

December 5, 2023

Co-Chair Lieber, Co-Chair Kropf, and Members of the Committee,

I write to you on behalf of The Oregon Justice Resource Center's FA:IR Law Project, which works to address systemic failures and create a more fair, just, and humane criminal legal system.

Some stakeholders have suggested that, in the wake of *State v. Hubbell*, 371 Or 340 (2023), our state needs a revised delivery statute that defines the offense as including possession with the intent to sell. Such an expansion of the law would exacerbate the disproportionate harm the criminal legal system already causes to BIPOC Oregonians. Moreover, existing statutes render it unnecessary to achieve the stated goal of prosecuting those engaged in the delivery and manufacture of controlled substances.

For more than three decades, the Oregon Court of Appeals' decision in *State v. Boyd*, 92 Or App 51 (1988) was used to convict people of delivery offenses when in fact, no drugs changed hands. *Boyd* prosecutions swept up tens of thousands of Oregonians under a variety of circumstances. Some used drugs but never delivered; others delivered to support an addiction; and others still were dealers who did not use.¹

First, it is clear from the record of the case and from historical context that *Boyd* prosecutions are a relic of the failed War on Drugs, and our review of statewide delivery convictions between 1990 to 2021 suggests that *Boyd* disparately affected Black and Hispanic² people: compared to white people, Black people were nearly five times as likely to be convicted of *Boyd* deliveries, while Hispanic people were twice as likely to be convicted.³

In addition to higher conviction rates, Black and Hispanic people were also more likely to serve longer sentences when convicted of delivery. An analysis of all 62,403 cases involving delivery convictions during the same time period revealed that Hispanic people were more often convicted of delivery offenses with the highest crime seriousness levels of '8,' '9,' or '10'; Black people were more often convicted of level '6' delivery offenses; and white people were more often convicted of delivery offenses with the lowest crime seriousness level of '4.'

¹ Notably, the delineation between drug user and drug seller is largely an artificial one. See Drug Policy Alliance, *Rethinking the "Drug Dealer"* (2019), https://drugpolicy.org/wp-content/uploads/2023/05/Rethinking_the_Drug_Dealer_Report.pdf.

² We use the term "Hispanic" because it is used by the Oregon Criminal Justice Commission and the 2010 United States Census, which were used in our analysis.

³ For more detail on our review findings, see Brief for Respondent as Amicus Curiae, *State v. Hubbell*, 371 Or 340 (2023), <https://ojrc.info/s/Amended-Final-OJRC-OCCLA-HUBBELL-BRIEF-1.pdf>.

These disparate conviction rates and sentence lengths are consistent with national patterns in the criminal legal system and are inconsistent with national data on rates of drug dealing as compared with race. Though all races are known to sell drugs at similar rates,⁴ national surveys show that Black Americans, for example, are 6.5 times more likely to be incarcerated in state prisons for drug-related crimes.⁵ Thus, the disparities Oregon and nationwide do not result from correspondingly disparate rates of offending, but rather reflect the systemic biases embedded within each stage of the criminal legal system, including policing, charging, and sentencing.⁶

Second, no “fix” to the current delivery statute is needed. Many of the proponents of such a change claim that since *Boyd*’s reversal, police and prosecutors no longer have the tools to go after people selling drugs. This is simply untrue. Some of the many charges still available to police and prosecutors include, but are not limited to:

- Possession as a Commercial Drug Offense: When possession is charged as a commercial drug offense, it carries an even greater penalty than a typical delivery. This means prison for someone found to be in possession of controlled substance, cash, stolen property, gun, kitchen scales, tin foil, Ziploc baggies, and/or a drug sale ledger.
- Possession of a Substantial Quantity: Simple possession of a substantial quantity of a controlled substance likewise carries a greater penalty than a typical delivery.
- Manufacturing: Manufacturing includes the act of repackaging a controlled substance, so a person found with multiple baggies who could previously be prosecuted of delivery under *Boyd* can still be prosecuted for manufacture and face the exact same penalty.

Police have the tools to investigate drug offenses and district attorneys have the tools to prosecute them. Expanding the definition of delivery to include possession with intent would be redundant, and it would result in the prosecution of a much wider class of people, many of whom are not actually selling controlled substances, or who are doing so only to support an addiction.

⁴ “An analysis from data collected by the federal Substance Abuse and Mental Health Services Administration found that 3.4 percent of white people, 2.9 percent of Black people, 2.8 percent of Latinx people, 4.2 percent of Native Americans or Alaskan Natives, 3.5 percent of Native Hawaiians or Other Pacific Islanders, and 1.1 percent of Asian people reported selling drugs in the past year.” Brief for Amicus Drug Policy Alliance at 13, *State v. Hubbell* (S069092); see also The Hamilton Project, *supra*; The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf>.

⁵ Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race, The Hamilton Project (Oct 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

⁶ Emma Pierson et al, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nat Hum Behav 736 (2020), <https://5harad.com/papers/100M-stops.pdf>.

We know from decades of fallout from the War on Drugs that incarcerating people who possess drugs—people experiencing addiction—not only fails to keep our communities safe; it disproportionately harms Black and brown people. And we know from our review of delivery cases in Oregon that this holds true in our state. We urge the legislature to focus on treatment and social services over needlessly expanding the scope of delivery prosecutions.

Sincerely,

A handwritten signature in black ink, consisting of the initials 'M.M.' in a cursive, stylized font.

Malori Maloney

Staff Attorney

The FA:IR Law Project