Juvenile Rights Project

JUVENILE LAW READER

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WAIVER OF COUNSEL

Oregon Needs Youth Standards

By Whitney Hill, Attorney

Although juveniles in Oregon are entitled to court appointed counsel, by both statute[i] and Fourteenth Amendment due process considerations,[ii] they also have the *right* to waive counsel. In Oregon[iii] a juvenile is treated like an adult, and waiver is determined under the totality of the circumstances. To be valid, a waiver must be made voluntarily, knowingly and intelligently.[iv]

In Oregon adult criminal cases, *State v. Meyrick* sets the standard for valid waivers of the right to counsel.[v] Waiver is defined as, "an intentional relinquishment or abandonment of a known right or privilege."[vi] Whether a waiver was valid depends on a variety of relevant circumstances, including but not limited to the defendant's age, education, experience, mental capacity, the complexity of the charge, and available defenses.[vii] Ideally, the relevant circumstances are discussed on the record in a colloquy between the court and the defendant. In particular, a colloquy should emphasize some of the risks and disadvantages of self-representation.[viii]

In *Meyrick*, the court found that the defendant understood the risks of self-representation partly due to testimony that, "my previous attorney told me that my chances of winning this case by going it alone were akin to his chances of handling nuclear materials with his bare hands and not being affected."[ix] The court emphasized the fact that Mr. Meyrick had consulted *with an attorney* about the risks.[x]

The *Meyrick* court encouraged the practice of having the defendant explain an understanding of the right to counsel and the risks of self-representation in his or her own words, rather than answer leading questions.[xi] The opinion rightly observes that because a courtroom can intimidate and frighten, a defendant may answer leading questions without actually understanding their import.[xii] The appellate court continues to emphasize the requirement that the defendant, "substantially ap-

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preciates the material risks of self-representation in his or her case."[xiii]

The analysis surrounding a waiver is individualized. If, upon challenge, a colloquy or a signed waiver form is deemed inadequate to show that the defendant substantially understood the material risks of self-representation, the waiver may yet stand. To support the idea that the waiver was nonetheless valid, the state may present alternative evidence of the defendant's education, legal experience, or prior consultation with an attorney.[xiv]

> There are large differences in brain activation between adolescents and adults during decision-making.

The totality of the defendant's circumstances is crucial to show not only that he or she did not understand the risks, but it also affects the state's alternative evidence. For example, in *State v. Gaino*,[xv] the defendant was held to have not knowingly and intelligently waived her right to counsel because, in looking at the totality of the circumstances, such as her 7th grade education, lack of criminal justice history, and a mental disability, there was no evidence that the waiver was knowing and intelligent. *Id.* at 115-116.

According to *State v. Forrest*, it is possible that under the totality of the circumstances, a signed written form alone can suffice to show a valid waiver of counsel by an adult.[xvi] Because the form included a detailed list of tasks an attorney is specialized to perform, the defendant was advised by negative inference of the risks of self-representation.[xvii] This kind of negative inference requires a level of sophistication—both in terms of reasoning process and an appreciation of risk—that most juveniles lack.

In Oregon, case law provides juveniles the right to waive counsel without procedures particular to youth. While age and experience are factors in an individualized assessment, there is no mandate that a colloquy include, for example, a youth's explanation of his or her understanding of the waiver, or questions eliciting maturity level. The *Meyrick* court would likely agree that there is great potential for

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a youth facing a judge to feel intimidated and frightened and to answer leading questions in the affirmative, even absent actual understanding. This danger is especially high if the youth has never consulted with an attorney. Also, the question of whether the waiver was truly voluntary is more pertinent to juveniles, considering the potentially coercive influences of parents and other adults, like those in the juvenile department.

The totality of a juvenile's circumstances includes his or her young brain. Juveniles are biologically incapable of making decisions in the same way as an adult.[xviii] In particular, emerging research indicates that the part of the youth's brain that deals with judgment and risk assessment does not fully form until well into early adulthood. *Id.* This deficiency may explain the youth's contact with juvenile court in the first place.

A recent study found that juveniles have a heightened propensity for risk-taking, impulsivity, and reckless behavior because the cortical structures of the juvenile brain are not fully developed.[xix] There are large differences in brain activation between adolescents and adults during decision-making.[xx] In sum, adolescents tend to perceive risk as less severe and more controllable than adults do, and are less adept at evaluating the ramifications of their decisions.[xxi]

Accordingly, a youth who hears of the potential benefits of an attorney is nonetheless unable to recognize the unstated risks of proceeding *pro se*. Even a youth advised by the judge of some of the risks of waiving counsel will likely underestimate those risks, especially if the plan includes waiving trial. The immediate benefit of moving forward

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to accept a plea agreement would eclipse vague risks of waiving the right to counsel. Without consulting an attorney first, a youth should not be said to knowingly and intelligently waive the right to counsel.

Other states, including Texas, New Jersey, Minnesota, Maryland, Iowa and Illinois, better protect juveniles against the danger of waiving the right to counsel in a fashion that is not voluntary, knowing or intelligent. Texas law prohibits waiver of counsel by juveniles in certain crucial proceedings [xxii] and allows waiver in other proceedings only if the child is already represented and informed by an attorney.[xxiii] In Minnesota, prior to waiver a child must be fully informed of his or her right to counsel via an in-person consultation with an attorney, and after waiver the court appoints standby counsel.[xxiv] Maryland similarly requires consultation with an attorney, as well as an in-depth inquiry into whether the waiver was knowing and voluntary.[xxv] Oregon should follow suit and require that a youth consult with an attorney regarding his or her rights prior to waiving the constitutional right to counsel.

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[i] ORS 419C.200
[ii] *See In re Gault*, 387 U.S. 1 (1967); Codified in ORS § 419C.200
[iii] For a succinct survey of the national status of the law in all of its incarnations, see the article *Juveniles' Waiver of the Right to Counsel* by Robert E. Shepherd, Jr. Found at http://www.abanet.org/crimjust/juvjus/13-1jwr.html. Last viewed 1/19/10.
[iv] *State ex rel. Juvenile Dep't of Marion Cty. v. Afanasiev*, 674 P.2d 1199 (Or. Ct. App. 1984) (applying to juvenile cases the standard of *State v. Verna*, 498 P.2d 793 (Or. Ct. App. 1972)).
[v] 313 Or. 125, 831 P.2d 666 (1992).
[vi] *Id* at 132.
[vii] *Id.*
[viii] *Id.*
[ix] *Id.* at 127-130.
[x] *Id.* at 135.
[xi] *Id.* at 133.
[xii] *Id.* at 133 n.9.
[xiii] *State v. Jackson*, 172 Or.App. 414, 423, 19 P.3d 925 (2001).
[xiv] *Id.* at 424.
[xv] 210 Or.App. 107, 114; 149 P.3d 1229 (2006).
[xvi] 213 Or.App. 151, 159 P.3d 1286 (2007).
[xvii] *Id.* at 161.
[xviii] National Institute of Mental Health, *Adolescent Brains Show Lower Activity in Areas that Control Risky Choices*, http://www.nimh.nih.gov (March 15, 2007).
[xix] Eshel, et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the ventrolateral prefrontal and anterior cingulate cortices*, 45 Neuropsychologia 1270-1279 (2007).
[xx] *Id.* at 1275.
[xxi] *Id.*
[xxii] Tex. Fam. Code § 51.10(b).
[xxiii] Tex. Fam. Code § 51.09.
[xxiv] Minn. Juv. Ct. R. P. 3.02.
[xxv] Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20.

PSYCH MEDS AND FOSTER CHILDREN

New Rules Aimed at Improving Protection

by Mark McKechnie, MSW, JRP Executive Director

During the 2009 session, the Oregon Legislature passed HB 3114, which requires the Oregon Department of Human Services to develop additional rules regarding the prescription of psychotropic medications for children in substitute care.

The Oregonian newspaper reported in 2007 that foster children are four times as likely to be prescribed psychotropic medication as other children covered by the Oregon Health Plan. Reviews also found that DHS routinely failed to comply with its own administrative rules, which require that all children in DHS custody be referred for a mental health assessment within 60 days of foster care entry.

HB 3114 created specific requirements that the DHS rules require foster children to be assessed by a mental health professional or medical professional with children's mental health expertise prior to the issuance of any antipsychotic medication or more than one new psychotropic medications. Refills for prescriptions that preceded DHS custody and placement are allowed.

The second requirement is that DHS obtain an annual review by a medical professional other than the prescriber when a foster child is prescribed more than two psychotropic medications, or for any foster child younger than six years who is prescribed any psychotropic medication. The bill also required that psychotropic medications must be prescribed for a medically accepted indication that is age appropriate.

The State of Oregon contracts with the College of Pharmacy at Oregon State University to review prescription patterns for the Oregon Health Plan population. As part of this review, DHS submits a list of children in substitute care, which is then matched to pharmacy claims.

As part of the Medicaid Retrospective Drug Use Review (DUR) Program, a clinical pharmacist conducts an annual review of psychotropic prescriptions for children under 6, for children under 12 prescribed anti-psychotic medication, and for children with three or more psychotropic prescriptions. If there is a question about the appropriateness of the child's prescriptions the pharmacist will contact the prescriber. If those questions are not resolved, the case is flagged for additional peer review. A report of the results of these reviews are provided to DHS's Children, Adults and Families Division (CAF) on a monthly basis.

The Department currently delegates the authority to foster parents to consent to psychotropic medications for children in their physical care as routine medical care. In addition to the requirements of HB 3114, DHS plans to require informed consent by a DHS manager or manager designee for psychotropic medication.

DHS convened an advisory group in November 2009, comprised of DHS staff, medical professionals and representatives from mental health, public defense, foster parents and CASA, regarding the implementation of HB 3114.

The proposed rule developed by the advisory committee also requires DHS to provide medical records to physicians prior to, or no later than, the time of examination when psychotropic medications are being considered. The committee found that it is quite common for pediatricians and psychiatrists to examine, assess, diagnose and prescribe mood-altering and behavior-altering medications without having the opportunity to review the child's medical and mental health history.

> Foster children are four times as likely to be prescribed psychotropic medication as other children covered by the Oregon Health Plan.

The group also recommended that the DUR file review should not be seen as a substitute for a second opinion when more serious concerns about the effects of psychotropic medication on a child arise.

The DHS Children Adult and Families Division (CAF) does not have the authority to adopt administrative rules which regulate the practice of medicine or the ability of licensed medical professionals to prescribe medications. Rather, existing and proposed rules determine the process by which DHS, as the legal guardian of children in foster care, provides informed consent to the prescription of psychotropic medications, as well as for other significant and potentially risky, medical treatments.

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What does this mean for attorneys representing foster children or their parents?

Pursuant to the requirement set forth in ORS 418.517(2), current DHS rule, OAR 413-070-0480, requires DHS to provide notice to parents, parents' attorneys, the child's attorney and a Court Appointed Special Advocate within seven working days when a child or young adult in substitute care begins psychotropic medication therapy. The rule also requires notice when there is a change in the prescribed dosage of a psychotropic medication, or when psychotropic medications are added or discontinued. (as required by ORS 418.517, 1993)

There are two key decision-makers in the process: the medical professional who determines that a medication will benefit the child and who explains the likely risks and benefits to the guardian, and the legal guardian who provides the informed consent to the prescription and administration of the drug.

Attorneys might want to engage their own expert to re-assess the child's need for the medication and assess whether the benefits outweigh the risks or actual side effects. This is not practical in every case, however, and it may not be necessary. These are some steps that the attorneys for children or parents can consider:

1. Attorneys for either children or parents can query the guardian on the decision-making process. DHS should be able to demonstrate an understanding of the purpose of the medication, as well as the possible negative effects. Children's attorneys also have the ability to query the medical professional. Parents' attorneys can seek permission from the court or guardian to ask questions (directly or indirectly) of the medical professional. Attorneys should ask specifically whether DHS provided the child's full medical and mental health history to the prescriber.

2. Basic information on the prescribed medication can typically be found on the manufacturer's web site. Information typically includes indications and contraindications, known side effects and may specify the ages of patients for whom the medication may be indicated or contraindicated.

3. Children's attorneys can talk to their clients about their medications, depending upon the child's developmental level, and ask them if they know what they're taking, what it's for, and how it makes them feel. Attorneys can also observe the child's demeanor, mood and behavior during meetings and note possible side-effects, such as sedation, agitation, tics or tremors.

4. Children's attorneys can also query foster parents, teachers and others who have regular contact with the child and ask about the child's mood and behavior as well as any physical or behavioral symptoms that might be concerning. Parents' attorneys can also ask the court or guardian to request the information from foster parents, teachers and others.

5. If any concerns are identified through these means, the attorney should urge DHS to notify the current prescriber of the concerns and/or suggest a review and second opinion by another medical professional. These services should be covered under the Oregon Health Plan for any child in substitute care.

6. If DHS fails to respond to concerns raised, ORS 418.517(4) authorizes a parent, an attorney for the parent or child, or a CASA who objects to the use or dosage of a psychotropic medication to petition the court for a hearing. The court is authorized to order an independent evaluation, and, upon a proper showing, the discontinuation or

modification of the prescribed dosage. In a case in which the attorney believes an independent court-ordered evaluation is needed, the attorney may need to consult with an expert in order to prepare a petition for a court hearing and may need to provide expert testimony in support of an independent evaluation if a hearing is granted.

Additional information can be found in the August 2006 ABA Child Law Practice Article, "An Advocate's Guide to the Use of Psychotropic Medications in Children and Adolescents," available at: http://www.abanet.org/child/aug06.pdf.

ENSURING PUBLIC DEFENSE SERVICES

PDSC Hearing on Youth Waivers Scheduled for March

by Ingrid Swenson, Executive Director, Office of Public Defense Services

As part of its responsibility to "establish and maintain" a public defense system that ensures the provision of public defense services that meet constitutional and statutory standards of justice, the Public Defense Services Commission (PDSC) has conducted a number of "service delivery reviews" in counties around the state. During the course of these reviews, Office of Public Defense Services (OPDS) gathers information about each of the local criminal and juvenile justice systems and how they operate.

During the Commission's visit to one region, members were surprised to learn that attorneys in that county were being appointed to represent youth in delinquency cases only about 50% of the time. All of the unrepresented youth were reported to be waiving their right to counsel. Anecdotal information indicated that the percentage of youth waiving counsel varied dramatically from one county to another.

In order to better understand the circumstances in which waiver occurs and to determine what action, if any, the Commission should take to ensure that youth who are entitled to appointed counsel are afforded representation, PDSC has scheduled a hearing on this issue for its March 4, 2010 meeting. In cooperation with the Child Advocacy Project under the direction of Prof. Leslie Harris at the University of Oregon Law School, PDSC is gathering data from each of the juvenile departments about practices in their counties.

This information will be available to PDSC in March. George Yeannakis with Team Child in Washington State will also be testifying at the PDSC meeting about the adoption in that state of a uniform court rule permitting juveniles to waive counsel only after consultation with an attorney. The rule took effect on September 1, 2008 and was adopted in response to the "significant problem" of juveniles appearing in court without counsel that was identified in a 2003 report by the American Bar Association Juvenile Justice Center. It was recently reported that the rule has been implemented in approximately 80% of Washington counties.

Waiver of counsel will also be a topic at the April 17-18 Juvenile Law Conference in Newport, Oregon sponsored by the Oregon Criminal Defense Lawyers Association. A panel including two judges, Angela Sherbo from the Juvenile Rights Project, and Mr. Yeannakis from Seattle will discuss the law of waiver and what attorneys can do to prevent inappropriate waiver.

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DEPENDENCY CASES

Inadequate Assistance of Counsel

by Holly Telerant, Office of Public Defense Services

The right to effective assistance of counsel has long been recognized in criminal proceedings. An entire body of constitutional law has discussed everything from unhelpful lawyers, to absent lawyers, to lawyers who work under the influence of intoxicants. Oregon extended this right to parents in termination of parental rights proceedings, not as a constitutional right, but as a necessary outgrowth of the statutory right to counsel. *State ex rel Juvenile Dep't of Multnomah Cty. v. Geist*, 310 Or 176 (1990). The logic held that right to counsel in termination cases, as provided by the juvenile code, would "prove illusory" if it did not also include the right to have that representation be minimally adequate. *Geist*, 310 Or at 185.

In *Geist*, the Oregon Supreme Court created a blueprint for reviewing counsel's performance in termination proceedings, which was later extended to all dependency and delinquency proceedings. The court observed that because cases involving the lives of children cannot endure the delays of a collateral process like post-conviction relief, challenges to the adequacy of counsel must be raised at the first available opportunity in the proceedings; namely, on direct appeal.

The court acknowledged that preservation was not required and that parties' ability to successfully critique their counsel's performance would sometimes be limited—especially where their claims involved omissions, such as counsel's failure to present key evidence or failure to advise their client of dispositive legal consequences. Geist, 310 at 192, fn 16. The court declined to articulate any specific process for raising an inadequate assistance claim before the court of appeals, suggesting instead that such claims be reviewed on a case-by-case basis. *See State ex rel Juvenile Dept of Multnomah County v. Dahl*, 104 Or App 145 (1990),

Since *Geist*, the court has addressed inadequate assistance in a limited number of cases, which case-by-case, can be taken together to present some guidance to practitioners.

Standard for Adequate Assistance

Geist established the standard by which counsel's adequacy is reviewed: whether, under the totality of the circumstances, including notice, confrontation, as well as counsel's assistance, the juvenile proceeding was "fundamentally fair," that is, whether it provided the parent with "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.*, 310 Or at 187-90.

Declining to establish any bright-line rules, the court observed that the concept of "[f]undamental fairness is flexible and calls for such procedural protections as the par-

ticular situation demands." *Id.* Given that there may be many ways to properly represent a client in any given case, the court noted that, "the search for a single, succinctly stated standard of performance, objectively applicable to every case, is 'a fool's errand,' upon which we decline to embark." *Id.* at 190 (citation omitted).

Test for Determining Inadequate Assistance

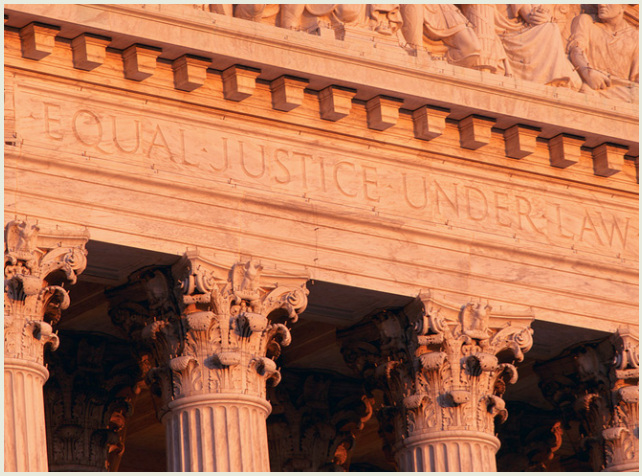
Although it explicitly declined to follow the line of criminal cases recognizing a constitutional right to effective counsel, the court in *Geist* implicitly adopted the same two-part test articulated by the US Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test puts the burden on the aggrieved party to demonstrate that (1) counsel was inadequate, and (2) counsel's performance actually caused prejudice to the outcome of the case.

Thus, the complaining party must present evidence to show not only that trial counsel was inadequate, but that their counsel's performance was responsible for the outcome of their case. In other words, that the result would have been different had counsel been adequate. *Geist*, 310 Or at 191. As later cases elaborated, prejudice was the key factor:

". . . a finding of inadequacy, standing alone, [does not] require a remand or reversal if, on de novo review of the record, the reviewing court is satisfied that the proceeding was fundamentally fair and that even with adequate counsel, the result inevitably, would have been the same." *Id.*

Lack of Preparation

One place where the courts have found prejudice is in cases involving counsel's glaring failure to prepare for a hearing. In *State ex rel SOSCF Rogers*, 162 Or App 437 (1999) the court of appeals reversed and remanded a termination judgment where trial counsel met mother for the first time on day of the termination trial. Mother had lacked the ability to pay for transportation to meet her attorney,



but counsel failed to review the record or prepare the case in any way. At the time of the hearing, counsel moved for withdrawal, or alternatively, a continuance. The court denied both motions and granted counsel a 10-minute break to prepare the case. Rather than placing the error at the feet of the trial court, the court of appeals held that the attorney failed to adequately review the case, and held that any competent attorney who reviewed the social file would see that mother's circumstances had drastically changed since jurisdiction was first taken, and she had not been provided with appropriate services by DHS. Thus, the outcome of the case was not inevitable, and counsel's inaction was directly to blame.

Similarly, in *State ex rel SOSCF v. Thomas*, 170 Or App 383 (2000), the court reversed and remanded where a father's pa-

rental rights were terminated in absentia in a trial that clearly indicated a lack of preparation on the part of counsel. The court found trial counsel's performance inadequate where counsel failed to get father transportation from his treatment program to the TPR hearing, and declined the court's offer to take telephonic testimony or leave the record open. The court found prejudice because father had no opportunity to be heard, and the trial court had no opportunity to judge father's credibility. As a remedy, it remanded the case for a new hearing on the petition to terminate father's rights.

Failure to Meet Filing Deadlines

Another area where litigants have found traction is in counsel's failure to meet filing deadlines for jurisdictional pleadings. In *State ex rel SOSCF v. Hammons*, 169 Or App 589 (2000) the court of appeals found that mother's counsel had been inadequate where he failed to timely file a notice of appeal after being instructed to do so by his client. Where counsel's assistance at trial was not at issue, and mother would be left without a remedy if the case were not considered by the court, it held that the proper inquiry was not as to prejudice, but as to whether the case to be reviewed presented a colorable claim of error on appeal. Finding that the failure to file a timely notice of appeal constituted inadequate assistance, and that mother demonstrated a colorable claim of error, the court of appeals allowed mother's delayed appeal from an order terminating her parental rights.

This case not only extended the reasoning in *Geist* to appellate counsel, it also provided a new procedure for clients seeking to file an untimely notice of appeal. However, in 2001 the legislature enacted a 90 day delayed appeal provision. 419A.200(5). Thus, as the court recently instructed in *State ex rel Juvenile Dep't of Multnomah County v. M.U.*, 229 Or App 35, 210 P3d 254 (2009), that since the legislature has provided a specific procedure regarding counsel's inadequacy for failure to file a timely appeal, litigants may no longer invoke *Hammons* or seek to extend the right provided by statute.

Failure to Advise Client

The court has also found inadequate assistance of counsel where a parent's attorney fails to properly advise them of the consequences of their legal actions. In *State ex rel SOSCF v Dennis*, 173 Or App 604, 25 P3d 341 (2001), the court found that father's counsel was inadequate for his failure to inform and advise father of the significant consequences of his stipulation to termination. However, the court ultimately concluded that dad was not prejudiced by counsel's mistake, since there was no credible evidence to show that father would have chosen any differently if he had been informed

that the putative open adoption he consented to had a small chance of failing.

Open Questions

It is clear that second guessing trial attorney's tactical choices, such as failure to call a particular witness, or failure to make a better record for review, will not prove successful where a reasonable attorney may have chosen the same strategy or the parent cannot show prejudice. *See State ex rel. Juvenile Dep't of Clackamas County v. Charles*, 106 Or App 628 (1991). So for the time being, successful inadequate assistance claims seem to lie in errors by counsel that preclude a client entirely from having her case heard on the merits, such as the failure to prepare a case in any way or file a jurisdictional pleading on time. The court has not yet parsed out the threshold of adequacy where counsel has presented evidence but the parent argues that it was inadequate under the circumstances, or where counsel may have prejudiced the trial court proceedings due to activities outside of the courtroom.

The court also remains open on the procedure for bringing inadequate assistance claims on appeal. Given the court of appeals recent willingness to allow parents to supplement the record with further evidence, *see State ex rel. Juvenile Dep't Of Wash. County v. L.B.*, ___ Or App. ___ (Or. Ct. App. Jan. 27, 2010) (court allowed parents to supplement the record with affidavits following oral argument as to why a dependency appeal should not be dismissed as moot), it seems that any remedy fashioned by the appellant could potentially be fair game.

RECENT CASE LAW

***State ex rel Juv Dept v L.B and N.A.M.*, ___ Or App ___ (January 27, 2010) (Wollheim, P. J.) (Washington Co.) affirmed.**

http://www.publications.ojd.state.or.us/A138333.htm

by Angela Sherbo, Attorney

In this appeal from the juvenile court's assertion of jurisdiction over an infant with unexplained injuries, the state argues that the appeal is moot because the juvenile court dismissed jurisdiction at some point after the appeal was filed. Parents argue that the collateral consequences of the original jurisdictional order prevent the appeal from being moot. On the merits, both parents argue that the jurisdictional findings were not supported by a preponderance of the evidence, because, they assert, the injury

Juvenile Law Resource Center

The Juvenile Law Resource Center (JLRC) assists attorneys representing parents in child welfare dependency proceedings throughout Oregon. It provides written resources including case law updates, sample motions, practice guides and issue briefs. The JLRC offers trainings for parents' lawyers in areas identified as most important to practitioners in JRP's statewide survey, which is available on line. Additionally, JRP attorneys are available to consult with attorneys on individual cases. More information is available at http://www.jrplaw.org/juvresocent.aspx. Check periodically for updates.

was explained. Father also argues that an "unexplained" injury, unless the injury is as a result of "abuse" or caused by "non-accidental" means, cannot support juvenile court jurisdiction.

The Court of Appeals agreed with the parents that the appeal was not moot, citing the potential adverse consequences, not only of the jurisdictional finding but of the DHS administrative conclusion that the report of abuse was "founded." The Court noted that under DHS's own rules, it will not provide an administrative review of the conclusion that a report is "founded" where a juvenile court's findings are consistent with a founded disposition. Citing a case involving an appeal by a person civilly committed who had been released prior to resolution of the appeal for the proposition that the stigma attached to the civil commitment was enough to defeat the mootness argument, the court declined to dismiss the case as moot.

On the merits, the court deferred to the "implicit credibility finding" of the juvenile court that mother's explanation, offered at trial, had not been communicated to the physicians and others attempting to find a cause of the injury at the time it was diagnosed. As to father's argument that an "unexplained" injury is not enough for jurisdiction, the court pointed out that the case had been pleaded and tried under the "conditions and circumstances" portion of the jurisdictional statute (ORS 419B.100(1)(c)) and not under a different subsection of the statute which refers to subjecting the child to "unexplained physical injury." ORS 419B.100(1)(e)(C). The court's precedents establish a totality of the circumstances test for "conditions and circumstances" that was met here.

State v. M.A.H., ___ Or App ___ (January 27, 2010) (_Per curiam_) (Clackamas Co.) appeal dismissed as moot.

http://www.publications.ojd.state.or.us/A142422.htm

by Angela Sherbo, Attorney

DHS appealed from judgments denying its request to change the permanency plan for mother's children from reunification to adoption. The juvenile court refused to change the plan because DHS had not identified and approved an adoptive resource. Since the judgments appealed from, the agency has identified and approved an adoptive home, thus, the appeal is moot. The court noted, "the only relief that we could grant would be a remand for the court to reconsider the request under the circumstances as they now exist; yet nothing in the trial court's judgment precludes DHS from obtaining that same relief independently of our decision, by requesting a change in the permanency plan based on the changed circumstances."

***Greene v. Camreta*, 588 F3d 1011 (9th Cir. 2009)** http://www.ca9.uscourts.gov/datastore/opinions/2009/12/16/06-35333.pdf

By Julie McFarlane, Attorney

In *Green v. Camreta*, ___ F3d ___ (9th Cir. 12/10/09), an appeal from the U.S. District Court for the District of Oregon, the 9th Circuit exam-

ined constitutional implications of the practice of interviewing an alleged child sexual abuse victim at her school without parental consent or a warrant. The mother and the children, S.G. and K.G., appealed a summary judgment granted in favor of the defendant-appellees, who included the CPS caseworker, a Deschutes county Deputy Sheriff, and the Bend LaPine School District.

The 9th Circuit applied traditional Fourth Amendment analysis, relying on the Court's holding in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) for the conclusion that, "the general law of search warrants applie[s] to child abuse investigations." 189 F.3d at 814. "Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim, we simply cannot say, as a matter of law, that she was seized for some "special need . . . . beyond the normal need for law enforcement," citing, Ferguson, 532 U.S. at 74 n.7. The Court found that exigent circumstances, which would permit a caseworker to seize a child absent a warrant, were not present in this case because the caseworker did not have "reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant." Rogers, 487 F.3d at 1294.

The Court found that the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances or parental consent, was unconstitutional. Making it clear that such actions by state agents in the future cannot expect to be immunized from possible damages, the Court stated: "We hasten to note that government officials investigation allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context."

***State v. Cervantes*, ___ Or. App. ___ (2009)**

http://www.publications.ojd.state.or.us/A130129.htm

by Julie McFarlane, Attorney

Cervantes, who was pregnant, used methamphetamine, and was charged with causing another person to ingest a controlled substance, unlawful application of a controlled substance to a minor, and recklessly endangering another person. The trial court allowed demurrer for all three counts. The Court of Appeals did not address the demurrer on the first two counts, as both parties invited the error. On the third count, the Court of Appeals upheld the demurrer, stating that the only "entity" (the fetus) was not a "person" when Cervantes ingested the methamphetamine.

RECENT CASE LAW

Juvenile Interrogations

***Crowe v. Wrisley*, 05-55467 (9th Cir., January 14, 2010)**

http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000010218

by Rochelle Martinsson, Law Clerk

Three teens wrongfully accused of and prosecuted for the murder of a 12-year-old girl, with their families, filed a civil rights action against multiple individuals and government entities involved in the investigation and prosecution, alleging constitutional violations under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and defamation. The District Court granted summary judgment for defendants on most of plaintiffs' claims. Two of the families appealed the grants of summary judgment, and several defendants' cross-appealed denial of summary judgment as to certain claims, on qualified immunity grounds. The U.S. Appellate Court for the Ninth Circuit, reviewing the District Court's decisions to grant or deny summary judgment *de novo*, affirmed in part and reversed in part.

Michael Crowe, Aaron Houser, and Joshua Treadway, each 14 or 15 years old at the time, were investigated for the murder of Michael's 12 year-old sister, Stephanie Crowe, who was stabbed to death in her bedroom during the night of January 20-21, 1998. Evidence implicating the youths was sketchy, and there was evidence suggesting that a transient man, who was in the area, was worthy of scrutiny. However, the police investigation focused on the three youths, and involved searches and extensive interrogations.

As to plaintiffs' Fifth Amendment claims alleging violation of the privilege against compelled self-incrimination, the Appellate Court reversed summary judgment for defendants. Relying on *Stoot v. City of Everett*, No. 07-35425, 2009 WL 2973229 (9th Cir. Sept. 18, 2009), the Court found that a coerced confession in violation of the Fifth Amendment privilege, used in certain pre-trial proceedings, may give rise to a civil rights claim under 42 U.S.C. § 1983. The Court also found that defendant police officers could be held liable for proximate harm because they could reasonably have foreseen that a coerced confession would be used against the youths and would lead to the youths' detention.

As to plaintiffs' Fourteenth Amendment claims, alleging the interrogation techniques used by defendant police officers violated the youths' substantive due process rights, the Appellate Court also reversed summary judgment for defendants. Noting that Michael and Aaron, "were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers," the Court commented that "[p]sychological torture is not an inapt description" of the youths' experience. The Court held that the interrogation techniques were so coercive as to "shock the conscience," (Rochin v. California, 342 U.S. 165, 172 (1952)), and that defendants were not entitled to qualified immunity, due to the fact that the youths' rights were clearly established at the time of interrogation.

As to plaintiffs' Fourth Amendment probable cause claims, the Appellate Court affirmed summary judgment for defendants as to Michael's arrest, on qualified immunity grounds, and as to Aaron's arrest, the search of Aaron's home, and the strip search of Michael, on grounds that there was sufficient probable cause.

As to plaintiffs' Fourteenth Amendment claims of deprivation of familial companionship as a result of Michael's and Aaron's detention, the Appellate Court reversed summary judgment for defendants. Finding that each youth's detention was wrongfully justified by illegally coerced confessions, and that parents have a fundamental liberty interest in companionship and society with their children which the state cannot abridge without due process of law, the Court held that the substantive due process rights of Michael's and Aaron's parents had been violated, allowing for remedy under § 1983. However, the Court affirmed summary judgment for defendants on the Crowes' deprivation of familial companionship claim based on the placement of Michael and Shannon Crowe (Michael's other sister) in protective custody, reasoning that such action was warranted under applicable California law.

The Appellate Court affirmed summary judgment for defendants Deputy DA Summer Stephen and Dr. Lawrence Blum on plaintiffs' state law and § 1983 defamation claims, and affirmed summary judgment for defendant cities on municipality liability claims.

***re L.A.W.*, ___ Or. App. ___ (2010),**

http://www.publications.ojd.state.or.us/A138346.htm

by Julie McFarlane, Attorney

The State appealed the juvenile court's grant of a motion to suppress statements the youth made to a police detective. The trial court had granted the motion on the ground that the youth's waiver of his rights was not knowing and intelligent.

L.A.W., a 12-year-old juvenile alleged to be in the jurisdiction of the juvenile court for unlawful sexual penetration in the first degree of a 10-year-old girl, was interrogated at his middle school by a police detective with a DHS caseworker present in a room in the school's office. The youth was read his rights by the detective and signed a rights card without asking any questions. The youth appeared calm and not confused throughout the interrogation.

Initially, L.A.W. denied the sexual penetration, but after the detective told the youth that, "[10] year-old girls don't come up with these things off the tops of their head," and that, "if it was a matter of, you know, [youth] making a mistake[,] and, you know, being sorry, you know for some of his actions, I'd be willing to put that in my report," the youth acknowledged that he had sexually penetrated the victim.

The trial court heard testimony from a psychologist, who had evaluated the youth and found he had an I.Q. of 106 and serious emotional problems. The psychologist testified that the youth did "not necessarily" understand the *Miranda* warnings.

On de novo review, the Court compared L.A.W.'s case to decisions in State ex rel Juv. Dept. v. Deford, 177 Or App 555 (2001) AND State ex rel Juv. Dept. v. Cecil, 177 Or App 583 (2001). Reversing the trial court, the Court of Appeals found L.A.W.'s facts did not support the finding that the youth had not made a knowing and intelligent waiver of his constitutional right not to incriminate himself.

***Stoot v. City of Everett*, 582 F3d 910 (9th Cir. 2009)**

http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000009863

by Julie McFarlane, Attorney

Stoot, a fourteen-year-old juvenile, was seized and interrogated in the principal's office at his school by an Everett Police Detective, based solely on statements of a four-year-old that she had been sexually abused when she was three. Toward the end of the almost two-hour interrogation, Stoot confessed to molesting the victim, and was subsequently charged in juvenile court.

The confession was suppressed due to the trial court finding that Stoot lacked the capacity to understand his rights and make an intelligent waiver before the interrogation based on his age, experience, background, and intelligence. The trial court also found that the confession resulted from coercive interrogation practices by the detective. The child complainant was incompetent to testify, and her hearsay statements were inadmissible. Ultimately, the charges were dismissed.

Stoot and his family brought suit under Section 1983 of the Civil Rights Act alleging violation of rights under the Fourth and Fifth Amendments. The Federal District Court granted summary judgment. On appeal, the 9th Circuit affirmed in part, reversed in part, and remanded.

Regarding the Fourth Amendment claim, the 9th Circuit agreed that the child's statements alone were not sufficiently reliable to establish probable cause, given the child's age and the fact that her statements were at times confused and contradictory. Additional evidence was needed to corroborate the allegations and establish probable cause. However, the 9th Circuit found that the detective was entitled to qualified immunity on the Fourth Amendment claim, since he could not have known that relying on the child's statements, without further corroboration, was unlawful.

Regarding the Fifth Amendment claim, the 9th Circuit adopted the approach of the Seventh and Second Circuits, allowing the claim because the coerced statements were used against Stoot, even though the case did not progress all the way to trial. The 9th Circuit found the detective was on notice when he interrogated Stoot, and that if he failed to appropriately notify the boy of his rights or if he physically or psychologically coerced a statement, the resulting confession could form the basis of a Fifth Amendment claim. On the Fifth Amendment claim, the 9th Circuit found that the detective was not entitled to qualified immunity because it was reasonably foreseeable that the coerced statements would be used against Stoot.

OTHER RECENT CASE LAW

Juvenile Sex Offender Registration

Amended Opinion *U.S. v. Juvenile Male*

by Noah Barish, Law Clerk

In September 2009, the Ninth Circuit issued an important decision declaring that the retroactive application of SORNA's registration requirement for former juvenile offenders is punitive and violates the Ex Post Facto Clause of the Constitution. *U.S. v. Juvenile Male*, 581 F.3d 977 (9th Cir. 2009). For a more complete summary of that decision, see the Juvenile Law Reader, Volume 6,

Issue 6, p. 18 (http://www.jrplaw.org/Documents/jrpreaderv6is6.pdf).

Last month, the Ninth Circuit amended that decision slightly but left the holding and substantive reasoning untouched. *U.S. v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2010/01/05/07-30290.pdf. The amended decision adds two footnotes to the prior ruling, both of which distinguish previous Ninth Circuit cases addressing Ex Post Facto challenges to SORNA's registration requirements for adults.

The first footnote clarifies that the Ninth Circuit decisions in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) and *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004) both addressed registration for adult convictions and failed to consider whether registration would be punitive if imposed on those adjudicated delinquent in the juvenile justice system.

The second footnote discusses *United States v. George*, 579 F.3d 962 (9th Cir. 2009), an Ex Post Facto challenge to SORNA's criminal provisions from an adult defendant convicted of a sex offense prior to SORNA and then convicted under SORNA for failure to register. *George* held that when there is a lawful obligation to register pre-SORNA, that obligation continues post-SORNA, and thus SORNA's imposition of criminal liability for post-SORNA conduct raises no Ex Post Facto Issue. *George*, however, did not consider whether juvenile offenders may be required to register based on pre-SORNA adjudications, the central issue of *Juvenile Male*.

This amended decision in *Juvenile Male* only serves to strengthen Ninth Circuit's holding that SORNA's registration requirement for juveniles is punitive and unconstitutional.

Title IV-E Services

***California Alliance of Child and Family Services v. Allenby*, ___ F3d ___ (9th Cir. 2009)**

by Julie McFarlane, Attorney

CACFS appealed a District Court decision that California's system for determining payment for foster care group homes, which resulted in payments of 80% of the actual costs of maintaining the children in those group homes, complied with the federal Child Welfare Act (Title IV-E) [CWA]. California had not adjusted foster care maintenance payments under its Rate Classification Level System, which is tied to the California Necessities Index(CNI), designed to reflect changes in costs of living, since 2001. The 9th Circuit, after examining the CWA found that the requirement that states "cover the cost" of food,

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clothing, shelter, supervision and other maintenance costs, requires strict compliance and paying 80% of maintenance is not substantial compliance. In reversing and remanding the case, the Court also held that California must make annual adjustments to the payment schedule based on the current CNI.

Hindering Apprehension

***State v. McCullough*, 347 Or 350 (2009),**

http://www.publications.ojd.state.or.us/S056910.htm

by Julie McFarlane, Attorney

The father of a youth facing time in a juvenile correctional facility for a probation violation on an Assault in the Third Degree aided the youth in attempting to flee the country. The father was subsequently charged with hindering apprehension. On appeal, the father argued that ORS 162.325 (1) only applies to adult felons. The Supreme Court affirmed, holding that hindering prosecution applies to juveniles adjudicated of a felony as well. Additionally, the Court held that hindering apprehension is not temporally limited to initial apprehension for the crime, but also applies to other stages of the criminal process.

UPCOMING CONFERENCES

National Conference on Juvenile and Family Law

National Council of Juvenile and Family Court Judges
March 14–17, Las Vegas, NV
www.ncjfcj.org/content/view/1246/315

2010 Model Court Conference

Implicit Bias and Family Engagement
April 2, Portland, OR
Abbey Stamp (503) 988-3383

Fifth Oregon Child Advocacy Project Conference

Ethical and Practical Dilemmas of Representing Children
April 2, Eugene, OR
Jill Forcier (541) 346-3845

28th Annual "Protecting Our Children" National American Indian Conference on Child Abuse and Neglect

National Indian Child Welfare Association
April 11–14, Portland, OR
www.nicwa.org/conference

Oregon Criminal Defense Lawyer's Association

Annual Juvenile Law Seminar
April 16-17, Newport, OR
www.ocdla.org

READER RESOURCES

Adolescent Sexual Offending II

Volume 28, Issue 1 (January/February 2010) of **Behavioral Sciences & the Law** is a "Special Issue: Adolescent Sexual Offending II." This periodical can be found at: http://www3.interscience.wiley.com/journal/3512/home?CRETRY=1&SRETRY=0

New Resources and Update on Juvenile Shackling

The National Institute of Corrections has issued a "review of juvenile offender shackling practices and related policies." This new resource, titled *The Shackling of Juvenile Offenders: The Debate in Juvenile Justice Policy*, includes information on the evolution of juvenile unshackling efforts in Florida, and overview of current juvenile shackling practices in Florida generally and Alachua County in particular, and an overview of national juvenile shackling practices. *The Shackling of Juvenile Offenders* is available at: http://www.nicic.org/Library/024016. On a related note, on December 17, 2009, The Florida Supreme Court banned the indiscriminate use of shackling of child offenders during court appearances. For more information, go to: www.jdaihelpdesk.org.

New Research Lends Support for Detention Alternatives

According to The Annie E. Casey Foundation, "New research out of Multnomah County's Department of Community Justice (DCJ) shows that most young people who are kept out of the formal juvenile justice system do not reoffend." [i] Additionally, results of a new longitudinal study published in the *Journal of Child Psychology and Psychiatry* suggest that contact with the juvenile court, and being placed in detention specifically, greatly increases an individual's likelihood of involvement with the penal system in adulthood. An August 7, 2009 article in *Time* states, "Researchers found that rather than rehabilitating young delinquents, juvenile detention—which lumps troubled kids in with other troubled kids—appeared to worsen their behavior problems."[ii]

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[i] The Annie E. Casey Foundation, *Most Minor Delinquents Diverted from the Juvenile Justice System Avoid Reoffending, available at:* http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/Resources/Dec09newsletter/JDAISiteUpdates6.aspx. See also, The Annie E. Casey Foundation, *Longitudinal Study Finds Detention is Precursor to Criminal Behavior, available at:* http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={FDCDE8B1-C05B-4836-A974-32DC82A7258F}.

[ii] Maria Szalavitz. *Why Juvenile Detention Makes Teens Worse* (Time, August 7, 2009), *available at:* http://www.time.com/time/health/article/0,8599,1914837,00.html.

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