TO: **Joint Interim Committee On Addiction and Community Safety Response**
FROM: **Mae Lee Browning, Oregon Criminal Defense Lawyers Association**
DATE: **December 5, 2023**
RE: **Do Not Return to Boyd**

Co-Chairs Lieber and Kropf, and Members of the Committee:

My name is Mae Lee Browning. I represent the Oregon Criminal Defense Lawyers Association. OCDLA's 1,200 members statewide include public defense providers, private bar attorneys, investigators, experts, and law students. Our attorneys represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon. Our mission is championing justice, promoting individual rights, and supporting the legal defense community through education and advocacy.

OCDLA urges this Committee to not return to *Boyd*. *(Hubbell*[1] is the current case which overturned *Boyd*[2]. *Hubbell* is not the problem). *Boyd*'s rationale is rooted in an outdated view on addiction, treatment, drugs and addiction-driven crime. *Boyd* is completely at odds with everything we know about how we should be responding to people who struggle with addiction, which is to treat addiction as a medical and behavioral health issue, and to treat people who use drugs as human. The law under *Boyd* made it more difficult for people with substance use disorder to get treatment. Going back to *Boyd* would be a backdoor way to increase the punishment for addiction.

In *Boyd*, the court treated attempted deliveries the same as completed deliveries. That is an anomaly in the law and Oregon was a national outlier in that respect for decades. The ordinary hierarchy of crimes is that completed crimes are more serious than attempted crimes and thus treated more severely than attempted crimes. Attempted crimes are one class lower than completed crimes (an attempted Class A felony is a Class B felony).

Under current law, there are the crimes of possession, attempted delivery, and delivery. What *Boyd* does is eliminate the crime of attempted delivery by treating it the same as a completed delivery. Under *Boyd*, a first-time addiction driven seller with no criminal history would be sent to prison. That person would be ineligible for drug treatment before prison; it is straight to prison. And we know that in prison, there is very limited opportunity for drug treatment. Plus, the consequences of a felony conviction reinforces the addiction cycle.

Sadly, some people with substance use disorders engage in addiction-driven drug selling. If they were not in desperate financial circumstances resulting from their addiction,

[1] *State v. Hubbell*, 371 Or. 340 (2023).
[2] *State v. Boyd*, 92 Or. App. 51 (1988).

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it's unlikely they would be selling drugs. If we are not careful in how we amend Oregon law, we risk inadvertently scooping up people who suffer from addiction and sell small amounts of drugs and treat them the same as large scale organized crime. We should be working to ensure that people engaged in addiction-driven selling can get treatment in order to break the cycle and help them move forward in our community.

Some will argue that there should be a return to *Boyd* because it was the law for over 30 years. Oregon allowed nonunanimous juries for over 80 years, but just because it was the law for a long time, does not mean that it was right or just.

Oregon's history is full of damaging responses to addiction that led to more arrests, incarceration, and stigma of people who suffer from addiction. It's ineffective, causes more harm, and wastes taxpayer dollars that can be spent on treatment. As we learn more about the right ways to address addiction and other behavioral health issues, it's our responsibility to change laws so that our communities have the benefit of that growth and learning.

Courts get things wrong. In *Hubbell*, the Court of Appeals determined that *Boyd* is not just wrong, it is plainly wrong. Courts assume that their fully considered decisions are correctly decided and would not overrule a prior interpretation of statute unless it is plainly wrong.

The Court of Appeals, acknowledging the certain communities are overrepresented in arrests, convictions, and sentences for drug offenses, said that if they went back to *Boyd*, they would have to ask themselves "whether [they] risk perpetuating a construction that would not only be wrong and unjust, but one whose effects may be disproportionately borne along racial and ethnic lines."

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