JUVENILE RIGHTS PROJECT

JUVENILE LAW READER

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McMinnville Middle Schoolers Accused of Sex Offenses

Summary by Kristin Hajny, LCSW

Recently, juveniles accused of committing sex offenses have been receiving a lot of media attention both in Oregon and at the national level. Increased reporting of juvenile offenses, and adjudications of less serious offenses can account for reported rises in juvenile sex offenses, according to an article in *The New York Times Magazine* on July 22, 2007.

Controversies surround the issue of juvenile sex offending, an issue that draws strong reactions on various sides of the issue. There are several issues involved in the debate. One is determining which behaviors rise to the level of a sex offense and which do not (or should not). Another is how schools and the juvenile courts can respond appropriately to the behaviors in question. There are also questions surrounding the current treatment methods for juvenile offenders and whether they have been found to be effective by recent research.

A McMinnville case which was covered by *the Oregonian* on July 22, 2007, and in subsequent articles and editorials, demonstrates how fuzzy the line can be between what some consider horseplay and prosecutors call a crime. Two thirteen-year old boys at a middle school in McMinnville, ran through the hallways slapping girls' bottoms in February of this year. They are now facing the possibility of up to ten years in juvenile detention and a lifetime on the sex offender registry.

The boys were taken away in handcuffs to spend five days in juvenile detention and were suspended from school. With charges still pending, they are required to be under constant parental supervision and are barred from contacting friends. To add to the confusion in the case, two of the victims recanted, saying they felt pressured by and gave false statements to interrogators. There is also evidence that as many as seven other students, both male and female, had been engaging in the same behavior. (Continued on p. 4)

2007 Legislative Wrap-Up

By Amy Miller, Staff Attorney

On June 28, 2007, just after noon, Oregon's 74th Legislative Assembly officially adjourned. The 74th legislative session may have been the shortest in 12 years, but the legislature took up many issues relating to juveniles, including child welfare and foster care reform, paternity, victims rights, juvenile justice reform, internet solicitation and the luring of minors for sexual activity, Healthy Kids (subsidized health care for Oregon's uninsured children and a corresponding tobacco tax increase), teen driving, and funding for public defense services.

JRP worked closely with Senator Kate Brown, Senator Jeff Kruse, Representative Wayne Kreiger and Representative Mike Schaufler to educate both Republican and Democratic legislators about the need for child welfare reform. JRP was also fortunate to work with many incoming freshmen legislators (Continued on p. 6)

Inside this issue:

Juvenile Law Reader
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No More "Bong Hits 4 Jesus" First Amendment Ruling: *Morse et Al. v. Frederick*

The US Supreme Court on June 25, 2007, ruled in *Morse et Al. v. Frederick*, a first-amendment, student speech case, holding that schools may curtail student speech that advocates, promotes or encourages illegal drug use. During the 2002 Olympic relay through Juneau, Alaska, a local high school permitted students to attend the relay as a school-sponsored activity.

Student Fredericks and friends unfurled a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS" as the relay passed. The high school principal, Ms. Morse, demanded the banner be taken down. Frederick declined the request, at which point Morse confiscated the banner and later suspended Frederick for 10 days. The district superintendent modified the suspension and the school board upheld the discipline. Frederick filed suit under 42 USC Sec. 1983, alleging the school board and Morse violated his First Amendment rights to free speech.

Chief Justice Roberts, writing for a five-justice majority, held the banner advocated use of illegal drugs and was not protected speech. Chief Justice Roberts writes "…[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." Morse et Al. v. Frederick, 551 US ___, at p. 8.

The majority set forth two principles: constitutional rights of students in school settings are not coextensive with the rights of adults, and public schools' interest in deterring drug use supersedes student speech regarding drug use. Morse et Al., at pgs. 8 to 14.

Justice Stevens, writing for the minority in dissent, noted the First Amendment should protect student speech that neither "…violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." Dissent, at p. 2. Justice Stevens noted the "nonsense banner" produced no such violation and noted "…the Court does serious violence to the First Amendment in upholding—indeed lauding—a school's decision to punish Frederick for expressing a view with which it disagreed." Dissent, at p. 2.

JRP Moves to Historic Jantzen Building, Open House Scheduled

On June 18, 2007, the Juvenile Rights Project (JRP) moved into a portion of the historic building that was the headquarters of Jantzen Sportswear. The portion that we occupy includes the Jantzen Board Room with a hand-painted mural of the world. Our new space has more room and more offices. Our new office is located at:

401 NE 19th Avenue, Suite 200, Portland, OR, 97232

Please join us for our open house scheduled for Wednesday, September 26, 2007, from 3-5 PM. We are inviting friends, family and our community partners. Contact Janet Merrell at 503-232-2540 ext. 231 for details.

Time for Treatment – Evaluating Trauma When Youth First Enter the System
By Jennifer L. Meisberger, Law Clerk

The National Center for Mental Health and Juvenile Justice (NCMHJJ) published a paper in June 2007 entitled, "Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions." The paper asserts trauma among children and youth in the general population is substantial, but that youth in the juvenile justice system display an even higher exposure to trauma than other juveniles. The paper, authored by Julian D. Ford, PhD, John F. Chapman, PsyD, Josephine Hawke, PhD, and David Albert, PhD, discusses not only the prevalence and impact of trauma on the juvenile justice system, but also described the emerging responses for identification and treatment of trauma.

The National Child Traumatic Stress Network defines child traumatic stress as a youth's inability to cope following exposure to a traumatic event or situation. Traumatic events may include abuse, domestic violence, or even disasters. According to the NCMHJJ paper, youth exposed to traumatic situations may exhibit a variety of behaviors, including depression, anxiety, aggression, and conduct problems. Authors explain that traumatic stress can disrupt a child's ability to think, learn, and develop physically, emotionally, and intellectually. In addition, traumatic stress among youth often correlates with an increased use of social services and involvement with the juvenile justice system.

The paper cites a 2002 article published in the Journal of Traumatic Stress, which reports as many as 25% of 9-16 year olds surveyed experienced at least one traumatic event. Furthermore, the paper reports that in the juvenile justice system, exposure to trauma often goes unnoticed in the evaluation and treatment of youth. Instead, the authors contend, the high prevalence of trauma among youth indicates that trauma screening should be routine, and ought to be performed on youth when they first enter the juvenile justice system.

Defense attorneys have observed that too often the juvenile courts and juvenile departments focus on protection of the public and accountability, without a sufficient investigation or analysis of the conditions of the youth that led to the offense. By focusing on the need to address the youth's trauma history, counsel for the youth not only can present their client in a more sympathetic light, but may be more likely to obtain services and assistance that will actually be effective in the youth's reformation and prevention of future delinquency.

Attorneys should interview clients to determine whether further screening for trauma history and traumatic stress should be done by appropriately trained staff. There are several instruments that can be used to screen for trauma exposure, and most instrument developers provide guidelines for the level of training and/or education needed to appropriately administer the screen. Existing screens cited by the authors include:

MAYSI-2 – a 52 item mental health instrument that includes a Traumatic Experiences scale; [Editor's note: The Oregon Youth Authority currently uses the MAYSI-2 and county juvenile departments are also considering the use of this instrument as part of their intake procedures.]

Traumatic Events Screening Inventory (TESI) – a structured clinical interview, which has been shown to reliably and validly identify exposure to traumatic events;

PTSD Reaction Index (PTSD-RI) – a self-report symptom inventory based on the DSM-IV;

Trauma Symptom Checklist for Children (TSCC) – a 54 item self report instrument that evaluates acute and chronic traumatic stress symptoms. The TSCC has been found to be reliable and valid in child psychiatric samples;

PTSD Checklist for Children/Parent Report (PCL-C/PR) – a brief measure of PTSD symptom sverity completed by parents. The PCL-C/PR has been shown to be reliable and valid with child and adolescent psychiatric and pediatric samples.

Services to treat youth with traumatic experiences may offer several benefits. The authors indicate services may not just relieve psychological suffering, but may also reduce future health and correctional costs for affected youth. Furthermore, authors state that services to treat youth with trauma disorders exist now, and advocate that services be made available to youth who have histories of traumatic experiences or a Post-Traumatic Stress Disorder diagnosis as soon as the youth becomes involved in the juvenile justice system. Authors conclude, the time has come to make trauma treatment within the juvenile justice a priority.

Information on the National Center for Mental Health and Juvenile Justice can be found at www.ncmhjj.com.

McMinnville Juveniles,

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Cases like these are of concern because of their ambiguity and because they happen so frequently. In one study of middle school students, eight of ten students reported experiencing some type of unwanted sexual behavior, primarily verbal, but half admitted engaging in the behavior themselves as well (*The Oregonian*, July 22, 2007).

Many experts argue that criminalizing such typical behavior will not solve the problem. In many cases it can lead to youth being ostracized or threatened by peers and neighbors and being kicked out of extracurricular activities, which eventually leads to lower self-esteem and more anti-social or criminal behavior on down the road. (*The New York Times Magazine*, July 22, 2007, p. 36).

What actions schools decide to take varies from school to school and can range from a simple reprimand, to notifying parents, or to expulsion. Schools often consider the age, intent, and disciplinary history as well as the severity of an incident when deciding what action to take, but this leaves much to the discretion of the school administrator. (*The Oregonian*, July 26, 2007)

There is the question of whether or not schools are adequately informing or warning students about the potential consequences of their actions in these situations. How and when the decision is made for a school to contact law enforcement is another concern. Clear policies are often lacking, leaving these decisions to the discretion of school staff. Schools maintain that they face potential liability issues if they do not contact law enforcement in cases such as these.

Another question for defense attorneys is the role that schools play in interrogating students with the police or holding students for the police to question them. The Oregonian reported the McMinnville vice principal and a police officer stationed at the school conducted hours of interviews before the boys were arrested and advised of their Miranda rights. The article does not say whether the boys who where were eventually arrested were ever given the opportunity to talk to their parents or to an attorney before questioning.

With regard to these cases, what actions will the juvenile court take? Since the *Oregonian* article was published, the Yamhill district attorney has spoken to reporters, saying it is unlikely the boys would receive the maximum sentence and, if they had to register, a judge could lift the requirement after it is imposed. (*The Oregonian*, July 24, 2007) However, even the possibility of such a heavy sentence and sex offender registration for such minor crimes is of grave concern.

Juveniles who commit these offenses may have to follow the same sex offender registration requirements as adult rapists without the benefit of a jury trial or similar protections given to adults. (*The New York Times Magazine,* July 22, 2007, p. 38)

At least 25 states, including Oregon, also apply a community notification law as a part of registration to juveniles as well as adults. In addition, as a part of a new federal law created last year, there is now a federal Internet registry that will allow law enforcement and the public to track convicted sex offenders, including juveniles fourteen and older. States that have so far excluded juveniles from community-notification laws may lose federal money within the next two years if they don't add juveniles to their registries. (*The New York Times Magazine,* July 22, 2007, p. 35)

Recent research has concluded that juveniles who commit sex offenses are in many ways different than adults, yet treatment methods and punishment are similar. Juvenile sex offenders have a recidivism rate which is much lower than that of adult sex offenders – 10%, as compared to the 25 to 50 percent (or higher) recidivism rates for adult offenders.

Recent brain research has shown that the frontal lobe of the brain which is responsible for impulse control, moral reasoning and regulating emotions, is not finished maturing until a person is in their mid-20s. Adolescents who commit sex offenses may be acting impulsively, which is dissimilar to the compulsive act of a pedophile (*The New York Times Magazine,* July 22, 2007, p. 39)

How effective most treatment methods are for juveniles is questionable. For example, group exercises which re-enact a juvenile's offenses may reinforce his already negative self-images as a sex-offender, rather than someone who needs lessons in boundary setting and relationship building.

A method which is showing promising results is multi-systemic therapy (MST) which focuses on improving parent-child bonds, and encouraging teenagers' involvement in school, activities and healthy friendships. Recidivism rates are reduced more effectively with MST than individual therapy and some other treatments, according to initial studies. Other treatment methods which show promise are therapy programs that help younger children with sexual behavior problems, as well as sex education in schools that includes information about how children can learn to avoid committing sex offenses themselves. (*The New York Times Magazine,* July 22, 2007, p. 42)

Zealous Advocacy in Dependency Review – Part III

By: Julie McFarlane, Supervising Attorney, Juvenile Rights Project

Continued from April/May Issue

Visitation

In addition to monitoring and resolving disputes involving case plans and services to children and parents, the juvenile court has long been considered to have the final decision over visitation between the child and parents. E.g., in ***State ex rel Juv. Dept. v. Richardson,*** 267 OR 374, 517 P2d 270 (1973), the Court held that the juvenile court's continuing jurisdiction includes the right to exercise discretion as to visitation between parents and children, and in the event of disagreement with DHS-CW (then CSD), the juvenile court may make the final decision as to the visitation plan.

Research has shown that frequent, high quality visitation is the greatest predictor of whether a child will ultimately be reunified with his or her parents. E.g., Fanshel, **Parental Visiting of Children in Foster Care: Key to Discharge?**, 49 Soc. Serv. Rev. 493 (1975). DHS-CW must provide services that comprise reasonable efforts to effect reunification unless the agency can be excused from that endeavor under ORS 419B.340 (5). *State ex rel Juv. Dept. v. Williams*, 204 Or App 496, 504, ___ P3rd ___ (2006).

ORS 419B.340 (5) sets out three general categories of circumstances under which DHS-CW may be excused from making reasonable efforts – aggravated circumstances, convictions for certain crimes, and prior involuntary termination of parental rights. Conditions not specified in ORS 419B.340 (5), such as incarceration of the parent do not , in and of themselves, constitute aggravated circumstances or justify DHS-CW failing to make reasonable efforts to assist the parent in making the adjustments to enable her to become a minimally adequate parent. Id at 506.

The Visitation Plan

The typical visitation plan that is offered by DHS-CW – one hour, once a week at the DHS-CW office — is unlikely to be of a sufficient frequency or quality to promote reunification. When the client's goal is to effect reunification, focusing on improving visitation is an essential step to achieve that goal. A brief encounter of one hour in a business setting, like a DHS-CW office, is likely to result in awkward and aimless encounters between parent and child. It should be no surprise when such encounters are unsuccessful. Both children and parents may find that they do not want to visit or avoid visits, as a result.

A detailed visitation plan should be developed at the initial disposition. Review hearings should be used to modify the visitation plan when necessary. A plan should address: the frequency and length of visitation, which should be tailored to the developmental and individual needs of the child; who should be included in visitation; the setting for visits; and when these aspects should be modified. a full array of visitation types should be considered, including: unsupervised visitation in the parent's home; supervised visitation in the parent's home – by DHS-CW staff or by family or friends; unsupervised visitation in the community away from the home; supervised visitation in the community – by DHS-CW staff or by family or friends.

"Icebreaker" meetings, which allow the parents and foster parents to meet to discuss visitation and other issues should be promoted.

The plan should also include a variety of activities that it is appropriate for the parent to engage in with the child. Parents should be advised about subjects they should discuss with the child, subjects that should be avoided and assisted with formulating answers for the questions the child is likely to pose.

Goals of Visitation

There are two important goals of visitation that should be developed in the plan. The first goal should be to maintain and improve the parent-child relationship in order to facilitate the preferred permanency goal: reunification. This parts of the plan addressing this goal should address how the visits will help meet the child's attachment needs.

The child's grief, behavioral reactions and emotions that can result from separation from the parent should be anticipated and addressed in the plan. A child may be experiencing feelings of abandonment, helplessness, anger, self-blame, extreme anxiety and fear of punishment, and these feelings may worsen during visits.

Children visiting their parents should be expected to act out after visitation, given these feelings. But well planned and facilitated visits can enable children to feel loved by their parents, see their parents realistically and rationally, and help them calm irrational separation fears. Blumenthal, Karen & Weinberg, Anita, "Issues Concerning Parental Visiting of Children in Foster Care" in HARDIN, MARK, Ed. FOSTER CHILDREN IN THE COURTS (1983) p. 374.

The parent may experience similar feelings and exhibit behavior that is hostile, argumentative, uncooperative

(Continued, p. 6)

Legislative Wrap-Up, continued from page 1

who were passionate about improving the lives of Oregon's vulnerable children and youth.

JRP's legislative agenda:

JRP's top priority was improving the child welfare system and, in particular, reforming the foster care system. The seven bills which were passed as part of the juvenile dependency package include:

- **Foster care support payments for relatives**: SB 282 will ensure *some* additional relatives are eligible for foster care support payments. The bill allows DHS to establish a means test based upon the relative foster parent's income so that some, but not all, relatives will be eligible for maintenance payments. This bill represents a substantial step towards eliminating the disparity between relative and non-relative foster parents in Oregon. SB 282 takes effect January 1, 2008.

- **Court's authority to order placement types for children in foster care**: SB 409 amends ORS 419B.349, the section of the code limiting the court's authority to direct DHS to make a specific *type* of placement to situations where the court determines the current placement is not in the child or ward's best interest. The new language allows the court to order placement in the care of the child or ward's parents, with a relative foster parent or with another foster parent. SB 409 takes effect on January 1, 2008.

- **Timing of the filing of a petition to terminate parental rights**: SB 408 amends ORS 419B.498 by adding a requirement that a petition to terminate the parental rights of a child or ward's parents may not be filed until the court has held a permanency hearing pursuant to ORS 419B.476 and determined that the permanency plan for the child or ward should be adoption. SB 408 takes effect on January 1, 2008.

- **Sensitive review committee to examine agency actions and conduct:** SB 410 adds additional language to ORS 409.194, which establishes the processes and procedures for the Director of DHS to conduct a sensitive review committee for the purpose of reviewing the actions and conduct of the Department. SB 410 takes effect on January 1, 2008.

- **Notification of child abuse report for child in substitute care:** SB 412 requires the Department of Human Services (DHS) to provide notice when a child or ward in substitute care has been the subject of a child abuse report. The notification must be made to the child or ward's attorney, court appointed special advocate, parent(s), and parent'(s) attorney within three business days. SB 412 takes effect on January 1, 2008.

- **Reporting key child welfare outcomes:** SB 413 requires DHS to submit a report every other year to the legislature on key child welfare outcomes. SB 413 takes effect on January 1, 2008.

- **Placement, visits and court reports in dependency cases:** SB 414 is a comprehensive foster care reform bill and the cornerstone of the juvenile dependency package. The bill emphasizes child welfare practices that have been demonstrated to have a positive impact on children and families. Those practices include: *placement with relatives*, *visitation between parents and children, contact with siblings, face to face contact with caseworkers, placement and school stability, and high school graduation*. Through the existing mechanism of DHS reports and court oversight, the bill focuses attention of the agency, the courts, CASAs and court appointed lawyers on these "best practices" in case planning and court reviews.◇

Visitation, Cont'd from p. 5

or undermining of the caseworker or foster parents. Child and parent behavior that can be exacerbated by visitation should be anticipated, and it should be understood that with proper planning and facilitation these behaviors can be expected to improve over time.

The caseworker or a therapist should work with the parent or child to help them address these issues. Such behaviors should not be used to justify a denial of visitation. Successful visitation will allow parents to maintain an attachment with their child and provide motivation for the parent to complete services necessary for the safe return of the child.

A second goal of visitation is to allow parents opportunities to enhance their parenting skills. Parenting skills can be enhanced through coaching, therapeutic visitation, modeling of skills and management techniques. Id.

If the child has siblings who are not placed in foster care with the child, a plan should be made for sibling visitation. The sibling relationship is an important one and separation from a sibling may cause more grief and behavioral reaction than the separation from the parent. Children worry about their siblings and often long to reunite with them. The siblings of children in foster care may be the individuals with whom the child has had the most consistent and stable relationship.

Immigrant Children and the Child Welfare System,

Summary by Julie McCarter

The *Children's Bureau Express* recently covered the subject of Immigrant Families in the Child Welfare System. The Urban Institute published three recent issue briefs involving immigrant families in Texas. The briefs examine the role of placement settings and case goals, reasons for removal, and title IV-E eligibility to determine why child welfare services for immigrant children differ from or lag behind those provided to other populations.

According to one of the briefs, the absence of a "relative network" and the immigration status of one or both parents might help account for the difference in placement options and case goals among immigrant children and the children of immigrants. In March 2006, only 8 percent of immigrant children in child welfare were living with relatives, while 20 percent of children of immigrants and 28 percent of all U.S.-born children were living with kin.

Also noted in another brief, a high percentage of immigrant children enter care for sexual abuse. This might be explained by the profiles of these children, including their runaway or "alien" status, the lack of family supports, and the vulnerability of unaccompanied minors in the face of commercial sexual exploitation.

A third issue brief shows that immigrant children are also less likely to be eligible for title IV-E assistance than other children. This is most often due to the undocumented status of the immigrant children. In 2005, 50 percent of U.S.-born children received title IV-E assistance compared to 5 percent of Latin American immigrant children.

This information is available from: http://cbexpress.acf.hhs.gov/articles.cfm?articles_id=1366.

To access the briefs directly, go to the Urban Institute website: www.urban.org/children_immigrant_child_welfare.cfm

In The News: Back Where They Belong

From an editorial in the *New York Times* on July 5, 2007:

The Governor of Connecticut, M. Jodi Rell, recently signed a bill that prevents sixteen and seventeen year old offenders from transferring directly to the adult court system. As soon as this law takes effect, New York and North Carolina will be the only two states that automatically transfer sixteen year old offenders to adult court.

This change likely is in response to studies showing that children who serve time in adult jails are more likely to commit more violent crimes than youth whose cases are handled by the juvenile system. In adult jails, teenage offenders have little protection from being battered or sexually assaulted. Nearly every state has laws that encourage prosecutors to try children as adults and the author of this editorial feels that the country needs to abandon these failed, destructive policies. •

SAVE THE DATE!

ESSENTIALS OF JUVENILE COURT PRACTICE CLE

When: Friday and Saturday, October 5 and 6, 2007

Where: Valley River Inn, Eugene, Oregon

Focus: The essential things that lawyers for the state, for parents and for children need to know to practice in juvenile court dependency matters. This two-day training is intended to be a brief but thorough overview of the information lawyers who are new to the practice of juvenile law (0 to 2 years) need in order to provide quality representation to their clients in juvenile court proceedings.

Both procedural and substantive law will be covered. Comprehensive materials will be provided including references to applicable statutes, case law, and administrative rules. Lists of online resources will also be provided to give juvenile court attorneys access to up-to-the-minute developments in law and practice.

Social Event: On Friday evening there will be a social event so that lawyers from all over the state can get acquainted with their colleagues from distant places.

Accommodations will be available at the Valley River Inn at a special conference rate.

Registration: Registration for the conference will begin in the late summer. In the meantime KEEP THESE IMPORTANT DATES OPEN.

Information: If you need information before the brochure and registration forms are available, please contact Paul Levy at the Office of Public Defense Services, (503) 378-2478, paul.levy@opds.state.or.us.

CASE LAW UPDATES

Criminal Law

***U.S. v. Luis Narvaez-Gomez*, 2007 WL 1614778 (9th Cir. June 6, 2007)**

Luis Narvaez-Gomez made incriminating statements when questioned by a border patrol agent after being placed under arrest, but before being told his *Miranda* rights. He subsequently received the *Miranda* warnings, waived his rights, and confessed to being in the United States illegally. The Ninth Circuit held that Narvaez-Gomez's post-warning statements were admissible.

"A defendant's post-*Miranda* statements *may be* inadmissible if law enforcement officers use a two-step interrogation process." The two-step interrogation process must be a "deliberate" attempt to circumvent the *Miranda* warnings. In step one, officers must elicit an unwarned confession from the defendant. In step two, officers give the defendant his *Miranda* warnings, obtain a waiver, and then elicit a repeated confession.

Deliberateness is found if objective evidence and any available subjective evidence support an inference that the interrogation procedure was used to undermine the *Miranda* warning. Objective evidence consists of time, place, and completeness of the pre-*Miranda* interrogation, continuity of police personnel and overlapping content of pre- and post-warning statements.

In this case the Court held that the agent's questioning did not meet the two-step interrogation standard because it was not a "deliberate" attempt to circumvent the *Miranda* warnings. First, the pre-warning interrogation was in an informal setting, brief, and only consisted of two questions. Second, another agent handled the second interrogation (although the first agent was present) and there was no reference to the pre-warning statements. Finally, there was a four hour time span and change in locations between interrogations.

***State V. Kayfes*, 2007 WL 1829353 (Or. App. June 27, 2007)**

A jury convicted Kayfes, a former middle-school teacher, of rape, sodomy and sexual abuse arising out of a relationship with one of his students. The victim refused to testify at trial. The trial court admitted evidence of the sexual nature of their relationship, including 12 audiotapes of telephone conversations recorded by the victim's mother, victim's statements to an emergency room doctor, a videotape of the victim's interview with police, and a grand jury clerk's testimony recounting what the victim told the grand jury.

The Appellate Court found that it was harmless error that the trial court admitted the videotape and the grand jury clerk's testimony over defendant's hearsay objections because there was "little likelihood that the errors affected the jury's verdict." The State introduced evidence of the sexual nature of [victim's] relationship with defendant that were "cumulative and uncontradicted and there was *other* substantial evidence of defendant's guilt."

The Court of Appeals found that the victim's statements to the police and to the grand jury inculpating defendant for these crimes falls within the clearly defined category of evidence covered by OEC 803(18a). Although the police officers and clerk would have been permitted under OEC 803(18a)(a) to testify that a complaint was made, their testimony should have been limited to just that.

"The details of a complaint of sexual misconduct or abuse may not be admitted under OEC 803(18a) unless the witness is available or, if the witness is unavailable, chronologically or mentally under 12 years of age when the statement was made." In this case the victim was 16 years of age and unavailable; therefore, the statements were not admissible.

The Court left open the common-law doctrine of forfeiture by wrongdoing as an exception to the hearsay rule. Although the State argued that Kayfes had caused the victim to be absent from trial through his wrongdoing (there was substantial evidence that defendant exercised significant influence over victim), the Court found that they need not decide this issue because admission of the victim's statements were found to be harmless.

***State v. Rennells*, 213 Or. App. 423 (2007)**

In a companion case to *State v. Jackson,* 212 Or App 51 (2007), the Defendant appealed from a conviction of robbery in the second degree. The Defendant sat in a car waiting roughly 25 feet from victim while Jackson approached the victim and struggled with her while taking her purse. Jackson then jumped into the now moving car and he and Defendant sped away. They were both apprehended later.

The trial court erred in its instruction to the jury because it did not emphasize that to commit robbery in the second degree; the actor must use *direct* physical force against the victim and must be aided by another. In this case, the Defendant aided Jackson while Jackson used *direct* physical force against the victim to commit robbery. (Continued, next page)

CASE LAW UPDATES, Continued

The jury should have been instructed that Defendant could not have committed robbery in the second degree without physical contact with the victim. The conviction for robbery in the second degree was therefore reversed and remanded.

Dependency

***State ex rel. Klamath County v T.S.*, 2007 WL 2045185 (Or App June 18, 2007)**

The Appellate Court held that there was a "reasonable likelihood of harm to the welfare" of mother's other children because of mother's blindness to the welfare of her daughter, sexually abused by father, and her unyielding allegiance to father despite the substantial evidence against him. The Court affirmed jurisdiction of the juvenile court over all four children.

Father recently adopted mother's four children, including the victim. In 2006, the victim made allegations of sexual abuse by father spanning three years. These allegations were established by the preponderance of the evidence during the jurisdictional hearing. At the hearing, mother testified that she did not believe that father posed a threat of harm to her other children. The Court found particularly disturbing mother's complete refusal to question father's actions and the evidence against him in the face of her admission that if victim's claims were true, then her sons would also be in danger.

Juvenile Delinquency

***State ex rel. Clackamas County v. C.N.W.*, 212 Or. App. 551 (2007)**

In this juvenile delinquency matter, the juvenile court did not follow the mandate of ORS 419C.478(1), which requires written findings describing why it is in the best interest of a youth offender to be placed with the Oregon Youth Authority. The court rejected the state's argument that because youth did not request written findings, it should not remand the case with instructions to include such findings. The Court found that "the statutory mandate is unambiguous." It "does not require a request, nor does it state that findings are not necessary when evidence supports the disposition." The case was vacated and remanded to include such findings.

***U.S. v. C.M.*, 485 F.3d 492 (9th Cir. 2007)**

In 2005, border patrol agents near Pine Valley, CA, arrested and detained C.M., a juvenile Mexican national, for alien smuggling. Upon arrest, C.M. was not informed of his rights in violation of 18 U.S.C. § 5033 of the Juvenile Delinquency Act (JDA). The Ninth Circuit found that the violations were not harmless and reversed the adjudication, dismissed the juvenile information, and remanded the case.

The Juvenile Delinquency Act prescribes the process due to a juvenile in federal custody. The juvenile must immediately be advised of his rights upon being taken into custody – interrogation is not the starting point; the juvenile's parents, guardian or custodian must be contacted immediately and advised of juvenile's rights; any request by juvenile to speak with his parents or a parental surrogate must be honored before interrogation; and he must be brought before a magistrate forthwith.

Agents held C.M. in custody for six hours before informing him of his rights. They refused to allow C.M. to speak with someone at the Mexican Consulate before questioning. They failed to inform the Consulate of the juvenile's rights. They did not attempt to contact his parents or his uncles (his surrogate parents) even though C.M. had contact information for his uncles. As a result, the Court dismissed the charges against C.M. and found that "despite their familiarity with the statute, the agents failed to engage in the basic steps necessary to comply with the JDA."

***People v. Vinthuong Nguyen*, 2007 WL 1866343 (Cal. App. June 29, 2007)**

In one of two schools of thought among California Appellate Courts interpreting *Apprendi* and its progeny, the Sixth Appellate District Court recognized that there is a Sixth Amendment right to a jury trial before a prior conviction may be used to increase the maximum sentence for a criminal offense. Thus if a juvenile contests but is nonetheless adjudicated without a jury trial, the adjudication may not be used to increase a later sentence on a new conviction. (Continued, p. 11)

Foster Care and Adoption: A Pathway to Understanding, book review by Julie McCarter

Kinship House announces the publication of an interactive therapeutic book entitled Foster Care and Adoption: A Pathway to Understanding, written and illustrated by Heather Wilson, an art therapist. Kinship House, located in Portland, provides services for children in transition between foster homes, birth homes or adoption. The book is designed to help children understand the foster and adoptive process better and provide some comfort to them by acknowledging the confusing emotions they may experience along the way. It is also an interactive book which can be used by professionals in working with these children.

In the book, children can use interactive, creative methods, such as designing family trees and engaging in artwork to help facilitate an understanding of their experience. Children using the book can explore their feelings by seeing and drawing facial expressions and reading detailed descriptions of how a feeling might be experienced inside their body. Ideas for different ways to deal with feelings are also given in the book.

The book teaches important information, such as how to keep appropriate boundaries with people by explaining personal space (the personal bubble), and who strangers, acquaintances, friends and family are. It explains the different roles of all the people they will meet in the system: attorneys, judges, caseworkers, therapists and CASAs.

Overall, this is an excellent book for children in the foster care system and the professionals who work with them. Employees at Kinship House suggest the book is appropriate for ages three to about eleven years old, depending upon the child's developmental level.

Kinship House is planning a training session for professionals who want to learn how to use the book effectively on August 14th from 12 to 1:30 p.m. at Kinship House. Call (503) 460-2796 to RSVP. The book costs $20, but there is a 20% discount if 20 or more books are ordered. ◊

2007 SHOULDER TO SHOULDER CONFERENCE SCHEDULED

SAVE THE DATE:

November 8, 2007

8:00 a.m. to 5 p.m.

The Oregon Convention Center

Proposed Rules Issued to Implement "Adam Walsh Act," summary by Michael Mangan, Law Clerk

In May 2007, the U.S. Attorney General released the proposed National Guidelines for Sex Offender Registration and Notification. SORNA (Sex Offender Registration and Notification Act), replaces the patchwork of standards for registration created by 42 USC 14071 (1994). The guidelines now extend jurisdiction to include all 50 states, the District of Columbia, the territories of the United States and, significantly, Indian Tribal Jurisdictions.

In addition, the classes of sex offenders and the kinds of offenses for which registration is required have been expanded. The Act adopts reforms extending the required duration of registration. Sex offenders in covered classes must register and keep current in jurisdictions in which they reside, work, visit frequently, or go to school. More extensive information and periodic, in person appearances are now required.

SORNA also broadens the availability of sex offender information to the public and law enforcement by requiring maintenance of registration websites and other methods. The public had until August 1, 2007, to comment on the proposed guidelines.

Juvenile offenders fall under SORNA. Registration is required for "young adult" sex offenders who satisfy certain criteria even if their adjudication is referred to as something other than a "conviction" and even if a conviction is "vacated" or "set aside." "Convictions" include juvenile adjudications where the offender is 14 years of age or older at the time of the offense and the offense includes genital, anal, or oral-genital contact with a child younger than 12 years of age. Under the proposed guidelines, a 14 year-old who touches an 11 year-old's genitals will be required to register as a sex offender for life.

In a recent *New York Times* article, Mark Chaffin, University of Oklahoma, noted that if an adolescent hasn't committed another sex crime within five years of their first offense, they are unlikely to ever do so. In fact, the recidivism rate for juveniles who commit sex offenses is about ten percent, which is lower than the rate for other juvenile offenses. In contrast, the adult recidivism rate ranges above 50 percent. Studies show that these juveniles are not just 'short adults.' Despite this, the proposed federal guidelines will treat juveniles as

(Continued on Page 12)

Case Law Updates, Continued From Page 9

This case is another in the divergence of views among the emerging case law struggling to decide how to treat juvenile adjudications. It offers a description of the US Supreme Court's most recent decisions in this area of law and one possible interpretation of those cases, including *Apprendi, Ring, Blakely* and *Booker*, and *Almendarez-Torres*.

The Court first describes the historical belief that children are impressionable and capable of being reformed and the recent shift in juvenile law from a rehabilitative approach to one that is punitive. The Court then found that juvenile adjudications will become prior convictions if used in sentencing guidelines and that this is contrary to the goal of juvenile court, which remains rehabilitate regardless of the recent trend.

The court identifies and then dismisses three reasons other California courts have allowed contested juvenile adjudications to be used to increase a statutory maximum sentence: recidivism, jury reliability, and indispensability of juries.

First, the court dismisses recidivism, which was used in *Almendares-Torres* as the reason for a prior convictions exception, because *Apprendi* characterizes *Almendares-Torres* as an "exceptional departure." This court found that *Almendares-Torres* does not resolve whether a juvenile adjudication is the equivalent of a prior conviction. In essence, a juvenile adjudication may not prove recidivism; it simply proves that a youth has been adjudicated.

Second, while the reliability of jury-trials is not necessary in juvenile adjudications, only a jury fact-finding is reliable *enough* to afford due process in criminal cases where the outcome is longer imprisonment.

Finally, the court found that the right to a jury trial in criminal proceedings was not indispensable because of the long history of that right combined with federal and state constitutional and case law recognition of the right.

The court concludes that proving to a jury that the defendant once suffered a contested juvenile adjudication is vastly different than proving to a jury that the defendant actually committed the criminal conduct underlying that adjudication; and therefore, the former may not be used to increase a maximum sentence.

Federal Sex Offender Rules, continued from p. 9

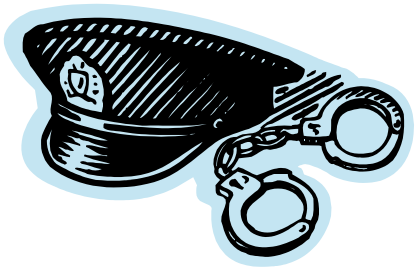
such. Under this system a 30 year-old man who has a history of repeated rapes of 11 year-old girls will have the same registration requirements as a 14 year-old who inappropriately, but consensually, touched an eleven year-old girl.

Under the federal law there are three tiers of sex offenders who are required to register. Tier I includes all sexual offenses that do not fall into Tier II or Tier III. Tier I offenses require registration for a minimum of fifteen years. Tier II and III offenses are generally punishable by imprisonment for one year or more. Tier II offenses require registration for a minimum of twenty five years while Tier III offenses require registration for life.

Tier II offenses cover most sexual offenses against minors (under 18). It also covers offenses that are comparable to or more severe than 18 USC 1591, 2241(b), 2423(a), and 2244. Examples include: use of a minor in a sexual performance; solicitation of a minor for practice of prostitution; and the production or distribution of child pornography.

Tier III offenses cover severe aggravated sexual abuse comparable to 18 USC 2241(a), 2242(1), 2241(b) and 2241(c). Aggravated sexual abuse includes: engaging in a sexual act with another by force or the threat of serious violence; engaging in a sexual act with another by rendering them unconscious or involuntarily drugging the victim; and a sexual act with a child under the age of 12.

The proposed guidelines are based on the Adam Walsh Child Protection And Safety Act of 2006, which created the SORNA and authorizes the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) to ensure that all jurisdictions comply with the new standards. SORNA sets the "minimum" standards. Jurisdictions may exceed these standards with a few exceptions, such as the Act's restriction against listing the victim's name or the registrant's social security number. SORNA requirements relating to sex offender registration are only partial funding eligibility conditions (failure to comply results in a ten percent reduction in 42 USC 3750 funding). As such, the requirements are believed by the Attorney General's Office to be within the constitutional authority of the Federal Government.



Summer Law Clerks and Interns Provide Support for JRP

JRP welcomes three law clerks and one intern to the office this summer!

Michael Mangan, who also clerked during the school year, is entering his second year at Lewis and Clark School of Law. Michael is assisting with JRP's Detention Alternatives program and organizing research on probation conditions for sex-offenders and gun crimes.

Jennifer Meisberger joins us from the University of Oregon School of Law and is entering her third year. In addition to assisting with the System of Care Agreement report, Jennifer represents clients as a court-certified law student.

Rakeem Washington, who clerked at JRP last summer and throughout the school year, will be a 3L at Lewis and Clark School of Law. In additional to representing clients as a court-certified law student, Rakeem is spearheading JRP's Detention Alternatives program and representing OYA youth in JRP's SchoolWorks II Program for youth re-entering their communities and schools from OYA youth correctional facilities.

Viviana Gordon joins JRP as an intern from Whitman College in Walla Walla, Washington. With her excellent language skills, Viviana has helped bridge the language gap with Spanish-speaking clients both in the office and on home visits. Viviana's projects include studying minority overrepresentation in the juvenile justice system, as well as compiling a JRP resume.

In addition, three law clerks from Miller Nash, LLP are performing pro bono work for JRP this summer. Katie Harris, a third-year student at the University Of Oregon School Of Law is assisting with updates to the Termination of Parental Rights notebook. Katie Eichner is going into her second year at Stanford Law School, and is researching Measure 11. Megan Thompson just finished her second year at the University Of Oregon School Of Law and has been updating several JRP publications, including a "Survival Guide for Teens Aging Out of Foster Care."

JRP Juvenile Rights PROJECT

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