Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW

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"...the court gave weight to expert studies indicating that shackling is almost always psychologically and emotionally harmful."

Yamhill County Juvenile Court Sharply Limits Shackling

By Talia Stoessel, Law Clerk

Accused juveniles throughout Oregon have been shackled to, from, and during certain court appearances, including arraignments and review hearings. Shackling procedures for juveniles have not been uniform throughout the state, and can include belly chains, handcuffs, and leg irons.

In February 2011, Yamhill County juvenile defense attorney, Paula Lawrence obtained a favorable ruling on a motion for release of youth detained in the Yamhill County Juvenile Detention Center (YCJDC), addressing several practices in the YCJDC.

Presiding Judge John L. Collins, in his fourteen page Letter Opinion, found that, as of the writing of the Letter Opinion, the youths were no longer in custody, but that the issues raised by Ms. Lawrence are likely to re-occur with other youth in detention and the issues presented are of ongoing and important public policy, that should be addressed regardless of the present circumstances of the particular youth.

Click here for Judge Collins full letter opinion: http://www.jrplaw.org/documents/detentionopinionanon.pdf

In addition to addressing the handcuffing and shackling of youth before, during and after in-person court appearances and handcuffing youth before during and after video appearances, the Letter Opinion addressed practices of the YCJDC that required counsel to remove all staples from materials brought to attorney-client visits in detention and restrictions on youths' access to their legal papers while in detention. Lastly, the Letter Opinion addressed the practice

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« *Shackling continued from previous page*

of strip searching youths following court appearances and at other times without individualized reasonable suspicion.

Shackling of In Custody Youth

The Court put limits on the practice of shackling in custody youth, finding that a youth could remain shackled in the courtroom and during video appearances *only* where it is *necessary* to prevent escape, injury, or destruction and that shackling must last only as long as that danger exists.[i] The Court stated that the Presiding Judge must make the decision, basing it on specific indications of danger. The court also found that youth could be reasonably restrained when transported to and from court but that procedures could not include full-scale shackling without prior judicial approval and that officials should always consider alternatives that would mitigate potential harm.

The court based its decision on *State ex rel. Department of Multnomah County v. Millican*, 138 Or. App. 142 (1995), and a logical reading of ORS 169.730 *et sec. Millican* considered the constitutionality of shackling juveniles during court proceedings. The *Millican* court found that the lower court erred in denying the juvenile's motion to be unshackled because juveniles have the same right to be free from shackling during court appearances as adults; however, it also found that in this instance the error was harmless beyond a reasonable doubt. In support of its decision to prohibit shackling during court proceedings, the *Millican* court pointed to the effect that shackling has on a juvenile's psychological well-being and access to counsel as well as the rehabilitative purpose of the juvenile justice system. In addition to the *Millican* decision, the court gave weight to expert studies indicating that shackling is almost always psychologically and emotionally harmful. Additionally, it looked to types of limits that ORS 169.730 *et sec.* places on the use of physical restraint of in-custody juveniles.

Access to Counsel

Judge Collins did not find that the requirement that counsel to remove all staples from materials brought to attorney-client visits in detention rose to the level of being a denial of meaningful access to counsel, but urged YCJDC to clarify a reasonable policy regarding attorneys' use of staples.

Similarly, regarding the complained of restrictions on youths' access to their legal papers while in detention, the Court found that the YCJDC's practice of not allowing youth to keep legal papers in their cells, but retrieving them for youth and allowing them to look at those papers, only at certain locations and during certain hours, had a reasonable basis and did not constitution a denial of a constitutional or statutory right sufficient to warrant Court intervention. The Court did, however, state that ready access by the juveniles to their legal papers in their cells would be ideal, and encouraged YCJDC staff to examine procedures and/or practices that might allow legal papers to be more readily available to detained youth.

Strip Searches

The Court applied the ruling in *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233 (D. Or. 2010), *as amended* (May 4, 2010), to the practice of strip searches of youth after court appearances and at other times without individualized reasonable suspicion. Such searches may not be routinely conducted after contact visits and court appearances and must be restricted to those situations where there is a reasonable suspicion that the juvenile may have acquired contraband. The search must be based on articulable facts and reasonably restricted to the facts that form a basis for the search. "To allow such searches otherwise places a chilling effect on the willingness of juveniles to come to court and subjects the juveniles to emotional harm and unlawful search."[ii] YCJDC is required to develop clear, unambiguous, and objective criteria and to get prior impartial magistrate approval. ●

[i] The court points to a 2010 Massachusetts policy directive for a list of factors to consider in making this decision.

[ii] The YCJDC director had testified that in his view, was cause to subject the juvenile to a search because she had, at some point, brought a stapled and glued legal pad into the facility. Judge Collins indicated: "This is not reasonable suspicion for a search of the juvenile. It smacks of retaliation for Ms. Lawrence's perceived role in litigation challenging YCJDC's policies and practices."

The board and staff of Youth, Rights & Justice would like to thank Emily K. Shannon for her four years of service on the board of directors, as well as for her previous work as a staff attorney and law clerk.

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

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Tax deductible donations are welcome and can be sent to the YRJ offices. Queries regarding contributed articles can be addressed to the editorial board.

Model Colloquy for Juvenile Waiver of Counsel

As a result of a statewide survey that revealed a high waiver of counsel rate for juvenile delinquency cases in some Oregon Counties, the Oregon Judicial Department at the direction of Chief Justice Paul DeMuniz sent the following memo and model waiver colloquy to all juvenile court judges. A change to Part III. A. (2) Collateral Consequences is being developed to include immigration consequences faced by juvenile delinquents.

Juvenile Waiver of Counsel-Model Colloquy for Judges

I. Explanation of Petition and Allegation(s)

Explain the district attorney's allegations to the youth, why he/she is in court, and that he/she has a constitutional right to have an attorney help him/her.

II. Competency Assessment

The purpose of this section is to determine whether the youth understands the process and is competent to waive hislher right to counsel. First, ask questions to ascertain general information such as the youth's age and grade level that he/she has completed. Second, ask questions to determine whether the youth understands the roles of all of the parties, including that of the district attorney, the defense attorney, and the court. Finally, ask questions that determine whether the youth understands the possible dispositional consequences of adjudication, such as detention and probation.

NOTE to Court:

- If after asking those questions, the court determines that the child does not have sufficient understanding of both the proceedings and the parties' roles, appoint counsel.
- If the colloquy demonstrates that the youth understands, ask the youth if he/she wants an attorney. If yes appoint an attorney, if no proceed to the advice of rights and waiver colloquy.

III. Advice of Rights and Waiver Colloquy

You have a constitutional right to have an attorney represent you and help you with your case. It is generally not a good idea to proceed without an attorney in a case where you could be facing detention time. I am going to explain the nature of the charges, possible consequences, and the proceedings. Then I am going to explain how a lawyer could help you.

A. Accusations, Consequences, and Proceedings.

Explain the nature of the charges, possible consequences (direct and collateral), and the purpose of the present hearing and future proceedings:

1. Direct Consequences: explain potential disposition and sanctions, including custody, probation, and conditions of probation.
2. Collateral Consequences: (See list below and discuss as applicable)

- You may lose your driver's license or ability to apply for one.
- You may not get ajob that you want.
- If you want to go to college, you may not be able to get fmancial aid.
- You may not be able to join the military.
- (If applicable) You may have to register as a sex offender; I may order that you cannot live at home with your minor brothers and/or sisters.
- You may not be able to associate with friends who are on probation.
- If I find that the district attorney has proven beyond a reasonable doubt that you committed an act that would be a crime if you were an adult, that finding may be used against you in any future juvenile cases or adult criminal cases.

B. Role of Defense Counsel

By choosing to proceed without a lawyer and represent yourself, you are at a *serious disadvantage*. Here's why:

- Because you lack experience and legal training, you may not realize that you have one or more defenses to the charges.
- The rules and procedures of this court will apply to you, even if you do not have a lawyer.
- The district attorney is a lawyer and understands the rules and procedures of this court, which gives himlher an advantage over you.

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« *Model Colloquy continued from previous page*

- Your juvenile counselor is not a lawyer and he/she cannot give you legal advice or represent you in this case.

By choosing to proceed without a lawyer, you are giving up the following *benefits*:

- A lawyer will review the facts of your case and discuss them with you to determine what defenses you may have to the charges against you and to find weaknesses in the district attorney's case.
- A lawyer can advise you on whether you should have a trial in your case or agree to admit some of the charges.
- You don't have to be innocent to benefit from having a lawyer. Even if you have done what you are charged with a lawyer can often negotiate with the district attorney for a lower charge or for an agreement about what should happen to you.
- [*If applicable*] A lawyer can advise you on whether you qualify for release from detention while you are waiting for the trial.
- If you have a trial a lawyer will prepare your case for trial, which would include gathering evidence, talking to your witnesses and getting them to come to court.
- A lawyer knows the rules of evidence and can help you question witnesses and present evidence necessary for your defense. A lawyer also knows how to prevent the district attorney from using improper evidence.
- A lawyer knows how to get information from the district attorney that is important to your case, such as police reports and witness statements.
- A lawyer will investigate and properly raise any defenses you might have.
- A lawyer can make legal arguments to the court during the trial and present opening and closing statements to the court.
- A lawyer can explain to you the possible disposition and consequences if you are found to have done what you are charged with.

If you choose to proceed without a lawyer, you cannot rely on your juvenile counselor, the judge, court staff, your interpreter, or the district attorney for legal advice or to help you in defending yourself.

C. Waiver

- Do you have any questions about what we have discussed?
- In light of the information that I have given you, can you tell me in your own words the disadvantages of proceeding without a lawyer?
- Has anyone encouraged you to go forward without a lawyer or threatened you if you choose to have a lawyer?
- Do you want me to appoint a lawyer for you?
  a. If "Yes," appoint a lawyer.
  b. If "No," ask the youth to explain in his/her own words why he/she does not want a lawyer.
- If the youth's answer does not demonstrate that he/she understands the disadvantages of proceeding without counsel, appoint a lawyer. ●

OETO3-11

OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

February 9, 2011
(SENT BY EMAIL)

MEMORANDUM

TO: Members of the Judicial Conference
Trial Court Administrators

FROM: Mollie Croisan, Director
Office of Education, Training, and Outreach

RE: Completion of the *Juvenile Waiver of Counsel Script* - Available for Use

The Public Defense Services Commission (PDSC) conducted a hearing in March 2010 on public defense representation in juvenile delinquency cases. At that hearing the commission was provided with the results of a survey of local Juvenile Department directors that indicated that there were high rates of waiver of counsel by juveniles in some Oregon counties.

In order to ensure that youth fully understood the right to counsel before making a decision to waive counsel, the commission recommended that a model waiver colloquy be developed. Lawyers in the Office of Public Defense Services Appellate Division prepared an initial draft of this document which was circulated to Oregon Judicial Department juvenile court judges for comment. After their comments were received, the document was amended to address the issues they raised. A small work group headed by PDSC member and Senior Judge Elizabeth Welch then approved the final version of the document which was then sent to the Chief Justice for his review. The Chief Justice supports this document as a helpful tool.

This colloquy is separated into three sections:

- Explanation of Petition and Allegation(s)
- Competency Assessment
- Advice of Rights and Waiver Colloquy
  - Accusations, Consequences, and Proceedings
  - Role of Defense Counsel
  - Waiver

The Juvenile Waiver of Counsel is attached and also available on the Education and Training Reference Database in Lotus Notes. Please check this database occasionally as any updates will be reflected here.

Juvenile_Waiver_of_Counsel_2011-2-1.do

As you begin using this form, the Office of Education, Training, and Outreach would like to hear your feedback. Please direct all comments to OETO@ojd.state.or.us or call 503-986-5911.

MC:ma/11dMC003ma
ec: Leola McKenzie
Ingrid Swenson, OPDS
OSCA Division Directors

Office of Education, Training, and Outreach ● Supreme Court Building ● 1163 State Street ● Salem, Oregon 97301-2563
503-986-5911 ● FAX 503-373-2238 ● Oregon Relay Service - 711

The Impact of Washington's *Parents Representation Program* (PRP) on the Child Welfare System

by Talia Stoessel, Law Clerk

Many states recognize that legal representation for parents whose children have been removed from their custody is an essential protection. However, a 2010 study in Washington demonstrates that the quality of parental representation also has a significant impact on the efficiency of child welfare system in achieving permanency for children. In 1999, the Washington State Office of Public Defense (OPD) conducted a study of inequalities in attorney funding from one Washington County to another in dependency and parental rights termination cases, finding that some parents were not receiving adequate legal representation. In 2000, OPD and the Washington State Legislature developed the Parents Representation Program (PRP) to address the inadequacies. PRP seeks to enhance the quality of defense representation in dependency and termination hearings by providing supplemental funding to reduce the number of continuances requested by attorneys, establish a maximum caseload per full-time attorney, enhance attorney practice standards, support the use of investigative and expert services, and ensure implementation of indigency screenings.

In 2010, Partners for Our Children at the University of Washington conducted the first methodologically sound study of the impact that a parental representation program can have on the quality of the child welfare system. The study specifically examined PRP's influence on the speed with which children are reunified, adopted, or entered into guardianships. Over a period of four years, the study followed 12,104 children who entered care for the first time in order to see whether and when they achieved reunification, adoption or guardianship. The study compared counties with PRP to counties without PRP, while accounting for other causes of variation such as the child's sex, age at entry, and race. The staggered implementation of the program across the state benefited the researchers by providing them an opportunity to compare across counties as well as within counties before and after the implementation of PRP. Limitations of the study include a lack of long-term data on kids in the child welfare system generally, no examination of the rates of re-entry into the system, a lack of national data on parental representation programs, and an inability to prove causation.

The results of the 2010 study indicate that adequate parental legal representation hastens reunification with parents as well as permanency through adoption and guardianship for those who do not achieve reunification. In counties with PRP, the rate of reunification was 11% higher. Because the most common outcome for children is reunification, a large number of children are impacted by this statistic. Additionally, the rate of adoption was 83% higher, and the rate of guardianship placement 102% higher. These results indicate that PRP is helpful in finding permanent homes for children in a shorter amount of time.

The results of the 2010 study indicate that adequate parental legal representation hastens reunification with parents as well as permanency through adoption and guardianship for those who do not achieve reunification.

There are several proposed explanations for the program's findings. For example, in cases where reunification is possible, adequate representation may increase the chances that the parents will receive services needed to safely parent the children. Additionally, in cases where reunification is not possible, adequate legal representation may increase the likelihood that parents will more quickly come to terms with their inability to care for the child and will understand the necessity of finding an alternative placement that is in the child's best interest. On the other hand, some professionals argue that lawyers slow down the process by engaging in delay tactics; however, the outcomes of this study do not support this contention.

Currently, PRP functions in twenty-five counties throughout Washington State and the researchers recommend that Washington extend PRP to all counties. While the study was unable to conduct a cost-benefit analysis due to lack of available data, the results support an argument that investing in the court system saves money in the child welfare system. The study also states that PRP is a fairly straightforward intervention that can be readily replicated in other jurisdictions. Other states interested in conducting a similar study should begin by engaging judges, lawyers from all sides of the issues, and child welfare professionals. For questions regarding this process or the

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« *Parent Representation Program continued from previous page*

Washington study, contact Mark Courtney at the University of Chicago, markc@uchicago.edu, (773) 702-1219, or Clark Peters at the University of Missouri, peterscm@missouri.edu, (573) 884-1411.●

JLRC Case Summaries

Dept. of Human Services v. W.F., __ Or App __, ___ P3d ___ (January 19, 2011) (Armstrong, J.) (Hood River Co.)

Permanency judgment reversed.

http://www.publications.ojd.state.or.us/A145459.htm

Upon appeal of a permanency judgment, father raised several challenges, one of which was that the trial court had erred in failing to include in the judgment the determinations required by ORS 419B.476(2)(b) and (c). The Court of Appeals agreed, finding that because the plan in effect at the time of the hearing was adoption, the trial court should have included in the judgment determinations as to reasonable efforts made by DHS to place the child, as well as whether DHS had considered permanent placement options for the child.

The state argued that the trial court had satisfied the requirements of ORS 419B.476 by incorporating into the permanency judgment the Permanency Court Report. However, the Court of Appeals found that the permanency judgment referred to and incorporated that report only insofar as it related to DHS' "active efforts to make it possible for the ward to safely return home," and that it did not satisfy the statutory requirement that the judgment describe DHS' reasonable efforts to implement the plan of adoption.

Dept. of Human Services v. K.A.S., __ Or App __, ___ P3d ___ (February 16, 2011) (per curiam) (Polk Co.)

Permanency judgment reversed.

http://www.publications.ojd.state.or.us/A146533.htm

Mother appealed a permanency judgment, arguing in part that it was ineffective as a matter of law. Specifically, mother argued that under ORS 419B.476(5)(d), a permanency judgment changing the plan to adoption must include a determination by the court that one of the reasons to defer filing a termination petition under ORS 419B.498(2) is applicable, and that the judgment in question failed to include such a finding. The state conceded that the trial court had erred in this regard, and the Court of Appeals agreed, reversing the permanency judgment and remanding the case.

Dept. of Human Services v. P.P., __ Or App __, ___ P3d ___ (February 2, 2011) (per curiam) (Linn Co.)

Termination of parental rights affirmed.

http://www.publications.ojd.state.or.us/A146533.htm

Father appealed a judgment terminating his parental rights to his child. The Court of Appeals affirmed the judgment, finding that it was proper under ORS 419B.504, and declining to discuss the case further.

Dept. of Human Services v. H.R., __ Or App __, ___ P3d ___ (March 3, 2011) (Ortega, P.J.) (Coos Co.)

Permanency judgment affirmed.

http://www.publications.ojd.state.or.us/A146143.htm

Mother appealed a permanency judgment changing the plan for her son, R., from reunification to adoption. In particular, she challenged the sufficiency of the juvenile court's findings regarding reasonable efforts made by the Department of Human Services (DHS) to reunify the family, and the court's determination that a petition to terminate her parental rights need not have been deferred.

The permanency judgment at issue incorporated DHS's "report/petition/probable cause statement" as the written findings regarding reasonable efforts, as well as a letter opinion by the court noting that mother's mental health condition had worsened over time despite DHS' efforts to help her. On appeal, mother argued, among other things, that the juvenile court had erred by not including in the judgment a brief description of DHS' efforts to reunify the family, as required under ORS 419B.476(5)(a) and *State ex rel DHS v. M.A.*, 227 Or App 172, 205 P3d 36 (2009). The Court of Appeals disagreed, distinguished *M.A.* from the case at hand, and concluded that the juvenile court's adoption of DHS' court report as its written findings regarding reasonable efforts was sufficient to comply with ORS 419B.476(5)(a).

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Mother also argued that the juvenile court had erred in its determination that there was no reason under ORS 419B.498(2) to defer filing a petition to terminate her parental rights. Specifically, she argued that an exception to the requirement to file a petition contained in subsection (a) of that statute applied to her case, i.e., that a relative was caring for R. and that the placement was intended to be permanent. The relative mother referred to was R.'s maternal grandmother, whom DHS had identified as an adoptive resource. The Court of Appeals again disagreed with mother's arguments, concluding that the Juvenile Code treats "adoption" and "placement with a fit and willing relative" as two distinct permanency plans, each requiring different findings, and that ORS 419B.498(2)(a) refers to a permanent placement with a relative *other* than adoption.

Dept. of Human Services v. T.C.A., __ Or App __, ___ P3d ___ (February 16, 2011) (Ortega, P.J.) (Lane Co.)

Judgment terminating parental rights reversed and remanded.

http://www.publications.ojd.state.or.us/A145369.htm

Mother appealed from judgments terminating her parental rights as to her two sons, A.A. and A.F., who were removed from her care because of allegations that she was manufacturing and using drugs. The Court of Appeals reversed, concluding that DHS had failed to prove, by clear and convincing evidence, that integration of the children into mother's home was improbable within a reasonable time due to conduct or conditions not likely to change.

The Court's analysis reflects mother's mixed history of success regarding drug and alcohol use. On one hand, the Court noted that mother had complied with the juvenile court's initial order to undergo psychological and drug and alcohol evaluations; that while participating in an intensive outpatient treatment program for cannabis dependence and alcohol abuse, mother had shown a positive attitude, participated in extra services, and been successfully discharged; and that results of the first psychological evaluation showed "little cause for serious concern about mother's ability to parent." On the other hand, the Court acknowledged mother's opioid dependence; mother's need for residential treatment to address that issue specifically, in addition to other drug and alcohol treatment; and mother's periodic relapses on heroin after the juvenile court took jurisdiction in the case.

The Court's analysis also reflects both positive and negative evidence about the children. The court noted that despite initial educational delays and other issues, A.A. and A.F. were doing well in foster care, were well adjusted and bonded with each other, and were bonded to some extent with mother. However, the Court also acknowledged evidence indicating that A.A. had emotionally distanced himself from mother, and that A.A. wanted to live with his grandmother, the prospective adoptive placement, rather than with mother.

The Court reviewed the expert testimony about mother's prognosis for maintaining sobriety and the timeframe for her to be able to parent A.A. and A.F. One expert articulated concerns about mother's ability to abstain from drug and alcohol use without a high level of support, and suggested at least three to six months from the time that mother demonstrated "real awareness" of the behaviors she would need to avoid before being able to parent her children. A second expert testified that mother's long-term prognosis was very good, that her short-term prognosis was good if she took certain specific measures, and that mother needed 12-18 months of continued services, but that there was no reason to believe mother could not effectively parent. A third expert testified that if mother engaged in certain long-term services, she had a good possibility of long-term recovery, and that mother should demonstrate at least six months of sobriety before regaining custody of A.A. and A.F.

Reviewing the framework for termination of parental rights as set forth in ORS 419B.504, as well as the applicable analysis as provided in *State ex rel SOSCF v. Stillman*, the Court concluded that it need not decide whether mother was unfit, because it concluded that DHS had failed to prove that the children's integration into mother's home was improbable within a reasonable time due to conduct or conditions not likely to change. The Court reasoned that mother had the skills to be a good parent if she remained sober, and that despite having had some relapses, mother had made progress in drug and alcohol treatment. The Court also explained that "DHS did not show that mother would be unlikely to achieve sobriety or otherwise meet its burden to prove that it was improbable that mother would be able to provide a safe home for the children in [six to 18 months]." The Court stated:

> "Ultimately, the problem here is that the record is devoid of evidence regarding how such a delay in achieving permanency would affect the children's emotional and developmental needs or their ability to form and maintain lasting attachments . . . [T]he record does not contain clear and convincing evidence that a six- to 18-month wait to return to mother's home is unreasonable in light of the children's needs." ●

View From the Bench

One Judge's Street Level Observations of Juvenile Sex Offense Cases

By Jim L. Fun, Circuit Court Judge
Washington County

No delinquency charges inflame emotion like those which involve inappropriate sexual behavior. The conversation among juvenile justice partners to creatively adopt procedures which effectively treat and manage juvenile sexual offending behavior has been, like the offense itself, held in secret for fear of blame or ridicule. But this issue is too important to be avoided. In our climate of budget restrictions, the juvenile justice system's mandate of fair and just treatment of our children along with the responsibility of rehabilitation and community safety obligates us to think creatively and responsibly. Although the wide diversity in community standards and resources in each juvenile court make it impossible for one paradigm to address this topic completely, I offer some observations to open a discussion for more transparent and effective approaches to delinquent sex offender cases. Whether juvenile court counselor, attorney for youth, prosecutor, therapist, or judge, we share the goal of better outcomes in the treatment and rehabilitation of juveniles that engage in inappropriate sexual behavior.

The affected Youth are usually in middle school and between 12 and 15 years of age at the time delinquency charges for inappropriate sexual behavior are filed. Youth age 15 or older if charged with a sex crime, are subject to prosecution as an adult pursuant to ORS 137.700, and beyond the jurisdiction of the juvenile court. The age range from 12 to 15 excludes Youth patently immature as well as those biologically mature. Most youth referred for inappropriate sexual behavior do not present with collateral concerns of cognitive impairment, significant mental health issues, delinquent behaviors or drug and alcohol use. Moreover, most do not seek social isolation, do not present with deviant sexual interests, do not have a prior sanction for sexual assaults, have not offended against multiple victims, have not offended a stranger victim, and most importantly have not had the benefit of treatment.

The delinquent sex charges which typically come before the court involve a Youth's inappropriate sexual behavior against a sibling, relative or close family friend. The typical case does not involve use or threat of force, use of a weapon, diverse sexual behaviors, or diverse victims. The delinquency charges commonly begin through a report by family members to law enforcement, or through a mandatory report from a treating professional with whom the family has sought treatment. Parents who were proactive in seeking an intervention upon discovery of Youth's sexual behavior find themselves in a dilemma that deters rather than promotes treatment, and separates rather than unifies families. The filing of a delinquency petition begins the adjudicative process which forces parents, relatives and neighbors to choose sides, which is neither rehabilitative for the youth, nor victim centered. While offender accountability is a value embraced by all, that resoluteness is tested when a parent is asked to choose between the loyalty to their child who is the offender, and allegiance to their child who is the victim. The goal of retribution and punishment is replaced by "making sure they get the treatment they need" when the offender is a niece or nephew. Those practical realities cannot be ignored

Between the court process which results in a permanent record upon adjudication together with sex offender reporting obligations, and resolution by a Formal Accountability Agreement which occurs out of the court process, lies a great gulf of despair for parents, lawyers, juvenile court counselors, victims and judges. I suggest neither approach alone or in combination, adequately serves the best interest of a Youth or society.

The prominent criticisms of Formal Accountability Agreements (FAA) are that FAA's neither achieve community accountability nor provide court oversight of Youth's treatment. Oregon law delegates to District Attorneys the decision on whether a Youth may avoid prosecution through a FAA when charged with a sex offense. While FAA's statutorily permit a delinquency sex charge to be diverted from the court process without the attendant consequences of adjudication, a well informed decision on the appropriateness of informal treatment of a sexual offense is challenged without the benefit of a psychosexual evaluation or a risk assessment tool, neither of which are customarily made available to the Juvenile Department or the District Attorney at this stage of the process. Law enforcement investigative reports alone cannot provide the breadth of information necessary for a well informed decision regarding a Youth's treatment needs. Moreover, without the transparency of a court process, parents, victims and their family are denied the opportunity to witness a youth accept responsibility in court, and denied the opportunity to comment on the Youth's process of rehabilitation. Without court intervention, the therapeutic needs of a sibling victim cannot be ensured.

At the same time, while transparency is achieved through a formal court process, the decision to address inappropriate sexual behavior by routinely filing a delinquency petition has serious implications for the Youth and consequently, addressing sexually inappropriate behavior through the delinquency process also has its critics. There are no clear statutorily identified procedures to divert Youth in the court process from receiving a permanent record of adjudication, and after adjudication, Youth have a single opportunity to challenge lifetime registration two years after probation has terminated. This result is a profound permanent consequence for behavior committed by a Youth in 6TH, 7TH or 8TH grade, or an older Youth that cognitively and emotionally presents several years below their biological age.

In addition, the juvenile justice system's historical response to inappropriate sexual behavior between siblings was to file

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« *View From the Bench continued from previous page*

delinquency charges, place the offending child in detention or a shelter home, and separating them physically and psychologically from their family. It is now universally accepted by child protective professionals that removal of a child from their home and parents results in collateral consequences to the family that extend beyond the original reason for removal. The time spent out of home delays the Youth's rehabilitation, and makes transition back into the home and community more complicated. Although an initial out of home placement may occur, is out of home placement necessary? Can Youth remain in home pursuant to a safety plan with Youth participating in treatment along with a therapeutically guided safety plan? Can the Juvenile Court Counselor facilitate Youth's continued school attendance? If a Youth cannot be returned home, are there relatives or grandparents with whom Youth could safely be placed? While no parent wants to inform grandparents or relatives their child is charged with a sex offense, grandparents and other adults are an essential part of a Youth's safety planning and rehabilitation. Will Grandparents and extended family members participate in sex offender education classes or family counseling, to serve as supervisors to safely facilitate Youth's participation in community activities? Is the family addressing a sibling victim's therapeutic needs through individual or family counseling? These issues can be addressed, but require collaborative effort from the juvenile department, the bar, prosecutors and the court.

This dynamic of a child's removal from the home also removes, rather than promotes, parental responsibility for treatment and safety planning. Parental and family participation in the Youth's sexual offender treatment is essential to a Youth's success in addressing inappropriate sexual behavior. However, the pending allegations of a delinquency petition estrange the family with no contact orders, and delays counseling and a psychosexual evaluation for the Youth until jurisdiction has been established. The consequence of a permanent record of adjudication with lifetime reporting does not encourage the Youth to take accountability for the conduct nor does it promote parental engagement in treatment, both essential to Youth's success in treatment in the short and long term.

While the judicial system's evolution toward specialized courts has benefited adults, our Youth have been left behind. Creative sentencing practices and specialized courts are universally accepted and applauded for their demonstrated success in adult offender rehabilitation. From diversion for driving under the influence, to deferred sentencing for domestic assault, to drug, mental health and restitution courts, the adult criminal justice system has creatively evolved to promote offender accountability and transparency, and creatively evolved toward effective rehabilitation. Court hearings with transparent discussions among treatment providers promote offender accountability. Frequent and regular court hearings result in clear and meaningful expectations of offenders and facilitate family involvement. However, with the exception of diversion for possession of marijuana, Youth, their families, and victims of juvenile offenders, have not shared in that spirit of innovation.

While the judicial system's evolution toward specialized courts has benefited adults, our Youth have been left behind.

Similar innovation could be made in these juvenile sex offense cases that would improve outcomes for Youth, families, victims and our communities. Juvenile departments could facilitate individual counseling, family sex offender education and family counseling along with a psychosexual evaluation. The financial resources used for pretrial detention could more effectively be used to promote prompt sex offender treatment for the Youth, the victim if a family member and their family. Defense attorneys could facilitate prompt engagement of a Youth into treatment and an evaluation along with release of the treatment records and psychosexual evaluation to the parties and the court while ensuring that the Youth's legal rights to representation and trial are preserved. Prosecutors could agree that records released pretrial to the court and Juvenile Court Counselors not be used in an adjudication. Prosecutors could initiate the development of deferred sentencing programs. The Court could facilitate pretrial release and identify case specific conditions of release consistent with the specific recommendations of a Youth's therapist. Regular hearings could be held every 60 days, or more frequently as necessary, until treatment is completed. Each of these issues can be addressed collaboratively and transparently.

Toward that goal of improving outcomes for Youth offenders, families, victims and our communities, I offer the following suggestions:

1. Front load services to support placement in home
    a. Parties must collaborate to identify whether removal of a Youth offender from their home is necessary. If Youth's return home is not viable, parents must be motivated to identify potential community placements, and parties. Further, youth's community placement must be supported by robust individual treatment directed by a psychosexual evaluation, in addition to family sex offender education and family therapy. We all can learn lessons from "wraparound" programs used so successfully by DHS and county mental health departments.
2. Introduce transparency and flexibility into the court process
    a. There can be procedures collaboratively endorsed that maintain the legal rights of all parties. An agreement by the district attorney to continue disposition as often as necessary provided Youth is compliant with the conditions of release along with an agreement by Youth to enter an admission to the charges is an impetus for Youth to resolve

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« *View From the Bench continued from previous page*

the factual allegations promptly. With the factual allegations resolved, Youth's treatment process can begin, and the records and evaluations can be released to the parties for discussion in court.

b. Following Youth's resolution of the factual allegations, disposition can be continued by the court for good cause and comprehensive conditions of release which mirror the safety plan can be implemented and reviewed in court with the full participation and input of the Youth and parents of both the Youth and victim . With comprehensive conditions of release that are consistent with Youth's treatment plan, Youth's progress can be reviewed openly in court at subsequent hearings, and Youth's treatment plan can be modified as it evolves. More importantly, if the Youth violates a condition of release or no contact order, a sanction can be imposed immediately and transparently.

c. An agreement by the DA's Office to dismiss and vacate the Delinquency Petition when treatment is fully and successfully completed is powerful motivation for the Youth to fully participate in the rehabilitation process. The Youth's family will also be strongly motivated to participate in both Youth and their family member victim's rehabilitation. Unlike an adult charged with a crime, parental legal responsibility for a Youth continues until age 18. Moreover, when the victim is a sibling, long after treatment is completed and court wardship is dismissed, the family's dedication to remain an ally in youth's continued rehabilitation is essential to a successful and permanent outcome.

Not all juvenile sexual offenders however, can be effectively or safely treated in the community. Diverse or significant emotional, mental health, behavioral or cognitive deficits can render any safety plan unsafe or impractical. Nor can all juvenile sex offenders safely be returned home without inpatient therapeutic intervention. Likewise, not every juvenile sex offender deserves relief from a permanent record of adjudication, or qualifies for relief from reporting as a sex offender. At the same time, it is inappropriate that all youth adjudicated for sexually inappropriate behavior receive the same adult consequences. If our work going forward is creative rather than reactive, collaborative rather than confrontational, our community will be safer, our Youth more successful, and our survivors more satisfied with the process. ●

"If we don't stand up for children, then we don't stand for much."

– *Marian Wright Edelman*

Case Summaries

Whether the Constitution Allows Courts to Sentence Juveniles to Life Without Parole for Intentional Homicide

The Wisconsin Supreme Court heard oral argument on January 5, 2011, in *State v. Ninham.* Omer Ninham was sentenced to life imprisonment without the possibility of parole for first-degree intentional homicide. In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court found that juveniles 18 and younger cannot be sentenced to the death penalty. In 2010, the U.S. Supreme Court decided that juveniles cannot be sentenced to life in prison without parole for non-homicide crimes in *Graham v. Florida*, 130 S. Ct. 2011 (2010). It is possible that the U.S. Supreme Court may soon decide whether sentencing children 14 and under to life imprisonment without the possibility of parole for intentional homicide is also unconstitutional in violation of the cruel and unusual punishment clause of the Eighth Amendment.

Ninham and four other accomplices pushed a 13-year-old boy over the edge of the fifth floor of a parking garage. Ninham also verbally threatened several people during subsequent court proceedings. He was sentenced to life imprisonment without parole, which precludes any possibility of release regardless of whether he is ever considered rehabilitated. Defense Attorney Bryan Stevenson argues that it is cruel and unusual punishment in violation of the Eighth Amendment to deny children 14-years-old and younger access to a meaningful possibility of release. Stevenson emphasizes that Ninham will not automatically be released but should have the chance to be released upon a showing of complete rehabilitation. He further argues that young children cannot be fully culpable for their actions because their brains have not completely developed. On the other hand, the Assistant District Attorney argues that the state has the right to exact retribution on a 14-year-old without being required to give him an opportunity to show that he has "grown out" of committing homicide.

J.D.B. v. North Carolina – U.S. Supreme Court Heard Arguments

By Talia Stoessel, Law Clerk

On March 23, 2011, the U.S. Supreme Court heard oral arguments on *In re J.D.B.*, 363 N.C. 664, 665, 686 S.E.2d 135, 136 (2009), *cert. granted*, 131 S. Ct. 502, 178 L. Ed. 2d 368 (U.S.N.C. 2010) (See Youth, Rights & Justice Juvenile Law Reader, Vol. 7, Issue 6 for further description of the case). The main question in *J.D.B.* is whether courts should consider the age and academic status of a juvenile suspect

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« *Case Summaries continued from previous page*

in deciding whether he is "in custody" for *Miranda* purposes. The facts of the case indicated that a uniformed officer escorted J.D.B. to a private room with a closed door, seated him at a conference table, and proceeded to question him about a larceny in front of three other adults. Although the crimes did not take place on school grounds, the officer decided to question him there, which has a number of qualities restrictive of one's freedom and lacks the protection of parental presence.

The North Carolina Supreme Court examined the test for determining whether one is "in custody", looking to whether a "reasonable person" in the same circumstances would believe that she was not free to leave. The Court found that age and academic standing could not be considered as part of an objective test. The Court highlighted the findings in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004), which came closest to rejecting age as a possible consideration and stated that considering age "could be viewed as creating a subjective inquiry." However, as the dissent discussed, North Carolina courts had previously taken age into consideration when determining whether a person of the "defendant's age and experience" would have believed he was in custody. *See State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986). Furthermore, the concern in *Alvarado* that officers should not be forced to guess the age of every person whom they question is not present in a case where the officer seeks out the youth in a middle school.

At the oral argument on March 23, Justice Kennedy seemed somewhat worried about having to create a special Miranda warning for kids, but expressed skepticism that a "reasonable person" test could be accurately applied in a middle school setting. Justices Scalia, Alito, and Roberts seemed concerned about a possible slippery slope of subjectivity, stating that it would be difficult to find a stopping point for which factors to consider as part of the "in custody" analysis. These Justices thought the custody inquiry would become impossibly complicated if it required police to imagine how a suspect's unique characteristics would shape his reaction to being confined for questioning. On the other hand, Justices Breyer, Ginsburg, Kagan, and Sotomayor seemed enthusiastic about adding age as a factor in the custody analysis. Breyer's previous argument in *Alvarado* focused on taking into account what both a youth and a police officer knew about the youth's age when determining whether a custodial interrogation had occurred. Breyer's questioning also led Attorney General Roy Cooper's agreement that police should take into account some objective characteristics, such as how a suspect would react if he spoke only Spanish or Ukrainian. Justice Thomas remained silent during the oral argument. ●

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"If you want peace, work for justice."

– *Henry Louis Mencken*

Save the Date

Second National Parent Attorney Conference

National Project to Improve Representation of Parents Involved in the Child Welfare System

American Bar Association Center on Children and the Law

July 13-14, 2011, Pentagon City, VA

Info: http://apps.americanbar.org/aba_timssnet/meetings/tnt_meetings.cfm?action=search&primary_id=CH0711&CFID=3278170&CFTOKEN=dd7975b0c8180ff3-A54FCF34-9341-25CD-81399E384AA84A6B&jsessionid=1a301ba51c8578c7d85441f9391d563f4369TR

Through the Eyes of a Child, XIV

Annual Juvenile Judges Conference

August 14-15, 2011

August 16, 2011: JCIP Model Court Day: Summit on Child Abuse & Neglect

Salem Conference Center

Mark your calendar for attendance at the Juvenile Court Improvement Program's (JCIP) 14th annual conference for judicial officers who hear child abuse and neglect cases. Preliminary topics include: Legislative Update, Appellate Case Law Update, a pre-session on Juvenile Dependency 101 for judges new to dependency cases and much, much more....

Judges invite local stakeholders involved in the child abuse and neglect system to participate in "Model Court Day." This event will be held at the Salem Conference Center. Last year there were over 260 participants! This year JCIP will collaborate with the eight counties involved in the Casey Family Program's Safe and Equitable Foster Care Reduction project. Registration Information will be available soon.

34th National Child Welfare and Family Law Conference

National Association of Counsel for Children

August 30 thru September 1, 2011

Pre-Conference August 29

Hotel del Coronado, San Diego, California

Info: http://www.naccchildlaw.org/?page=National_Conference

NACC members will receive the full conference brochure in May. Online registration will also be available starting in May.

Training for Western Region Juvenile Defenders

Western Juvenile Defender Center (WJDC) in collaboration with the National Juvenile Defender (NJDC)

October 20, 2011

Sheraton Hotel, Seattle, Washington

The training will precede the NJDC Summit (10/21-23) and will be free for juvenile defenders from the Western Region, which is comprised of Alaska, Idaho, Montana, Nevada, Oregon, Washington and Wyoming. The goal of the training is to share information and resources and promote collaboration among juvenile defenders in our region. Speakers and panels will address: Advocating for Un-Shackling Youth in Juvenile Courts; Raising Competency and Restorative Services for Youth Unable to Aid and Assist, and Strategies for Waiver and Direct File Cases. A limited number of $300 stipends will be available for juvenile attorneys who will attend. If you are interested in attending the training, please email Julie H. McFarlane at: julie@jrplaw.org and indicate whether you would be seeking a stipend. ●

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www.facebook.com/Youth-Rights-Justice-Attorneys-at-Law

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Join us at the Third Annual Wine and Chocolate Extravaganza and help us improve the lives of children.

Saturday, November 12, 2011 5:30 p.m. The Nines, Portland

R.S.V.P. (503) 232-2540 or info@youthrightsjustice.org

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We Would Love to Hear From You

If you have any questions about who we are and what we do, please email Janeen Olsen at: JaneenO@jrplaw.org.

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"We pay a price when we deprive children of the exposure to the values, principles, and education they need to make them good citizens. "

– *Sandra Day O'Connor*

MAKE A DIFFERENCE

You are invited to join the Wine & Chocolate Committee!

Meetings monthly at Tonkon Torp.

Help Oregon's vulnerable kids.

Have fun.

Info: teresa.c@youthrightsjustice.org

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Help us help youth.

We would love your financial support.

Please join our Monthly Giving Club.

By pledging just $10 a month ($120/year), you will help a child receive educational advocacy from a Youth Rights & Justice attorney for an entire month. Knowing we can count on these funds throughout the year empowers us to say yes to a child in need. We are able to assist more than 300 vulnerable children and youth each year through our SchoolWorks program, and the need is even greater.

Go to www.youthrightsjustice.org and click on DONATE to make a one-time or recurring monthly donation.

Thank you.

Youth, Rights & Justice is a 501 (c) (3) nonprofit.

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