice system and requires judges to make determinations whether children should be tried and sentenced as adults;

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501(c)(3) nonprofit children's law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

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- Extends eligibility for "second look" hearings, which occur halfway through youth sentences and allow judges to order supervised release for youth if it is determined they have been rehabilitated significantly, do not pose danger to the community and the youth will be better served by release rather than further incarceration;
- Allows transfer hearings for youth aging out of the Oregon Youth Authority and into adult prison with remaining sentences fewer than two years, when appropriate; and
- Addresses the constitutional problem identified by the United States Supreme Court by eliminating automatic life without parole sentences for youth and making them eligible for parole hearings after serving 15 years.

Ballot Measure 11 – passed by Oregon voters in 1994 – requires mandatory minimum sentences for specific crimes. It requires young people ages 15 to 17 charged with Ballot Measure 11 offenses to automatically be prosecuted and, if convicted, sentenced in adult court. The Senate Committee on Judiciary convened a work group with local stakeholders and national experts who examined case law, brain science, best practices, national trends and relevant data to better understand the effects of Measure 11. The group also examined whether Measure 11 ensures justice for victims, protects the public, holds juvenile offenders accountable and provides opportunities to reform and rehabilitate, reducing recidivism and promoting productive citizenry. Senate Bill 1008 is the product of that work group.

"This juvenile justice reform bill is about some simple values that matter to all Oregonians: making things fair, making things equitable, protecting constitutional rights and standing up for kids and standing by them," said Rep. Jennifer Williamson (D-Portland), a chief proponent of the bill. "Children are not miniature adults, and we should not treat them like they are. We have an opportunity with this legislation to not only ensure our system is constitutional but do a better job of making sure it is fair, and that kids who go through it are rehabilitated into productive members of society. What could be more important than that?"

In many cases, under the current law, youth who have served time in a juvenile detention facility rehabilitate rather quickly. Under the status quo, Measure 11 offenders convicted as juveniles spend the first part of their sentences in juvenile facilities and then can be transferred to adult prisons once they reach a certain age. That move often wipes out most of the progress that the juvenile has made toward rehabilitation and turns them into lifelong criminals.

"Since Measure 11, we have learned a lot about how youth react to incarceration and what works and what doesn't," Prozanski said. "On the same ballot, voters also passed Measure 10, which authorized the Oregon Legislature to change sentencing guidelines with a two-thirds majority. That's a high bar to clear, and it took bipartisan support in both chambers to get this done. I truly appreciate all of the work that Sen. Jackie Winters provided for this bill and her continued efforts to bring positive change to our state criminal justice system. That shows widespread agreement that these changes are necessary. We need to give kids a second chance, rather than locking them up and throwing away the key."

This press release is reprinted with permission from the Senate Majority Office of the Oregon State Legislature

Jackie Winters Dies At 82

Senate Bill 1008 Her Legacy

Oregon is mourning the loss of long-time legislator, Jackie Winters. A well-regarded Oregon state senator, she was the only African-American Republican ever elected to the legislature.

One of her key causes was criminal justice reform, and her final vote came on April 18 when she shepherded SB1008 to passage in the Senate. Winters' office said the bill represents her "crowning legislative achievement."

As reported by Gordon Friedman and Chris Lehman in The Oregonian on May 29, Governor Brown said of Winters, "Her commitment to service knew no bounds. It shone through in every project she took on and every issue she tackled. I feel lucky to have had the privilege to call her my friend as well as my colleague for so many years.

"I will always remember her courage in moving forward on Senate Bill 1008 just this session. Her legacy will live on through her family and in her community through the legislation she spearheaded to improve the lives of all Oregonians."

The Negative Effect of Fines and Fees in the Juvenile Justice System

By Amy Miller, YRJ Executive Director

"…Fines and fees in the juvenile justice system harm youth and their families. They also undermine public safety and contribute to racial disparities in the justice system."[1]

In *A Debtor's Prison*, the Juvenile Law Center of Philadelphia analyzed the impact of costs, fines, fees, and restitution on youth: the significant consequences for failure to pay, the resulting financial stress on youth and their families, and the exacerbation of racial and economic disparities in the juvenile justice system. As part of the report, Juvenile Law Center reviewed statutes in all 50 states, conducted national surveys of system stakeholders, and interviewed families and young adults who had experiences with the juvenile justice system. The result of this large-scale project is simple: costs were regularly imposed and they posed significant problems for youth and families.[2]

Photo courtesy of Negative Space

The report identified seven different types of legal financial obligations that relate to the prosecution and rehabilitation of youth offenders: probation/supervision fees, fees for informal adjudication or diversion, fees for evaluation or testing, fees for the cost of care (including child support, placement, programming, health care and other support), court costs and fees, fines, fees in expungement/sealing of records, and restitution. When compared nationally, Oregon ranks high in terms of the number of different categories in which fees are imposed. The median number of categories in which fees are imposed is five, with 34 states imposing fees in five categories or fewer. Oregon joins 16 states in imposing fees in six of the seven categories.[3]

While costs, fines, fees, and restitution may be burdensome when imposed individually, when considered cumulatively they can be overwhelming to financially-

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stressed youth and families. Even seemingly minimal payments may require families to choose between meeting basic needs and paying fees. According to an Advisory issued by the US Department of Justice, "Families burdened by these obligations may face a difficult choice, either paying juvenile justice debts or paying for food, clothing, shelter, or other necessities. The cost of fines and fees may foreclose educational opportunities for system-involved youth or other family members. When children and their families are unable to pay fines and fees, the children often suffer escalating negative consequences from the justice system that may follow them well into adulthood."[4]

Photo courtesy of Negative Space

Judges also recognize the harms and hardships posed by fees, fines, costs, and restitution orders. To ensure youth are not criminalized for poverty, the National Council of Juvenile and Family Court Judges created a bench card to guide judges in addressing financial assessments within the courtroom. Central to the guide is ensuring that financial obligations are conditioned on the youth's ability to pay. Additionally, the guide warns of unintended consequences tied to imposition of fees. For example, probation supervision fees raise concerns about fundamental fairness and due process that may be counterproductive. Court costs create the impression of the court as a collection agency rather than a neutral arbiter and may erode the sense that the court is impartial and fair.[5]

Earlier this year, the U.S. Supreme Court addressed the issue of fines and fees in Indiana v Timbs, 586 U.S. ___(2019) . The issue in the case was whether the Constitution's ban on excessive fines—part of the 8th amendment that was originally interpreted to apply to the federal government—applies to the states. In the case, Timbs pleaded guilty to drug charges and was sentenced to a year of home detention and five years of probation. The state court also forced Timbs to forfeit his $42,000 Land Rover on the theory that it was used to transport drugs. Timbs challenged the forfeiture as a violation of the 8th Amendment's ban on excessive fines because it was worth four times more than the maximum fine that the state could impose, and therefore the forfeiture was completely disproportional to the gravity of Timbs' crimes. A unanimous Supreme Court agreed with Timbs, holding that the Constitutional ban on excessive fines applies to the states through the 14th Amendment.[6]

Although Timbs was an adult at the time of his conviction, the Court's decision is a significant step forward for youth in the juvenile justice system. Ginsburg's opinion highlights excessive fines as a tool of racial subjugation. The opinion points to the Black Codes enacted in the post-Civil War South as a tool to maintain prewar racial hierarchy though the imposition of "draconian fines" that often demanded involuntary labor from newly freed slaves who were unable to pay imposed fines.[7]

The focus on racial equity is front and center in today's efforts to end the practice of imposing fines and fees on poor youth and their families. In Oregon, youth of color are disproportionately represented in Oregon's Juvenile Justice System at all points of contact, from referral to juvenile departments by law enforcement, to placement in secure Oregon Youth Authority (OYA) facilities.[8] And because youth of color are punished more often and more harshly, they and their families are liable for higher fee burdens.

Footnotes

[1] Feierman, Goldstein, Haney-Caron, and Columbo, Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System, Juvenile Law Center of Philadelphia (2016).
[2] Id at 4.
[3] Id. at (i), excluding fees for expunction/sealing of records.
[4] U.S. Dep't of Justice, Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles (2017).
[5] National Council of Juvenile and Family Court Judges, State Justice Initiative., National Juvenile Defender Center, Ensuring Young People are not Criminalized for Poverty (2018), https://njdc.info/wp-content/uploads/2018/04/Bail-Fines-and-Fees-Bench-Card_Final.pdf.
[6] Timbs, 586 US ___(2019) at 7.
[7] Id. at 6.
[8] Oregon Youth Development Policy Brief, http://www.oregonyouthdevelopmentcouncil.org/wp-content/uploads/2016/09/Juvenile-Justice_Equity-Considerations-Venngage-Policy-Brief.pdf.

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The following is reprinted from *Debtor's Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, published by the Juvenile Law Center. Find the full report here.

CONCLUSION

The juvenile justice system in each state is designed to help young people meet their potential, get back on track, and become productive members of their communities. Across the country, however, the imposition of costs, fines, fees, and restitution hinders these goals. For the many youth and families who cannot afford these payments, consequences can be dire, including recidivism (as shown by criminologists Piquero and Jennings), incarceration, and significant financial strain. As Piquero and Jennings also demonstrate, these policies have a racially disparate impact. This means that youth in poverty and youth of color may face harsher consequences and receive less rehabilitative treatment than their more affluent peers. Moreover, while further research is needed, existing studies suggest that court costs, fees, and fines have limited, if any, fiscal benefit to states and counties, given the difficulty in collecting from families in poverty and the high administrative costs in trying to do so. It is time to re-focus the juvenile justice system on approaches that work: eliminating costs, fines, and fees placed on youth who are not yet old enough to enter into contracts or take on full-time work; prioritizing restitution payments that go directly to victims and are within the youth's ability to pay; and ensuring that restitution policies are developmentally appropriate by thoughtfully addressing the needs of victims in the context of the juvenile justice system's rehabilitative model. These approaches can hold youth accountable, ensure public safety, and support youth in realizing their own potential.

Practice tip:

Oregon's juvenile code requires that the court, before imposing fines and fees, takes into account the youth's ability pay the fines or fees and the rehabilitative effect of the fine. ORS 419C.449 (2018). ORS 419C.459 (2018). See also ORS 137.286 Attorneys should present evidence regarding these issues at the time of disposition.

Youth, Rights and Justice Names Amy Miller Executive Director

The Youth, Rights & Justice Board of Directors is pleased to welcome Amy Miller as Executive Director effective April 17, 2019. An early experience as a volunteer with the Big Brothers Big Sisters program ignited Miller's career as a champion for children, youth and families in the child welfare and juvenile justice systems.

At the Office of Public Defense Services (OPDS) from 2014-2018, Miller served as Deputy General Counsel and Deputy Director. During her tenure, she created the Parent Child Representation Program, which has been effective in reducing caseloads and improving outcomes for juvenile court involved families. In implementing the PCRP, Miller oversaw the work of 31 attorneys and case managers, providing training and mentoring, and ensuring that rigorous program outcomes were achieved. After a successful pilot, the program is now on track to receive additional funding and expand to Multnomah County and four other counties.

"Amy Miller is a leader in juvenile law and has been a catalyst for systemic change in the child dependency system in Oregon. The YRJ board was impressed with her track record of accomplishment, her commitment to diversity, equity and inclusion, and her passion for our mission," said Board Chair Janet Steverson.

Miller's legislative advocacy over the past two budget cycles was instrumental in building momentum for increased funding for the public defense system and passage of substantive legislation. She also participated in many initiatives to improve the quality of dependency representation in Oregon including planning the Juvenile Law Training Academy, updating the Public

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Defense Services Commission qualifications standards, and developing performance standards for juvenile attorneys.

From 2003 – 2013, Miller worked as an attorney at Miller Legal Services, Multnomah Defenders, and Youth, Rights & Justice. Most recently, as Legal Director at CASA for Children, she participated in agency-wide strategic planning and developed advocacy tactics spanning three counties, 1,100 dependency cases, and 500 advocates.

Miller's current activities include serving as Chair-elect of the Oregon State Bar Juvenile Law Executive Committee, participating on the Steering Committee of the ABA's Center on Children and the Law, and coaching the Jefferson High School Mock Trial competition.

Miller has a J.D. from Lewis & Clark Law School and a B.S. in Industrial Engineering from Georgia Institute of Technology. In her new role, she succeeds Leslie Kay who has served as YRJ's Interim Executive Director since October of 2018.

Washington Judicial Colloquies Project

A Guide for Improving Communication and Understanding in Juvenile Court

This 2012 report by TeamChild and the Juvenile Indigent Defense Action Network can he found here. The foreword which follows is reprinted with the permission of TeamChild.

Foreword by Retired Washington Superior Court Judge Dennis Yule

Colleagues:

If your experiences are anything like mine during the 23 years I was a superior court judge in Benton and Franklin Counties, there have been occasions (in my experience they were persistent) when you stepped off the bench at the end of a juvenile court hearing or docket, doubtful that much you had tried to explain to the juvenile offenders before you had actually gotten through to them. The language judges and lawyers are accustomed to, which is necessary to make a clear record of what occurs in the courtroom, is a foreign language to kids and to adults who are unfamiliar with the court process.

We've probably all made an effort to translate that language with which we are comfortable into language that is both understood by young offenders and maintains a clear and legally sufficient record. I don't know about you, but I never felt confident that my intuitive efforts actually improved communication much, even with the expert advice of my 15-year-old grandson!!!

Some of you have no doubt heard about or are involved with a major, nationwide juvenile justice reform initiative sponsored and funded by the John D. and Catherine T. MacArthur Foundation, called Models for Change. Washington was the fourth of four core Models for Change states, selected by the Foundation in 2007. One of the products of the Models for Change Initiative has been the formulation of action networks focused on particular areas of improvement in juvenile justice processes and services. In 2008, a Washington team of juvenile justice professionals, assembled and led by TeamChild, has joined teams from seven other states in the Juvenile Indigent Defense Action Network (JIDAN) to focus upon strategies to improve juvenile indigent defense policy and practice.

One of the specific strategies the Washington JIDAN team has chosen to pursue is the development of model colloquies to assist juvenile court judges and juvenile defenders in communicating effectively with juvenile offenders at critical court hearings. We have begun that work with draft bench colloquies for two particularly critical hearings—(1) an accused juvenile's first appearance, at which rights and conditions of release are explained, and (2) disposition hearings, at which the consequences of conviction and conditions of probation are explained.

We began the process of developing the colloquies with a review of research and literature about adolescent development and communication and efforts within the juvenile justice system to improve communication with adolescents. Then we assembled an advisory panel of experts on talking with kids—10 middle school students and 14 high school students at the Discovery Middle School and New Horizons High School of the Pasco School District. Over two afternoons, TeamChild Program Coordinator, Rosa Peralta, and I worked with

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these two focus groups to review the terminology used in the Benton/ Franklin Superior Court's Order Setting Conditions of Release (WPF JU 07-0510) and Order on Adjudication and Disposition.

Most of the youth in the focus groups had experience with the juvenile justice system and therefore had previously been exposed to the language in the forms. Despite this, the two sessions confirmed that the language of the orders, which is the framework and, to varying degrees from court to court, the content of what judges say to the juvenile offenders, is language often not understood by adolescents. The sessions also enlightened us. We learned that some commonly used words and phrases, which had not occurred to us as being unclear, were in fact confusing to the kids. One example comes readily to mind. When we talked with the kids about "appearing in court as required", a number of them, including older high school students, thought we were referring to the way they were supposed to look when they came to court: i.e. hair combed, modestly dressed. We experienced one of those "duh" moments at the end of our discussion when one young man said "Then, why don't you just say 'you have to come to court when you're told to'?"

While we have chosen to focus this project upon communication, at critical points in the juvenile court process, between judges and juveniles accused or adjudicated guilty of crimes, we recognize the primary importance of the detailed communications that occur between juveniles and juvenile probation counselors and defense counsel throughout juvenile court proceedings. Probation counselors and counsel are the critical contacts and messengers juveniles have with the juvenile court system. The objective of this project is to improve the communications between the bench and juveniles that will serve to reinforce the authority of the probation counselors and their conversations with juveniles, not to supplant or unduly duplicate their discussions and explanations or those of counsel. Our consultations with both juvenile court professionals and with juveniles have underscored the importance of juveniles "hearing it from the judge."

With the work and advice of experts in hand, both adult and juvenile, we began drafting colloquies that we hope will be helpful in bridging the gap between what lawyers and judges need to make a satisfactory record and what kids need to better understand what is happening.

As explained below, the colloquies are designed to be user-friendly tools that can be utilized in various ways. For seasoned judges with substantial experience in juvenile court, we hope that the colloquies will have value as source material and a guideline for review of the methodology they have developed for communicating with kids. For other judges, who may find themselves in juvenile court less frequently, our goal is to provide colloquies that can be used as a script followed verbatim, or as a resource from which to craft personalized outline colloquies.

In drafting these colloquies we recognize that every judge develops a style and method of addressing counsel and litigants during court proceedings that he or she finds appropriate and effective. We also assume that every judge who has presided at juvenile court offender proceedings has given thought and made decisions about how to communicate with kids. Our intention with these colloquies is to provide every judge in juvenile court, whatever his or her experience, with information and alternative approaches that will be helpful in the on-going effort to communicate with juveniles as clearly and effectively as possible.

Honorable Dennis Yule (ret.)
Washington State Superior Court Judge
Benton-Franklin Counties

Photo courtesy of Negative Space

Juvenile Law Resource Center

JLRC Contact Information

To receive a call back within two business days from a JLRC attorney for advice, email the workgroup and please include your name, telephone number, county, and brief description of your legal question.

CASE SUMMARIES

By Matt Steven, YRJ Attorney and Christa Obold Eshleman, YRJ Supervising Attorney

Dependency

Oregon Supreme Court

Dept. of Human Services v. T.M.D., 365 Or 143 (June 13, 2019)

The Oregon Supreme Court affirmed the juvenile court's finding that it was not in the child's best interests to have her mother's rights terminated, holding there was no presumption or preference for termination.

DHS appealed from a juvenile court judgment denying termination of parental rights based on the determination that severing the legal tie between mother, maternal grandparents, and child was not in the child's best interests. In the Court of Appeals, DHS argued that if the other requirements for TPR were met, then it should be presumed that termination is in the child's best interests under ORS 419B.500. In an en banc decision, the Court of Appeals majority held they would not address the argument about a presumption, instead finding that termination was in the child's best interests. The dissent argued that the majority's decision applied a presumption, in effect. In the Oregon Supreme Court, DHS did not argue for a "presumption," but rather, argued that when parental unfitness is proven, absent evidence that a termination would be harmful to the child, there is a "preference for adoption [that] requires termination."

There was no question that mother remained unfit to parent, due to her long-time drug addiction and related criminal activity. Reviewing de novo, the Supreme Court found, however, that mother and child had a bond, and positive visits, though child had some transitory emotional difficulties in the foster home after visits. Child was evaluated by a psychologist who opined that child would be harmed by removal from his foster parents (his aunt and uncle), or by further delay in knowing who his permanent caregiver would be. The doctor did not offer an opinion about whether guardianship or adoption would be a better plan, but did say that child would benefit from ongoing relationships with relatives. The DHS caseworker testified that adoption was a better plan than guardianship for child because the statutes indicated that adoption was the most permanent plan, which should be pursued if there was not a reason to rule it out.

The Supreme Court held that there was neither a statutory presumption nor "preference" that termination of parental rights was in the child's best interests when a parent was unfit. Rather, the decision "requires consideration of the evidence presented."

> "[F]or instance, if a parent has physically abused a child and the child continues to suffer trauma in the parent's presence, those facts alone may establish that it is in the child's best interest to terminate parental rights. But, when a parent and a child have a positive bond, more may be required."

Here, permanent guardianship was proposed as the alternative to

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adoption. The Supreme Court first held that a permanent guardianship was not a "temporary arrangement that would permit mother more time to obtain treatment and prove herself a fit caretaker." Rather, it met the need evidenced for the child "to be placed with a permanent caregiver without delay." The court reasoned that only the court, not mother, could change the placement, and there was no evidence that the child was worried that mother would not accept his aunt and uncle as permanent caregivers, or had concern about the court making a different best interests determination about placement "in the distant future." The court gave "significant weight" to the fact that "Child's grandparents, his foster parents, and his mother are all 'working together' for child because 'family is very important to them.'"

The Court held that the effect of termination of parental rights on mother was not a consideration in the assessment of the child's best interests.

The Court concluded:

> "we, like the lower courts, recognize that child has an urgent need for a permanent caregiver and should not be required to wait longer to see if mother can fill that role, we also recognize that child is attached, not only to his foster parents, but also to mother and her family. * * *. We conclude, as did the juvenile court, that there is a way to meet child's need for a permanent caretaker without sacrificing his interest in maintaining his maternal family relationships and that termination of mother's parental rights is not in his best interest."

The court noted, "This court has allowed review of a case in which a parent successfully moved to dismiss jurisdiction and thereby ended a durable guardianship without seeking to have that guardianship vacated under ORS 419B.368. Dept. of Human Services v. J. C., 289 Or App 19, 407 P3d 969 (2017), rev allowed, 362 Or 389 (2018). We do not intend to comment on that case here."

Justice Balmer concurred in the opinion, expressing that this was "a close case" in which "[r]easonable judges could look at the same facts and reach a different conclusion." He discouraged "fact matching" in future cases, saying this case does not represent a "sea change." Rather, "Courts adjudicating terminations of parental rights should read carefully those sections of the court's opinion explaining that the 'best interest of the child' inquiry should proceed without a presumption in favor of adoption and should be focused on the needs of the child to the exclusion of those of the parents."

Oregon Court of Appeals

Dept. of Human Services v. H. R. E., 297 Or App 247 (Apr. 24, 2019)

The juvenile court terminated Mother's parental rights to her four-year-old daughter for unfitness and neglect. Mother appealed the judgment, and the Court of Appeals agreed that the evidence did not support termination.

Daughter was removed from mother's care after a traffic stop in which methamphetamine and syringes were found in the car. She was "dirty, behind on her vaccinations, and needed dental care." Her parents both appeared to be methamphetamine users, with tooth decay, marks on their faces, and a dirty appearance. DHS placed daughter with an uncle where she did well.

Mother began drug treatment after the removal. She got a job, in which she was subject to random UAs and had management responsibilities, including handling large sums of money. Mother's UAs did not indicate methamphetamine use, but showed that mother had used alcohol. DHS conducted two hair follicle tests that showed "very low levels" of methamphetamine, just above the "minimum confirmation level." Mother had a psychological evaluation that concluded that she was "defensive" but also that she did not require mental health treatment.

The Court of Appeals addressed the standard for unfitness, emphasizing that the state must prove that the effects of the parent's condition has a "seriously detrimental" effect on the child, and that the parent

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must be shown unfit by clear and convincing evidence at the time of trial, regardless of their previous conditions at the time of jurisdiction.

The state's argument was primarily based on mother's insufficient progress in drug treatment as shown by the hair follicle tests. The court found, de novo, that mother "had made a marked transformation" by the time of trial. Mother was living with two of her adult children, the home was safe and stable, the family was involved and watchful for relapse, and that mother had shown no signs of relapse. The court observed that mother's mood was improved, she was employed in a position of responsibility, and that she had made significant efforts to maintain contact, including driving hundreds of miles each week to appropriately engage with her child.

Addressing the hair follicle tests, the court found them "exceedingly low" and that there was no other evidence of methamphetamine having had any effect on mother's conduct or life. Addressing the allegation that mother financially neglected the child, the court found no persuasive evidence in the record to support it. The judgment was reversed and remanded.

Dept. of Human Services v. M. E., 297 Or App 233 (Apr. 24, 2019)

Mother appealed the judgment terminating her rights to her three children, arguing three grounds for reversal.

> (1) the juvenile court erred when it continued the appointment of mother's guardian ad litem (GAL) from the permanency proceeding in the termination proceeding without holding a hearing; (2) mother's counsel was inadequate for failing to object to the continuation of the GAL's appointment; and (3) as a result, the juvenile court erred when it terminated mother's parental rights to [the children].

The Court of Appeals rejected the first claim as unreviewable due to a failure to preserve the issue. It reversed and remanded the case with instructions to hold an evidentiary hearing regarding the adequacy of mother's counsel.

At the GAL appointment hearing, the court found that mother's "thinking has become erratic, disorganized, delusional, and paranoid," and appointed a GAL.

On appeal, mother argued that the court should address her first claim because preservation was not required—the order continuing the GAL was entered before any party had an opportunity to object. The court noted several subsequent court appearances where mother could have objected, had she so chosen. The court also found that mother could have, but did not, object through her GAL, and that she made "no effort to place opposing parties or the court on notice of the error."

Rejecting mother's argument that the error was obvious enough to merit plain error review, the court observed that the question of whether a second hearing to appoint a GAL is required by the statute prior to the termination proceeding is one of first impression, and that the statute was susceptible to more than one interpretation.

Mother also argued that her trial counsel was inadequate "for failing to independently assess whether her interest in preserving her parental rights to her children [was] protected and safeguarded by the appointment of a GAL." Although this issue was not preserved, the court noted that it need not be, and vacated and remanded for further fact finding on the issue.

Dept. of Human Services v. G. C. P., 297 Or App 455 (May 8, 2019)

In this appeal of a dependency jurisdiction judgment, the Court

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of Appeals reversed because of testimony that constituted vouching.

During their custody battle, the parents reported one another to DHS for child abuse. The juvenile court found that child suffered an unexplained physical injury while in father's custody and took jurisdiction. Father appealed, arguing that the child's physician's testimony was impermissible vouching. The physician had testified that the basis of his conclusion was based on child saying, "Daddy did it," concluding, "I trust a child when they say something like that."

DHS conceded that the physician had improperly opined on the truthfulness of another witness. The Court of Appeals agreed, quoting State v. Black, 364 Or 579, 593 (2019):

> [W]hen a party objects to testimony as improper vouching, a court must determine whether the testimony provides an opinion on truthfulness or, instead, provides a tool that the factfinder could use in assessing credibility. * * * If a court determines that testimony constitutes vouching because it provides an opinion about the truthfulness of another witness and not information that could be helpful to the factfinder in forming its own opinion about that subject, the court must prohibit the testimony.

The court found that the error was not harmless because the central issue in the case was whether father had physically abused the child.

The court did not decide whether additional testimony would have been admissible "regarding a child answering 'without thinking about it' because 'the child's being honest and telling you is the perception'—[which] arguably could be a tool that the factfinder could have used in assessing credibility."

During the pendency of the appeal, the juvenile court dismissed the case. DHS did not move to dismiss the case as moot because of "the potential effects this judgment may have on father's rights in the future." The Court of Appeals therefore reversed the judgment without remand.

Dept. of Human Services v. M. A. H., 297 Or App 725 (May 30, 2019)

Mother challenged the termination of her parental rights to her three children. The Court of Appeals affirmed.

The family had a "long-running involvement" with DHS, and the children had been placed in foster care with their grandparents several times, most recently in October 2014. Mother had difficulty parenting safely due to substance abuse, mental health issues, criminal activity, and parenting skill deficits. Her two sons had high needs and behavioral challenges. Her daughter was on track developmentally but there were concerns of attachment issues should she be removed from her grandparents. Visits between mother and children had been terminated in 2016, prior to an earlier judgment of termination of parental rights which the juvenile court later set aside after the Court of Appeals reversed a permanency judgment. The children did not want to return to mother, and one did not want to visit.

Mother moved to dismiss the case at the outset of trial, arguing that she was not unfit at that point in time. The juvenile court denied the motion and terminated her parental rights. The court of appeals affirmed, holding: "[t]o determine whether mother's conditions remain detrimental to the children, we must consider the children's needs in the context of the history of this case." The court relied on the fact that the children had been in the foster care of their grandparents for years, were bonded to them, and had experienced "a series of placement disruptions." The court held that despite some recent progress by mother, she had waited too long. Because of mother's lack of insight into her patterns of relapse and their effect on the children, her intent to terminate the children's relationship with their grandparents, and the "tenuous and untested" nature of her progress so far, she remained an unfit parent. The court also ruled that it would be unreasonable to give mother more time to rebuild her

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relationships with the children.

Considering the high needs of the children and their bonds with the grandparents, it was also found that it was in their best interests to have mother's parental rights terminated.

Dept. of Human Services v. M. R., 298 Or App 59 (Jun. 12, 2019)

Mother challenged the juvenile court's finding that it had temporary emergency jurisdiction (TEJ) under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). DHS conceded the error but argued that the court had jurisdiction under another provision of the Act. The Court of Appeals agreed that TEJ was not supported by the record but remanded the case for further development of the record for other possible UCCJEA jurisdictional provisions.

In August 2017, Mother signed and notarized a document purporting to grant guardianship over child to child's grandparents in Virginia. Child lived with grandparents until Mother brought her to Oregon in April 2018. Child came to the attention of DHS and entered shelter care in September 2018. Mother moved to dismiss for lack of jurisdiction, and grandparents joined in the hearing by phone, telling the court that if the petition was dismissed they would promptly fly to Oregon to take child back.

The juvenile court ruled that it had TEJ because grandparents might not be able to keep child safe from mother if they cannot prove a superior claim of custody. The same day, grandparents filed a writ of mandamus with the Supreme Court of Virginia seeking an emergency declaration that they had custody. The results of that petition were not within the record.

The Court of Appeals held that because there was no showing that child would be at "immediate risk of harm" if returned to mother's care, the juvenile court's conclusion that it had TEJ was in error. It then declined to rule on the other potential grounds for jurisdiction under the UCCJEA. The Court of Appeals vacated the judgment and remanded for further development of a record relevant to whether Virginia was the home state, or whether Oregon could take jurisdiction because no other state would have jurisdiction under the UCCJEA. This would implicate findings about whether mother's absence from Virginia was "temporary," and whether the grandparents were "acting as [child's] parent," by "claim[ing] a right to legal custody" as contemplated by the Act.

Criminal: Juveniles Tried as Adults

Oregon Supreme Court

White v. Premo, 365 Or 1 (May 31, 2019)

White v. Premo, 365 Or 21 (May 31, 2019)

In 1995, twin brothers Lydell and Laycelle White (then fifteen years old) were convicted of murdering an elderly couple. Each were sentenced to 800 months. On appeal of their denied petitions for post-conviction relief, they argued "virtually the same issues" in their respective cases: the sentencing court did not make a finding that they warranted de facto life sentences due to "irreparable corruption," as now required by the United States Supreme Court's decision in Miller v. Alabama, 567 US 460 (2012).

This petition for post-conviction relief procedurally barred unless the "grounds" for relief "could not reasonably have been either asserted or raised" in prior proceedings. The Supreme Court of Oregon held that the term "grounds" means an assertion of the "same legal rule," not claims of a generally similar nature.

The Court further held that the legal rule announced in Miller could not have reasonably been raised in youth's prior proceedings because it would have been "novel, unprecedented, or surprising" at the time. Charting the progression of juvenile Eighth Amendment doctrine, the Court pointed out that at the time youths were sentenced, Stanford v. Kentucky, 492 US 361 (1989) was the prevailing law. Stanford had rejected an argument

> "that the death penalty failed to serve the legitimate goals of penology because there was evidence that juveniles possess less developed cognitive skills than adults, are less likely to fear death, and are less mature and responsible, and therefore less morally blame-worthy."

That view prevailed until 12 years after youth's conviction and eight years after their first post-conviction petitions. By the time Miller was decided, it was clear that a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a

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lifetime in prison." The sentencing court will determine whether the offender's crime "reflects unfortunate yet transient immaturity," or whether it "reflects irreparable corrup¬tion." The Court held that Miller "made a novel, unprecedented change in the law," and that the merits of the petition could therefore be heard.

The first possibility for parole was 54 years into the sentences, when the petitioners would be 68 years old. The Court declined to rule on what constitutes a de facto life sentence but found that the sentences in this case were "sufficiently lengthy that a Miller analysis is required." The Court remanded the cases to the sentencing court for further proceedings.

Oregon Court of Appeals

State v. Link, 297 Or App 126 (Apr. 17, 2019)

In this appeal the defendant argued that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment because it failed to take into account his youth. The Court of Appeals agreed, and remanded the case for resentencing.

The teenaged defendant was prosecuted as an adult under Measure 11 for aggravated murder. Along with several friends, the teenager "went on a crime spree that included stealing a car belonging to one friend's mother and then killing her to conceal the robbery." He was convicted, and the court gave him the mandatory minimum sentence of life without the possibility of parole for 30 years.

On appeal, citing the United States Supreme Court's ruling in Miller v. Alabama, defendant argued that because "ORS 163.105 does not allow the sentencing court to take into account the offender's age and other age-related characteristics and circumstances as required by Miller and indicated by Lyle, a mandatory prison term imposed on juveniles pursuant to ORS 163.105(1)(c) violates the cruel and unusual punishment clause of the Eighth Amendment."

The state responded that Miller and related cases only applied to two specific sentences: death and life without parole. Alternately, it argued, the 30-year murder review hearing provided under ORS 163.105(2) "is a sufficient procedural opportunity to consider the Miller factors of youth[.]"

The Court of Appeals majority held that the "foundational principle" of Miller and the cases upon which it relied was that

> "a state sentencing scheme cannot contravene Graham's (and also Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."

The Court reasoned that the sentences available for aggravated murder under ORS 163.105 were among "the most severe penalties" in the state. Considering possible points of mitigation, it noted that after Measure 11, the individual qualities of youth were no longer considered before trying them as adults when certain offenses are charged. Many youth are also denied access to the "second look" process under ORS 420A.203.

In deciding that the youthfulness of the defendant must be considered at sentencing, the Court found that sentencing for aggravated murder was the "most severe" and that the sentencing process did not adequately consider "the qualities of youth that might render the imposition of any of the three sentences prescribed by ORS 163.105 inapplicable."

Noting that Oregon had not followed other states in revising their parole review after Miller to consider the decreased moral responsibility of the defendant due to youthfulness at the time of the offense conduct, and that any such consideration under the current statutes is often read as a failure to accept responsibility, the Court rejected the state's argument that the 30-year review hearing was adequate to address the issue, finding that "[i]t would make little sense, and be questionably effective, to consider the unique qualities of youth when the defendant is well into middle age."

The dissent argued that Montgomery v. Louisiana (2016) held that "the imposition of a life sentence with the possibility of parole cures a Miller violation" and that the availability of a 30-year review hearing distinguishes the sentence in this case from those found unconstitutional by the United States Supreme Court. It would hold that the "possibility of parole after 30 years" equates to a "meaningful opportunity to obtain release based on demonstrated

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maturity and rehabilitation" under Miller.

The dissent also noted that this defendant had in fact been granted a hearing that considered his youthfulness to determine whether he was eligible for a sentence of life without parole, and that he had instead been sentenced to life with the possibility of parole after 30 years.

Perez v. Cain, 297 Or App 617 (May 22, 2019)

In this post-conviction relief case in which a juvenile stipulated to trial as an adult in 2005, the Court of Appeals held the petition for relief was barred because the issue had to be raised earlier because of the circumstances of this case.

The petitioner, representing himself, argued that the trial court should not have accepted his stipulation to trial as an adult under the constitutional standard later announced in State v. J. C. N.-V., 359 Or 559, 597 (2016). In J. C. N.-V., the Oregon Supreme Court interpreted ORS 419C.349(3) to mean that before a decision to try a youth as an adult, "a juvenile court must find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for the youth, the victim, and others." Petitioner argued that the juvenile court judge did not apply this standard, and that, although his petition for relief was untimely and successive, he qualified for the "escape clauses" of ORS 138.510(3) and ORS 138.550(3). These require that the petitioner's argument "could not reasonably have been raised" in a timely initial petition.

Photo courtesy of Negative Space

The state argued for a categorical approach: that because the principles upon which J. C. N.-V. was decided were straightforward, they were available to be argued earlier, and reasonably could have been timely anticipated and raised. Amici—Youth, Rights & Justice, and O'Connor Weber LLP— argued for an approach dependent on what was reasonable given the circumstances of each individual post-conviction relief case. The Court of Appeals agreed with amici.

Applying the circumstances in petitioner's case, the Court of Appeals held that because the J. C. N.-V. decision recognized that the legislature had used the criteria from Kent v. United States, 383 US 541 (1966) to develop the ORS 419C.349 waiver criteria, and in petitioner's case, the waiver study submitted to the juvenile court stated it had applied the Kent criteria, "[t]he waiver study put at issue the application of the Kent criteria, making it reasonably possible for petitioner to raise any issues regarding the juvenile court's inquiry under those criteria long before the Supreme Court's decision in J. C. N.-V."

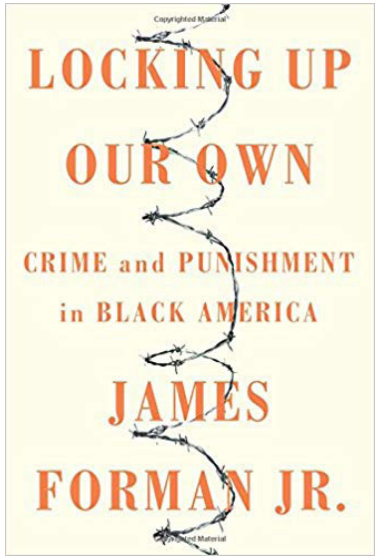
The Court of Appeals noted that petitioner did not argue that trial counsel had been ineffective. The court also noted that it was not considering two unpreserved arguments raised by amici: "(1) that petitioner's juvenile status should bear on the question whether he reasonably could have raised a claim for purposes of the escape clause, notwithstanding the fact that he was represented by counsel in his direct criminal proceedings and first post-conviction case; and (2) that Article I, section 20, requires that the limitations period under ORS 138.510 be tolled for juveniles, in view of the tolling granted to children within the juvenile court's jurisdiction under ORS 419C.615."

Book Review

Locking Up Our Own: Crime and Punishment in Black America

By James Forman Jr.

Report by Abigail Smith, YRJ Administrative Assistant



In *Locking Up Our Own*, James Forman Jr. tells the story of black communities in America's urban centers as they grappled with an explosion of crime rates and drug use during the second half of the 20th century and how their response helped to shape the criminal justice system we have today. Prompted by his own experiences as a public defense lawyer in Washington D.C., Forman unpacks the origins of the laws that would contribute to one of the highest rates of incarceration in the world and take a particular toll on black communities. In his examination of this history, Forman seeks to understand what role black communities across the US played in shaping the laws and policies that ultimately left them unfairly targeted by the criminal justice system.

Forman paints a bleak picture of the current state of the American justice system, noting that "African Americans are held in state prisons at a rate five times that of whites."[1] This massive disparity in incarceration rates is the result of many complex factors, all compounded by racism, poverty, and a lack of social services. While acknowledging these other factors, Forman's main point is to examine the role that black communities held in shaping the American criminal justice policy and how it related to a crisis of violence in America's urban communities. In cities across the US, violent crimes spiked in the 1960s. Washington D.C. saw the murder rate triple from 1960 to 1969.[2] Forman explains how, in many urban centers, black residents did not feel comfortable in their communities, their neighborhoods, even their own homes. With the introduction of crack in the 1980s, black communities were again subjected to a wave of widespread violence and addiction. Incensed and afraid, black leaders sought to make the streets safer by demanding harsher sentences for drug dealers and violent criminals.

As a result, at the time of enactment of laws criminalizing marijuana and disallowing gun control, and policies around stop-and-frisk and "warrior policing" (wherein police officers are encouraged to act as warriors on the streets—leading to over-policing and the targeting of young men of color), many within black communities tended to see these as a step towards protecting black communities from violence and crime. Although many leaders and activists within black communities also fought for more resources—better schools, more jobs, access to social services—in order to combat the rising violence, harsher punishments and over-policing seem to have been the only "support" which they would receive. In reviewing this history, Forman pulls apart the origins of these policies, and uses his own experiences to show the real-life consequences for black communities.

Overall, this comprehensive examination of a piece of American political history is a fascinating and expertly crafted piece. His research "recover[s] a portion of African American social, political, and intellectual history—a story that gets ignored or elided when we fail to appreciate the role that blacks have played in shaping criminal justice policy over the past forty years."[3] Forman ends the book by calling on us all to recognize faults in the American criminal justice system and the enduring power that it enacts over our communities. "Our challenge as Americans is to recognize the power each one of use has in our own spheres to push back against the harshness of mass incarceration."[4]

Footnotes

[1] James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus and Giroux, 2017), 299.
[2] Forman, 91.
[3] Forman, 23.
[4] Forman, 342.

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