



Tuesday, March 5, 2019

The Honorable Representative Jennifer Williamson, Chair
House Judiciary Committee, Members

Re: Testimony in Opposition to HB 2299

Dear Chair Williamson and Members of the Committee:

What the Bill Does:

House Bill 2299 imposes new mandatory minimum sentencing for eluding a police officer in a vehicle. The bill provides that when a person is convicted of fleeing or attempting to elude a police officer in a vehicle, the person will be sentenced to a mandatory 30 days jail upon the first conviction (60 days on second conviction, 90 days on third conviction) provided they were driving at 30 miles per hour over a speed limit or driving in a residence, school, or business district.

What is Attempting to Elude?

The actual crime of fleeing or attempting to elude an officer is a really simple crime to prove. A prosecutor merely needs to show (a) the person was driving, (b) a police officer gave an audio or visual signal to stop, and (c) the person knowingly continued to drive.¹ The crime is considered complete the second the person knowingly keeps driving.² So, if a person continues driving 30 over, or continues driving in a residential, school, or business district, the crime is complete, and they will be getting at least 30 days in jail.

The Oregon Courts have clarified for a fleeing or eluding conviction, **it does not matter:**

- How far someone drives;
- How long someone flees or eludes,
- Whether someone took any evasive maneuvering, or;
- Whether the person actually intended to escape.³

So long as they saw the lights and kept going, there is enough evidence to convict someone of this crime.

¹ O.R.S. § 811.540(1)(b)(A);

² State v. Reed, 256 Or.App. 61, 69, 299 P.3d 574 (2013) (Describing fleeing or attempting to elude as a crime focused on the defendant's specific conduct of *fleeing* or *eluding*, not how many different officers were pursuing

³ State v. George, 263 Or.App. 642, 646 (2014)(Case where individual drove two additional blocks after officers flashed lights, so he could park his car in a driveway).

The Oregon Criminal Defense Lawyers Association opposes HB 2299 for three core reasons:

- This Proposal Will Have Unintended, Bizarre Sentencing Outcomes;
- We Oppose the Creation of New Mandatory Minimum Sentences; and
- Youths are Automatically Waived into Adult Court on all Driving Offenses.

This Proposal Will Have Unintended, Bizarre Sentencing Outcomes

If HB 2299 passes, it will create bizarre outcomes. For instance, a 16-year-old can speed out of a high school parking lot, see the flashing lights, travel half a block in a residential neighborhood before calming down and stopping, and that kid would be required to serve a mandatory minimum 30 day sentence⁴ while a person attempting to elude on a freeway for 20 minutes would not face the same penalty. It's not a sound approach to sentencing. Facts should matter here, and a Judge should have the discretion to the facts into account when sentencing someone.

We Oppose the Creation of New Mandatory Minimum Sentences

Mandatory minimums are an outdated practice. The principle goals of minimum sentences are to (a) end sentencing disparities between defendants and (b) deter crime.⁵ In more serious crimes, mandatory minimums did not end racial disparities,⁶ and did not deter crime.⁷ On the Oregon level, Oregon's juvenile mandatory minimum laws had the same goals, and unsurprisingly, the same failed results.⁸ Instead, the minimum sentence laws became plea bargaining leverage for a prosecutor, instead of sentencing consideration of a neutral magistrate.⁹ It is possible that will happen here.

Here, mandatory minimum sentences could be disruptive in folks' lives. If someone is convicted of fleeing or eluding at 30 over, or did so in a residence, school, or business district, they are

⁴O.R.S. § 419C.370(1)(a) (Permitting waiver for juveniles to adult court for any misdemeanor traffic offense)

⁵ See e.g. United States Sentencing Commission, *Overview of the United States Sentencing Commission*, (2011) (providing history of the Sentencing Reform Act by stating "[to] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct")

https://www.uscc.gov/sites/default/files/pdf/about/overview/USCC_Overview.pdf (last visited Feb.12, 2019).

⁶ See Joshua B. Fischman, *supra* note 2, at 736 ("The U.S. Sentencing Commission [1991] qualitatively categorized cases in which a mandatory minimum could have been applied, and found that 46 percent of white defendants were sentenced below the mandatory minimum, compared to 32 percent of black defendants.").

⁷ Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, FEDERAL JUDICIAL CENTER (1994),

[http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf). (last visited Feb. 12, 2019).

⁸ See Criminal Justice Commission, *supra* note 3, at 45 ("In conclusion, M11 did not eliminate the tough choices about what the appropriate sentence is in a specific case. It did change who makes that decision from the judge to the prosecutor."); see Criminal Justice Commission, *supra* note 3, at 36 (showing growth of overall prison population from M11 charges from 1%–21%); Criminal Justice Commission, *supra* note 3, at 47, Appendix A, https://www.oregon.gov/cjc/SAC/Documents/measure_11_analysis_final.pdf (last visited Feb. 12, 2019).

⁹ Criminal Justice Commission, *Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon*, 45 (2011) ("M11 has combined in the prosecutorial function both the charging and the sentencing decision.").

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getting at least 30 days with no chance to prove themselves on probation or a suspended sentence. They will receive at least 30 days regardless of any other facts of their case, the person's acceptance of responsibility, or the person's circumstances. If the person convicted is 16, this means they will miss a month of school to sit in jail. If they are a 70 years old first-time offender, they get 30 days. If they are a single working parent, it means they will lose their job, their house, and whatever array of consequences may follow. Further, whether someone fled for 30 second or 30 miles will not affect the minimum sentence, even if they did so below or at the speed limit. All that matters is that the person knowingly continued to drive in any of the above circumstances for a moment, and that person will be serving 30 days.

Youths are Automatically Waived Into Adult Court on all Driving Offenses

Finally, the fact that this is a waivable offense for youth should warrant special concern. As the United States Supreme court has acknowledged, children are fundamentally different, and the goals of punishment sought by mandatory sentences are not achieved because of their differences.¹⁰

Retributive goals are not necessarily served by punishing objectively less blameworthy youthful offenders. Children are scientifically proven to be more disposed to risk taking, and it also means they are less likely to be deterred by their awareness of the 30-day minimum sentence here, if they have any at all. Lastly, they are young. Like all of us, they will change in the years before they reach adulthood. We do not know if our system is punishing a culpable offender or the "transience of youth".¹¹ However, the mandatory minimum 30 days here will punish youth and adult alike.¹²

For these reasons, we urge to say no to HB 2299. Thank you for the opportunity to submit the following comments in opposition of HB 2299.

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¹⁰ *Miller v. Alabama*, 132 S.Ct. 2455, 2465 (2012) (noting three reasons the court explained: (1) "lack maturity and . . . [have an] underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; (2) They ". . . are more vulnerable to the negative influences and outside pressures, including from their family and peers, have limited control over their own environment and lack the ability to extricate themselves from horrific, crime producing settings"; and (3) their "character is not as well formed as adults, and their brains are less fixed and his actions less likely to be evidence of *irretrievable depravity*." (emphasis added).

¹¹ *Miller*, 132 S.Ct. at 2465; *State v. Allen*, --- P.3d ----, 294 Or.App. 301, 316 (2018) (C.J. Egan)

¹² Oregon Council on Civil Rights, *Youth and Measure 11 in Oregon*, 25 (2018), <http://media.oregonlive.com/pacific-northwest-news/other/Youth%20and%20Measure%2011%20in%20Oregon%20Final%202.pdf> (last visited Feb. 12, 2019).

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About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of reform within the criminal and juvenile justice systems.

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