December 5, 2023

Joint Interim Committee On Addiction and Community Safety Response
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in opposition to reverting to a criminal approach to Oregon's addiction crisis

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

My name is Kelly Simon (she/her). I am the legal director for the ACLU of Oregon and **I urge you to oppose reverting to a criminal approach to Oregon's addiction crisis.** Oregon doesn't need more hammers, we need more healthcare.

I want to emphasize three facts about the Oregon Supreme Court's 2023 decision in *State v. Hubbell*, 371 Or. 340 (2023), which overruled the 1988 Court of Appeals interpretation of the drug delivery statute in *State v. Boyd*, 92 Or. App. 51 (1988).

Under *Boyd*, the required proof for the crime of drug delivery under an attempted transfer theory was the same as the inchoate crime of attempted drug delivery – proof of a substantial step toward delivery that can be satisfied by proving a person had a large quantity of drugs with a general intent to sell at some future time *even if* they made no effort or plan to sell.

Hubbell concluded that the legislature intended proof for those two separate crimes to be different, and that the attempted transfer theory of delivery required "some effort to undertake the *act or acts* of causing controlled substances to pass from one person to another," *i.e.* some effort to make a transfer. 371 Or. at 359. Steps preceding efforts to transfer are not a completed crime of delivery, but instead fall into the realm of the attempted crime of delivery. *Id.* at 360.

The logic of this differentiation between completed and attempted crimes runs throughout all of criminal law.

The following three facts test the veracity of statements I have heard from those who push for a legislative codification of *Boyd*[1]:

> **FACT 1:** Police took a witness statement from a person who had overdosed and stated they received drugs from Mr. Hubbell's hotel room wherein Mr. Hubbell held a large quantity of drugs, but the Washington County prosecutor did not present that evidence at trial, opting instead to rely on minimal evidence unrelated to any transfer. It is reasonable to expect prosecutors to meet the current evidentiary burden required to prosecute the crime of delivery. They had this evidence in *Hubbell*.
>
> **FACT 2:** Despite the prosecutor's shortcut, the Oregon Supreme Court *still* concluded there was sufficient evidence that Mr. Hubbell committed a felony crime – the lesser-included crime of attempted delivery. Prosecutors have tools; their hands are not tied when it comes to drug dealing. They had the tools in *Hubbell*.
>
> **FACT 3:** The *Hubbell* decision came down a mere 2 months ago[2] while *Boyd* was in place for over 3 decades. I question whether *Boyd* was an effective solution like the ones we now seek. One thing we do know is that when *Boyd* was the rule, there were significant racial disparities in prosecutions.[3]

The ACLU of Oregon opposes a return to such a failed and unfair system. A so-called *Hubbell* "fix" would give prosecutors a stamp of approval for taking shortcuts and continue encouraging resources to be put into ineffective solutions. The presumption of innocence – that a person is innocent until proven guilty beyond a reasonable doubt – is a bedrock of the United States justice system. Ensuring the state does its due diligence in every criminal prosecution is an important check on the immense power of a prosecutor to take away a person's freedom.

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[1] The Washington County District Attorney, Kevin Barton, has claimed that it is "unreasonable" to expect offers to meet their burden of proof and claims that the law now requires prosecutors to "catch someone in the act of a hand to hand transaction." Ezra Kaplan, "Oregon prosecutor say recent court decision is making it harder to prosecute drug dealers," Fox 12 (Nov. 22, 2023), https://www.kptv.com/2023/11/22/oregon-prosecutors-say-recent-court-decision-is-making-it-harder-charge-drug-dealers/. That is not true. In fact, the court left open a wide swatch of circumstantial evidence that could prove the crime of delivery *even under* an attempted transfer theory. *See*, 371 Or. at 360-61 (explaining that some additional evidence is required but explicitly refraining from agreeing with the defense that a specific transfer need be attempted but interrupted). Mr. Barton also claimed to Fox 12 that prosecutors do not have "tools" to address drug dealers at all different levels despite convicting Mr. Hubbell of a felony.

[2] In *Hubbell*, the Oregon Supreme Court affirmed a Court of Appeals decision from 2021.

[3] *See* Brief of Amici Curiae Oregon Justice Resource Center and Oregon Criminal Defense Lawyers Association, *State v. Hubbell*, Case No. S069092 (concluding that *Boyd* data showed that "Black people are 4.8 times more likely to be convicted of Boyd deliveries than white people, and Hispanic people are twice (2.0 times) as likely to be convicted of Boyd deliveries than white people"). *Brief attached*.

The ACLU of Oregon adamantly opposes a rushed *Hubbell* "fix" because it flies in the face of notions of justice and fairness in Oregon's criminal legal system.

Thank you,

Kelly Simon
Legal Director
ACLU of Oregon

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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. BRIAN G HUBBELL, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court Case No. 18CR43198 CA A170143 S069092

AMENDED BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable Theodore E. Sims, Judge

Opinion Filed: September 29, 2021
Author of Opinion: James, J.
Before: Lagesen, Presiding Judge, and James, Judge, and Kamins, Judge.

ERNEST G. LANNET #013248
Criminal Appellate Section
Chief Defender
ANNE FUJITA MUNSEY #994080
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
anne.k.munsey@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ROLF MOAN #924077
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
rolf.moan@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Petitioner on Review

Continued….

BRITTNEY PLESSER #154030
CLAIRE POWERS #192788
KAREN NEWIRTH NY #4115903
MALORI MALONEY #175899
Oregon Justice Resource Center
P.O. Box 5248
Portland, OR 97208
amicus@ojrc.info
Attorneys for *Amicus Curiae* OJRC

ROSALIND LEE #055566
Chair, Amicus Committee
Oregon Criminal Defense Lawyers Assn.
474 Willamette St., Ste. 302
Eugene, OR 97401
ros@mansonlee.com
Phone: (541) 485-5110
Attorney for *Amicus Curiae* OCDLA

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Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

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PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

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(503) 944-2270
amicus@ojrc.info

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PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND OREGON CRIMINAL DEFENSE LAYWERS ASSOCIATION IN SUPPORT OF RESPONDENT ON REVIEW

INTRODUCTION

Amicus Curiae Oregon Justice Resource Center (OJRC) is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle mass incarceration and systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by operating several distinct legal services programs focused on the principle that our criminal legal system should be founded on fairness, compassion, accountability, and evidence-based practices. The FA:IR Law Project, a program of OJRC, seeks to reverse, vacate, and prevent wrongful and unjust convictions and sentences and mitigate and prevent excessive sentences. The FA:IR Law Project's work encompasses broad challenges based on, among other things, changes in science, laws, and community standards; best practices; and evidence of misconduct. This is accomplished through individual casework, mass case reviews, data analysis, policy, advocacy, and public education.

Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

Amicus Curiae Oregon Criminal Defense Lawyers Association (OCDLA) is a non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators, and related professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

SUMMARY OF ARGUMENT

The Court of Appeals' decision overturning *State v. Boyd*, 92 Or App 51, 756 P2d 1276 (1988) should be affirmed for the reasons articulated by the Court of Appeals and in the brief of respondent on review. *See State v. Hubbell*, 314 Or App 844, 500 P3d 728, *rev allowed*, 369 Or 504 (2021).

In the wake of *Hubbell*, *amicus* Oregon Justice Resource Center began reviewing a representative sample of delivery of a controlled substance convictions in Oregon between 1990 and 2021. That review confirmed the Court of Appeals' system-wide concerns in *Hubbell*. *Boyd* has caused tens of thousands of people to be convicted of the delivery of a controlled substance when the evidence only supported—at most—convictions for possession or

attempted delivery of a controlled substance. The data further supports that *Boyd* convictions disproportionately affected Black and Hispanic[1] people, raising serious concerns about the "delivery of equal justice in Oregon." *Id.* at 867. These wrongful convictions caused untold harms that continue today in the form of a multitude of collateral consequences that deny people with delivery convictions the ability to live truly free and successful lives.

Boyd was decided at the height of the now-discredited War on Drugs. While the War on Drugs began as a political strategy that employed a racially-coded, tough-on-crime narrative to galvanize Southern white voters, scholars, activists, and affected persons now agree that it moved quickly from politics to the criminal legal system, infiltrating and infecting every aspect of that system. Indeed, the "political hysteria" caused by the War on Drugs led courts like the *Boyd* court to over-criminalize, over-convict, and excessively punish people for using and selling drugs. And despite the fact that people of all races use and sell drugs at comparable rates, the War on Drugs and its byproducts

[1] *Amici* use the term "Hispanic" throughout the brief because the term used by (1) the Oregon Criminal Justice Commission in the dataset *amici* received and (2) the 2010 United States Census, which is used in *amici*'s analysis.

disproportionately affected Black and Hispanic people in Oregon and throughout the nation.

Hubbell makes clear that *Boyd* was a judicial "mistake" that rested on an "incorrect interpretation" by the Court of Appeals that has never been addressed by the legislature or this court. *Id.* Given the judicial source of this error and the magnitude of its life-altering effects, this court should take a step beyond affirming *Hubbell*; it should fashion a holistic, group remedy that will provide efficient, expeditious, and low-cost (or free) relief to the tens of thousands of Oregonians wrongly convicted under *Boyd*.

ARGUMENT

I. For over three decades, *Boyd* has been used to convict people of crimes they did not commit, causing immeasurable harm to tens of thousands of Oregonians.

In 1988, at the height of the now-discredited War on Drugs, the Oregon Court of Appeals decided *State v. Boyd*, 92 Or App 51, 756 P2d 1276 (1988). As the same court has now explained, *Boyd* rested on "deep analytical flaws." *State v. Hubbell*, 314 Or App 844, 500 P3d 728, *rev allowed*, 369 Or 504 (2021). *Boyd* failed to examine the text, context, or legislative history of ORS 475.005(8), and, without any legislative intent, proceeded to define "'attempted

transfer'—an *act*—by grafting in the statute for the inchoate *crime* of attempt." *Id.* at 846.

The *Boyd* delivery is an "Oregon oddity * * * a bootstrapped doctrine where possession of drugs with the intent to sell them constitutes a substantial step toward the crime of delivery and, hence, the attempted crime becomes the completed crime of delivery of a controlled substance." *Id.* As *Hubbell* correctly identified, the *Boyd* rule caused people to be wrongfully convicted of delivery of a controlled substance ("delivery") when the evidence supported only possession of a controlled substance or the inchoate crime of attempted delivery. *See id.* at 864.

OJRC, together with a research scientist, reviewed a representative sample of delivery convictions between 1990 and 2020. As discussed in greater detail *infra,* this review identified a number of troubling trends. Significantly, the data suggests that between 45 to 55% of people convicted of delivery during that period were convicted using the *Boyd* rule. The evidence against those 45 to 55% at best supported convictions for possession or attempted delivery, far less serious offenses. Moreover, Black and Hispanic people were disproportionately convicted under *Boyd*. *Boyd* convictions violate basic constitutional protections: due process, the prohibitions against vagueness and

cruel and unusual punishments, and the requirement of proportionality. *See* US Const, Amend VIII, XIV; Or Const, Art I, §§ 16, 20, 21. In practice, *Boyd* convictions erode confidence in our criminal legal system: *Boyd* waters down the burden of proof, and it creates a substantial risk that the statute will be used "selectively to rid the community of individuals deemed subjectively less desirable than other offenders." *State v. Hodges*, 254 Or 21, 28, 457 P2d 491 (1969).

A. A review of delivery convictions since 1990 reveals that 45 to 55 percent of people convicted of delivery are guilty of only possession or attempted delivery.

To determine the extent to which *Boyd*'s application caused individuals to be wrongfully convicted of delivery, OJRC and Research Scientist Dr. Ann Leymon reviewed data from the Oregon Criminal Justice Commission (CJC) of delivery convictions that occurred between 1990 and 2021.[2] App 1 (Data Results and Methods) at 1, 5. The analysis included a representative sample of

[2] Due to error-prone data prior to 1990, as well as the sentencing guidelines change in 1989, the Oregon Criminal Justice Commission suggested OJRC's analysis begin in 1990. App 2 (Decl of Malori Maloney) at 1.

346 delivery convictions. *Id.* at 1. The details of that review, including the methodology and results, are set forth at Appendix 1 and 2.[3]

Based on OJRC's review, 174 of 346[4] or 50.29% of the delivery convictions reviewed were *Boyd* deliveries. App 1 at 7. *Amici* estimates with 95% confidence that from 1990 through 2021, there were between **24,093 and 29,710 *Boyd* delivery convictions**. *Id.* In other words, between **45% and 55% of all delivery convictions were *Boyd* deliveries**. *Id.* at 7.

OJRC's detailed review of the case documents associated with delivery convictions revealed that 50.29% of the convictions involved evidence that *only* supported convictions for possession or attempted delivery. *See* App 2. Thus, an overwhelming number of people convicted of delivery—whether by plea or after trial—did not actually commit the completed crime of delivery. The following case examples originated from diverse counties, took place over a

[3] As part of OJRC's FA:IR Law Project community education mission, OJRC will be publishing a report with the findings described herein.

[4] Thirty-five cases did not involve delivery convictions despite being included in the data set provided by CJC. App 2 at 5. Eleven cases could not be analyzed due to insufficient documents in the case files. *Id.* The overall size of the case review still allowed Dr. Leymon to use a 95% confidence interval to estimate total numbers of *Boyd* delivery convictions. App 1 at 1.

period of decades, and reflect the range of *Boyd* delivery fact patterns OJRC observed.

- Polk, 2010: T.B. pleaded guilty to one count of delivery of cocaine and one count of delivery of methamphetamine.[5] Police received a call that T.B. may have overdosed and went to her apartment for a welfare check. Police searched T.B.'s apartment and found a safe that held three baggies of cocaine, six baggies of methamphetamine, two digital scales, and three measuring spoons.

- Clackamas, 2020: A.W. was found guilty of delivery of cocaine after a bench trial. Police stopped A.W. on suspicion of DUII. Police searched his car and found 68 grams of cocaine, 3.31 grams of psilocybin, 24 unidentified pills, a digital scale, small plastic baggies, and $1,471 in cash. A.W. told police the cocaine was for personal use.

- Wasco, 2016: J.C. pleaded guilty to one count of delivery of methamphetamine. Law enforcement had been investigating T.S. on suspicion of drug dealing. Police stopped T.S. in her car and J.C. was a passenger. Between the passenger seat and the door, police found two bags of methamphetamine and a dental floss box. The floss box held two additional bags, one of which contained methamphetamine. J.C. told police that T.S. asked him to hold the baggies and floss container when she put on her seatbelt and started her car. J.C. said he used methamphetamine "on and off."

[5] To protect the privacy of the people impacted by *Boyd*, *amici* refer to defendants by their initials. *Amici* will provide unredacted versions to the Court or parties on request.

- Jackson, 2013: J.F. pleaded no contest to one count of delivery of methamphetamine. A state trooper stopped J.F.'s car for speeding. The trooper noted that J.F. did not immediately yield and had on his dash depictions of saints "often used by individuals in the illegal transportation of narcotics." The trooper searched the car and found six containers holding a total of 15.4 pounds of methamphetamine.

- Jackson, 2011: M.R. pleaded guilty to one count of delivery of methamphetamine, one count of delivery of a controlled substance, and other non-delivery charges. When police stopped a car in which M.R. was a passenger, he ran. Police discovered that a briefcase that had been between M.R.'s feet contained a pistol and ammunition, one-half gram of methamphetamine, 18 baggies, two scales, two small scoops, and 46 methadone tablets. When police apprehended M.R., he possessed $1,397.90 in cash.

- Jackson, 2008: J.L. pleaded guilty to one count of delivery of methamphetamine. Seeking to arrest J.L. on an outstanding warrant, police stopped a van in which she was a passenger. Police searched J.L.'s bag and found three baggies of methamphetamine with a combined weight of 3.5 grams.

- Klamath, 2001: A.B. pleaded guilty to one count of delivery of a controlled substance. An officer saw A.B. walking his bike and recognized him from prior incidents. The officer searched A.B. and found a glass pipe with methamphetamine residue, a baggie with 1.2 grams of methamphetamine, plastic baggies, and a pager. A.B. told police S.D. gave him the methamphetamine to sell, and that people contact A.B. via his pager to acquire it. A.B.'s pager was going off as he spoke to police.

- Multnomah, 2005: O.V. pleaded guilty to one count of delivery of a controlled substance. An officer stopped O.V.'s car for failing to signal. The officer searched the car and found $280 in $20 bills, six baggies of heroin in heat-sealed packages, a cell phone, and plastic produce bags purportedly used to package drugs.

- Clackamas, 2003: V.B. pleaded guilty to one count of delivery of a controlled substance. An officer saw her leave a "known drug house" on a bicycle and stopped her after she turned without signaling. Inside her fanny pack was a glass pipe, two small baggies of marijuana, four baggies of methamphetamine, an address book, and $645 in cash.

- Lane, 1998: D.K. pleaded guilty to one count of delivery of a controlled substance. An anonymous caller informed dispatch that the people in a specified hotel room had two to three ounces of heroin and two guns. When police responded, they found D.K. and J.L. in the room, along with an ounce of heroin "packaged for sale," scales, needles, and other unspecified drug paraphernalia.

- Wasco, 2018: M.B. pleaded guilty to one count of delivery of methamphetamine. Police obtained a search warrant for M.B.'s garage and person and found 30.2 grams of methamphetamine, a small amount of marijuana, $546.50 in cash, two digital scales, baggies, a cell phone, a glass pipe, and a rifle. Prosecutors charged M.B. with the *Boyd* delivery occurring on the day the search warrant was executed but did not charge him with any actual deliveries detailed in the warrant.[6]

[6] OJRC determined that the delivery charged in the indictment was the *Boyd* delivery based on the commercial drug factors indicated. The commercial drug factors relied upon were possession of $300 or more in cash; unlawful possession of a firearm; possession of materials being used for packaging of controlled substances, other than the material being used to contain the substance that was the subject of this offense; and possession of more than eight grams of methamphetamine. These factors were present in the *Boyd* delivery but not the completed deliveries that supported the issuance of the search warrant.

The above examples demonstrate a consistent pattern of drug possession combined with the now-ubiquitous earmarks of a *Boyd* delivery—amount, materials, and packaging—but without evidence of a completed or attempted transfer.

B. Black and Hispanic people were disproportionately impacted by *Boyd*.

OJRC's review suggests that *Boyd* disproportionately affected Black and Hispanic people.[7] Black people account for 6.90% of *Boyd* delivery convictions reviewed but represent only 1.8% of the Oregon population. App 1 at 2. Hispanic people account for 18.97% of *Boyd* delivery convictions reviewed but represent only 11.7% of the Oregon population. *Id.*

[7] Sample sizes of Asian and Native American people prosecuted for delivery offenses were too small to draw meaningful conclusions about disparities in the rate of convictions. More research into this area is needed. App 1 at 2.

	Oregon Population	*Boyd* Deliveries
Asian	3.7%	2.30%
Black	1.8%	6.90%
Hispanic	11.7%	18.97%
Native American	1.4%	4.60%
White	83.60%	67.24%

Comparatively, white people account for 67.24% of *Boyd* delivery convictions reviewed but represent 83.6% of the Oregon population. *Id.* Thus, our data suggests that, in Oregon, Black people are 4.8 times more likely to be convicted of *Boyd* deliveries than white people, and Hispanic people are twice (2.0 times) as likely to be convicted of *Boyd* deliveries than white people.[8]

In addition to higher conviction rates, Black and Hispanic people are also more likely to serve longer sentences when convicted of delivery. An analysis

[8] The significant disparities in the application of the *Boyd* theory of delivery suggest that *Boyd* is ripe for an individual or class privileges and immunities-based challenge. *See* Or Const, Art I, § 20 ("[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.") The provision "require[s] the government to treat similarly situated people the same" and "protects both individuals and classes of individuals." *State v. Savastano*, 354 Or 64, 68, 96, 309 P3d 1083 (2013).

of all 62,403 cases involving delivery convictions from 1990 to 2021 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.'[9] App 1 at 2-3.

Race	Oregon Population	Oregon Delivery Convictions	Crime Seriousness Level				
			4	6	8	9	10
Black	1.8%	8.82%	5.74%	**17.87%**	6.10%	5.46%	3.80%
Hispanic	11.7%	26%	12.89%	31.97%	22.58%	**35.45%**	**53.92%**
White	83.60%	63.04%	**79.36%**	48.12%	68.84%	56.54%	41.27%

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

[9] The impact of crime seriousness level on presumptive sentencing is significant. Under the Oregon Felony Sentencing Guidelines, the presumptive sentence for a person with no criminal history convicted of a level 4 delivery offense is two years of probation; that same person convicted of a level 10 delivery offense faces a presumptive 58-60 months in prison. OAR 213-004-0001 App 1.

known to sell drugs at similar rates,[10] national surveys show that Black Americans, for example, are 6.5 times more likely to be incarcerated in state prisons for drug-related crimes. *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. 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. 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.

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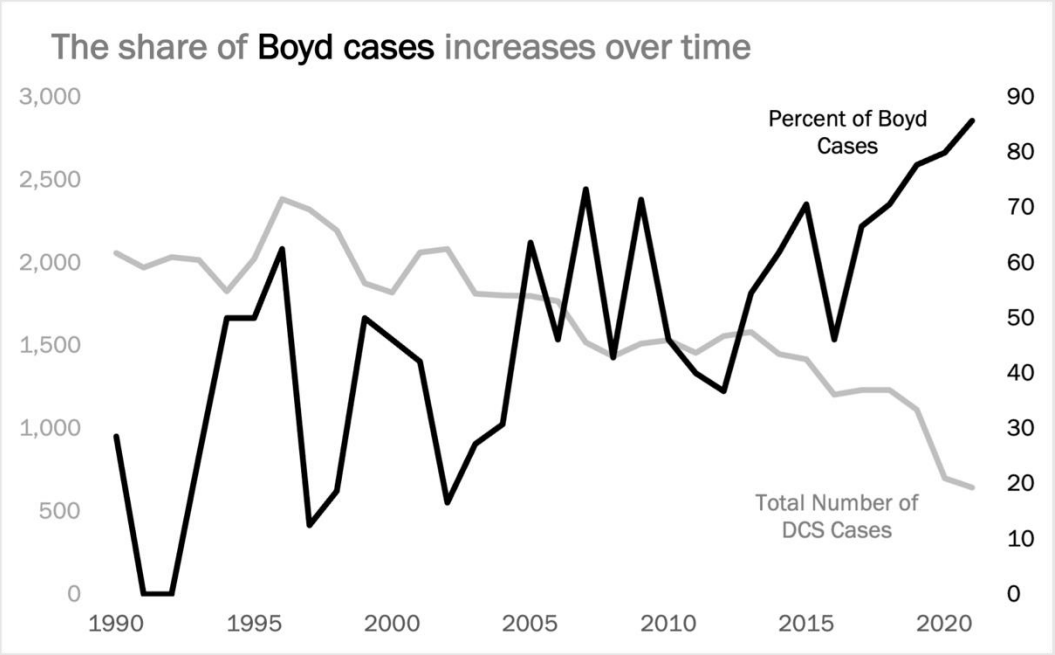
[10] "An analysis from data collected by the federal Substance Abuse and Mental Health Services Administration found that 3.4 percent of white people, 2.9 percent of Black people, 2.8 percent of Latinx people, 4.2 percent of Native Americans or Alaskan Natives, 3.5 percent of Native Hawaiians or Other 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.

C. As delivery convictions have decreased over time, *Boyd* convictions have increased.

In *Hubbell*, the Court of Appeals concluded that *Boyd* has affected "the way drug crimes have been prosecuted and charged." 314 Or App at 846. OJRC's case review supports this conclusion. As the chart below illustrates, *Boyd* convictions have increased even as convictions for delivery crimes decreased in Oregon.



App 1 at 3.

The overall decrease in delivery convictions in Oregon is consistent with national trends; arrests for drug delivery and manufacture in the United States fell between 1990 and 2019. Howard N. Snyder, *Arrests in the United States*,

1990-2010, US Dep't of Justice, Bureau of Justice Statistics (Oct 2012), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/aus9010.pdf; *Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019*, Pew Research Center (Feb 15, 2022), https://www.pewtrusts.org/en/ research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019.

While impossible to discern why *Boyd* convictions have increased over time, one reasonable conclusion is that law enforcement has relied on *Boyd* due to the ease of investigation and prosecution. Compared with completed delivery investigations, *Boyd* deliveries require relatively few resources to investigate. They do not usually involve confidential informants, nor do they involve controlled buys. Typically, law enforcement does not engage in a protracted, months-long investigation. Instead, as our case reviews confirm, *Boyd* delivery charges often follow a routine interaction, between police and the suspect, that results in the discovery of a small amount of drugs. Typically, cases involve a traffic stop followed by a search that reveals methamphetamine and a scale, or an arrest based on a warrant that leads to the discovery of individually packaged baggies of heroin in a backpack. Only a single law enforcement officer may be required to complete the entire *Boyd* delivery investigation and arrest.

By collapsing the inchoate crime of attempted delivery with the completed delivery offense (or by converting possession to a *Boyd* delivery), *Boyd* also diminishes the burden of proof on prosecutors. *Boyd* prosecutions are therefore easier to initiate, maintain, and resolve with a conviction. Under *Boyd*, to prove a completed delivery offense, prosecutors need only prove an attempted delivery or simple possession plus some "tools of the trade," such as a kitchen scale or Ziplock bag. *See, e.g.*, *State v. Fulmer*, 105 Or App 334, 804 P2d 515 (1991) (holding that possession of six baggies of cocaine in individually sealed packages, a razor blade, and $290 in cash was sufficient to prove delivery under *Boyd*).

D. *Boyd* convictions cause substantially greater harm than convictions for attempted delivery and possession, even when premised on identical facts and evidence.

Boyd convictions cause greater harm than convictions for attempted delivery or possession, even when premised on identical facts and evidence. *Hubbell*, 314 Or App at 865-68. In *Hubbell*, the court acknowledged the direct consequences of these wrongful convictions, including more serious criminal history scores and profoundly different sentencing outcomes. *Id.* at 865-66. The court also acknowledged the impact of *Boyd*'s potential collateral consequences, including the "financial cost to Oregon from incarcerating

people beyond what was contemplated by the legislature," the cost to the lives of individuals and families, and the impact on immigration status and outcomes. *Id.* at 866.

i) *Boyd* delivery convictions result in longer sentences and greater financial burdens.

The direct effects of a *Boyd* delivery conviction include longer sentences and greater financial penalties. Delivery is a more serious crime than attempted delivery or possession. Delivery offenses—including *Boyd* deliveries—are typically class A or B felonies. *See, e.g.*, ORS 475.904(2) (Unlawful manufacture or delivery of a controlled substance within 1,000 feet of a school is a Class A felony); ORS 475.890 (Unlawful delivery of methamphetamine is a Class B felony).[11] Attempted offenses—including attempted deliveries—are categorized one class level lower than the completed offense, *e.g.*, an attempt to commit a class B delivery is itself a class C felony. ORS 161.405. Simple possession is a misdemeanor or violation. *See, e.g.*, ORS 475.854 (Possession

[11] Exceptions include delivery of hydrocodone, a class C felony (ORS 475.810); delivery of a Schedule III controlled substance, a class C felony (ORS 475.752(1)(c)); delivery of a Schedule IV controlled substance, a class B misdemeanor (ORS 475.752(1)(d)); and delivery of a Schedule V controlled substance, a class C misdemeanor (ORS 475.752(1)(e)).

of one gram or more of heroin is a Class A misdemeanor; possession of less than one gram of heroin is a Class E violation.).

Because delivery is a more serious offense than attempted delivery or possession, people with *Boyd* delivery convictions face longer sentences and are more likely to face incarceration than under *Hubbell*. Under Oregon's Felony Sentencing Guidelines, implemented in 1989, sentencing is typically prescribed by a person's criminal history and crime-seriousness raking of the offense. Depending on the circumstances, *Boyd* delivery offenses may be given a crime seriousness ranking of 4, 6, 8, 9, or 10.[12] Since 1990, the most common crime

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[12] Level 10 delivery offenses involve the following drug quantities:

- 500 or more grams of cocaine;
- 500 or more grams of methamphetamine;
- 100 or more grams of heroin;
- 100 or more grams of fentanyl;
- 100 or more grams or 500 or more pills of ecstasy.
  ORS 475.930(1)(a)(A); ORS 475.925(1).

Level 9 delivery offenses include the delivery of cocaine, methamphetamine, heroin, or ecstasy to minors, and delivery of the following drug quantities:

- 100 or more grams of cocaine;
- 100 or more grams of methamphetamine;
- 50 or more grams of heroin;
- 50 or more grams of fentanyl;

seriousness ranking for delivery convictions has been 8 (n=18,995), followed by 6 (n=14,336), followed by 4 (n=13,305). App 1 at 2-3.[13] A person charged with a *Boyd* delivery with a crime seriousness ranking of 8, for example, faces a

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- 50 or more grams or 250 or more pills of ecstasy.

ORS 475.930(1)(a)(B); ORS 475.907(1); ORS 475.925(2).

Level 8 delivery offenses include the delivery of controlled substances other than cocaine, methamphetamine, heroin, or ecstasy to minors, delivery within 1,000 feet of a school, 'commercial drug offenses,' and delivery of the following drug quantities:

- 10 or more grams of cocaine;
- 10 or more grams of methamphetamine;
- 5 or more grams of heroin;
- 5 or more grams of fentanyl;
- 5 or more grams or 25 or more pills of ecstasy;
- 200 or more units of LSD;
- 60 or more grams psilocybin or psilocin.

ORS 475.900(1).

Level 6 delivery offenses involve the delivery of heroin, cocaine, methamphetamine, or ecstasy for consideration. ORS 475.900(2).

Level 4 delivery offenses include all those delivery offenses not encompassed by the above. ORS 475.900(3).

[13] Delivery offenses with crime seriousness levels of 9 or 10 appear to have been less common over the past three decades. Level 9 and 10 delivery offenses were not created until 2009. ORS 475.930.

maximum of 90 months in prison.[14] That same person charged with attempted delivery after *Hubbell* would face a maximum of 60 months in prison.[15]

Delivery convictions also impact future felony sentences more seriously than those for attempted delivery or possession. For example, a person with one prior delivery offense faces a presumptive 21-22 months in prison for a crime ranked '8' under the Oregon Felony Sentencing Guidelines. OAR 213-004-0001 App 1. A person with a prior violation for possession but no prior

[14] Under the Oregon Felony Sentencing Guidelines, a person with an 'A' criminal history charged with a level 8 offense faces a presumptive sentence of 41-45 months in prison. OAR 213-004-0001 App 1. This sentence may be doubled based on enhancement factor findings. OAR 213-008-0003.

[15] An attempted offense has a crime seriousness ranking two levels below the crime seriousness ranking of the completed offense, so an attempted level 8 delivery has a crime seriousness ranking of 6. OAR 213-004-0005(1). A person with an 'A' criminal history charged with a level 6 offense faces a presumptive sentence of 25-30 months in prison. OAR 213-004-0001 App 1. With enhancement factor findings, such a person may be sentenced to up to 60 months in prison. *Id.*; OAR 213-008-0003. Longer sentences have devasting consequences on those serving them. A longer prison sentence means more time away from family and friends, a more significant disruption to education and employment, and a more protracted period of limited healthcare and treatment options for substance use disorders. Longer prison sentences do not reduce recidivism. Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms*, Public Safety Performance Project (Jan 6, 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

convictions faces a presumptive 16-18 months in prison for the same offense. *Id.*

There are also significant financial costs associated with a *Boyd* charge and conviction, including (1) costs related to time in prison and on parole or post-prison supervision, (2) sentencing fines and court fees, and (3) bail fees and civil forfeiture.

The financial impacts of jail or prison are significant. Pre-trial detention—where bail is unaffordable—can, for example, result in lost jobs, housing, and financial instability. If incarcerated after a conviction, people are "liable for the full cost of care." OAR 291-203-0010 to 291-203-0060 (ability to pay will be assessed in the determination and modification of charges). Unless waived by a sentencing court or community corrections manager, anyone sentenced to probation or placed on parole or post-prison supervision must pay a monthly fee for the costs of supervision. ORS 423.570. Courts may also order probation conditions that incur significant costs, ORS 161.675(1), such as testing for controlled substances, substance abuse evaluations, mental health evaluations, risk and needs assessments. *See* ORS 137.540 (outlining potential probation conditions).

Boyd deliveries also generally carry more serious fines. *See* ORS 161.625 (maximum fines for Class A, B, and C felonies); ORS 161.635 (maximum fines for misdemeanors).[16] Longer sentences and greater financial penalties as a result of *Boyd* mean that tens of thousands of affected people have overserved sentences and overpaid financial penalties.

ii) *Boyd* convictions lead to far more severe and far-reaching collateral consequences than convictions for possession or attempted delivery, even when the underlying facts and evidence are the same.

In addition to more severe direct consequences, *Boyd* convictions also include harsher collateral consequences than convictions for possession or attempted delivery. These consequences have profound and innumerable effects

[16] If a person is unable to pay a fine, fee, or cost in the timeframe ordered by the court, they may be found in contempt for default and subject to wage garnishment and sanctions. ORS 161.685. Oregon courts also charge a fee for collecting any monetary judgment. ORS 1.202. The court debt may be sent to a collection agency, *e.g.*, *Payment Information for Multnomah County Circuit Court: Collections*, Oregon State Courts, https://www.courts.oregon.gov/courts/multnomah/payments/Pages/collections.aspx, resulting in high interest rates. *Or Revenue Bulletin 2020-01*, Or Dept of Revenue, https://www.oregon.gov/dor/forms/FormsPubs/orb202001800-012.pdf (outlining the 4-8% annual interest rates charged for payment "deficiencies and delinquencies"). Sanctions for nonpayment of fines include additional fines of up to $500 per day of nonpayment, additional probation, and up to six months of imprisonment. ORS 161.685 (effect of nonpayment of fines, restitution or costs); ORS 33.105 (sanctions). Failure to pay costs and fines required by probation could result in a probation violation, leading to more fines. *See* ORS 137.540 (12)(a).

on a person's ability to successfully reenter society after completing their sentence. People with felony drug convictions not only face barriers to housing, employment, public benefits, and expunging their records, but also, if they are not citizens, they lose their ability to remain in the United States regardless of their deep ties to this country. Most of these consequences flow only from felony convictions, not misdemeanors or violations; many flow only from delivery convictions, not attempted delivery or possession convictions.

As the Court of Appeals acknowledged, the immigration consequences of a *Boyd* delivery conviction are significant. *Hubbell*, 314 Or App at 866 ("Whereas a conviction for any drug offense can make a person deportable, an 'aggravated felony' is an absolute bar to relief like asylum and results in cancellation for lawful permanent residents. Over the years, the United States government has contended at times that a conviction on a *Boyd* theory is an aggravated felony.").

While Oregon has made efforts toward destigmatizing drug use and prior felony convictions in hiring, employers are still permitted to consider an applicant's criminal convictions before making final hiring decisions. *Hiring Discrimination and "Ban the Box,"* Or Bureau of Labor and Industries, https://www.oregon.gov/boli/workers/Pages/hiring-discrimination.aspx.

Additionally, many state occupational or professional licenses can be revoked or denied based on a delivery conviction. ORS 670.280(2) gives licensing boards, commissions, and agencies the authority to consider a conviction and its relation to the fitness and ability of an applicant or licensee. Thus, employment in medicine, education, commercial driving, residential facilities, marijuana processing, pharmacies, restaurants, outfitters and guides, and farming may be inaccessible with a *Boyd* delivery conviction.

With limited opportunities for meaningful employment, people with *Boyd* convictions are often forced to find lower paying jobs and denied opportunities for advancement. For people sent to prison, annual earnings are reduced by an average of 52%. Terry-Ann Craigie et al, Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality* (2020), https://www.brennan center.org/our-work/ research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal. For people with felony convictions who are not sent to prison, annual earnings are reduced by an average of 22%. *Id.* These "reduced earnings compound over the course of a lifetime. On average, formerly imprisoned people earn nearly half a million dollars less over their careers than they might have otherwise. These losses are borne

disproportionately by people already living in poverty[.]" *Id.* While these disparities are alarming, the difference is especially compelling here, where the same facts and evidence could result in a presumptive sentence of 16-18 months in prison for someone with no prior criminal history convicted of delivery within 1,000 feet of a school, probation for that same person convicted of attempted delivery within 1,000 feet of a school, or simply a civil fine for possession. *Hubbell*, 314 Or App at 865-66.

While housing options are greatly reduced for people with criminal records, options are even more limited for people with delivery convictions. The reduction in options impacts peoples' abilities to find stable housing and escape cycles of houselessness and poverty. ORS 90.303(3) provides specific limitations as to what criteria a landlord may use to evaluate applicants. Screening applicants for drug-related crimes, however, is allowed. A common policy for large landlords in Portland, for example, is to deny an application from anyone with a delivery conviction. *E.g.*, *Grid Property Management's Screening Criteria*, Grid Property Management, LLC, https://www.gridpropertymanagement.com/screening-criteria. Without a *Boyd* delivery conviction, a person would have more opportunities to obtain and maintain stable housing.

Because of the financial penalties and disadvantages associated with a *Boyd* conviction, people with criminal records may have to rely on other government programs to survive poverty. But ORS 411.119 (2)(a) gives supervising authorities, such as probation officers, the ability to recommend that a person with a criminal conviction for manufacture or delivery be suspended from Supplemental Nutrition Assistance Program (SNAP). No such authority exists for attempted delivery or possession convictions.

Extending the collateral consequences of a delivery conviction to people who are also experiencing substance use disorders creates additional obstacles to finding success during and after release from custody. In a national study, researchers determined that "[s]ubstance use was very common among those who sold drugs with nearly all of these participants (87.5%) reporting some illicit substance use in the past-year and a substantial percentage of this group meeting criteria for a substance-use disorder (43.1%)." E.T. Stanforth et al, *Correlates of Engaging in Drug Distribution in a National Sample*, 30(1) Psychol Addictive Behavs 138, 138 (2016). A study of narratives "revealed the nuanced impact of collateral consequences that affect individuals who have both a criminal record and an addiction to drugs and/or alcohol. These consequences impacted not only their ability to reintegrate successfully into the

community after prison, but also limited their recovery efforts." S. Streisel & R. Bachman, *An Extension of Collateral Consequences: Impact on the Recovery Process*, 59:1 J Offender Rehab 1, 1 (2020). In Oregon, it was common practice for district attorneys' offices to restrict access to recovery services in prison (alternative incarceration programs, or AIPs) if a person was convicted of delivery. While plea agreements conditioned on the waiver of eligibility for AIPs are no longer permissible as of January 1, 2022, ORS 135.418(1), some offices continue to argue against AIP eligibility at sentencing.[17] Many specialty court programs designed to promote recovery are inaccessible to those convicted of delivery, rather than possession.[18]

[17] For example, the policy manual for the Washington County District Attorney's Office notes that while current law does not permit plea agreements to be conditioned upon the waiver of eligibility for AIPs, deputy district attorneys may still "[r]ecommend that a judge impose a sentence with no time reduction programs after a trial or in any 'open sentence' situation." *Washington County District Attorney's Office Policy Manual* 28 (2022).

[18] For example, to be eligible for drug court in Clackamas County, a defendant must be charged with possession or attempted possession. *Clackamas County District Attorney (CCDA) Policy Manual* 37. In Washington County, a defendant is presumptively ineligible for specified 'Justice Reinvestment' programs if they have a pending delivery or attempted delivery charge. WCDA Manual, *supra*, 78-81.

Unequal access to expungement exacerbates the consequences of a delivery conviction compared to attempted delivery or possession convictions. Record expungement has the potential to change the trajectory of a person's life. "Preliminary research from the University of Michigan finds that a year after a record is cleared, people are 11 percent more likely to be employed and are earning 22 percent higher wages." *Communications Toolkit*, Clean Slate, https://www.cleanslateinitiative.org/resources/toolkit. In 2021, the legislature expanded Oregon's expungement statute to allow more people to set aside their convictions and arrests. *See* ORS 137.225; SB 397 (2021). The amendments did not modify lifetime expungement ineligibility for Class A felonies, *see* SB 397 (2021), a class intended to represent the worst of the worst convictions. Many *Boyd* deliveries are Class A felonies. *See, e.g.*, ORS 475.882 (unlawful delivery of cocaine within 1,000 feet of school). Attempted deliveries are generally Class B or C felonies and therefore eligible for expungement. *See* ORS 137.225; SB 397 (2021). Misdemeanor possession convictions are also eligible for expungement. *See id.*

Finally, *Boyd* has likely had a significant impact on families and communities. In a comprehensive study on the impact of incarceration on caregivers, researchers observed "there is a complex array of consequences for

the families and children of incarcerated parents. * * * The range of problematic outcomes includes financial hardship, elevated levels of emotional stress, additional strains placed on interpersonal relationships, and the increased difficulty in monitoring and supervising children." J.J. Turanovic et al, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 Criminology 913, 913 (2012). The same study found that "parental incarceration had a negative effect on the lives of 58% of caregivers, a finding consistent with prior research on the collateral consequences of imprisonment." *Id.* A National Institute of Justice study also revealed that the risk of child criminal involvement, antisocial behavior, educational attainment, and economic well-being are all negatively impacted by a parent's incarceration. E. Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, Nat'l Inst Just J (Mar 1, 2017), https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children. The data also revealed that due to higher incarceration rates, Black and Hispanic children are more at risk. *Id.* ("Data from 2007 * * * show that African-American children and Hispanic children were 7.5 times more likely and 2.3 times more likely, respectively, than white children to have an incarcerated parent.").

Over the past three decades, *Boyd* has resulted in more than 24,000 convictions for the completed crime of delivery when the state had, at best, sufficient evidence to prove only possession or attempted delivery. As with many aspects of our criminal legal system, Black and Hispanic people were disproportionately affected. As a result of *Boyd*, more than 24,000 Oregonians were convicted of more serious crimes than they should have been, served jail and prison sentences and probationary terms that were longer than they should have been, and paid more fines, fees, and costs than they should have paid. They have also suffered years of collateral consequences—including the denial of work, housing, and access to basic services—that they never should have experienced. The compounding negative effects are clear when considered in light of the abundant research that collateral consequences such as these cause greater harm to formerly incarcerated people by negatively affecting their earning potential and overall stability, thereby jeopardizing their ability to successfully reenter society.

The full scope of the negative effects of the *Boyd* decision—which the Court of Appeals has acknowledged was inexplicably but undeniably erroneous—are truly incomprehensible and are borne not only by the convicted person, but also their loved ones and their communities. Indeed, all Oregonians

suffer when one considers both the moral stain of these convictions and their financial harm—whether due to unnecessary spending on the carceral system or through lost taxes and other meaningful contributions to society. The legislature surely would not have intended for the same consequences to apply to the more than 24,000 people who were less culpable.

II. *Boyd* is an artifact of the failed War on Drugs.

There is no doubt that the judicial error of *Boyd* has damaged the lives of tens of thousands of people and their communities. Indeed, in reversing *Boyd*, the Court of Appeals described the decision as

> "an outlier that was decided without textual and contextual examination, appears to run counter to the intent of the legislature in adopting the criminal code and providing for a hierarchy of completed versus attempted crimes, and has sweeping consequences for Oregonians who have been charged with and convicted of the completed crime of delivery on a *Boyd* theory."

Hubbell, 314 Or App at 847. Such a rare rebuke of a court's own precedent begs the question: How did we get here? The answer lies in the historical context in which *Boyd* was decided.

Boyd was argued and decided in 1988 during the height of the nation's so-called "War on Drugs" —nineteen years after President Nixon's call for a

national anti-drug policy,[19] eighteen years after the passage of the Uniform Controlled Substances Act (which dramatically increased the criminal penalties for the use and/or sale of narcotics),[20] seventeen years after Nixon declared a "war on drugs,"[21] eleven years after the passage of Oregon's Controlled Substances Act (based on the UCSA),[22] six years after President Reagan

[19] President Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969), https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs.

[20] Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC §§ 801-971 (1970).

[21] President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), https://www.presidency.ucsb.edu/documents/special-message-the-congress-drug-abuse-prevention-and-control.

[22] Controlled Substances Act, ORS 475.005 - 475.980.

declared his war on drugs,[23] two years after Anti-Drug Abuse Act was passed,[24] the same year Reagan created the Office of National Drug Control Policy,[25] one year before President George H.W. Bush appointed the first "drug czar,"[26] and seven years before the U.S. Sentencing Commission released a report that

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[23] Andrew Glass, *Reagan declares 'War on Drugs,' October 14, 1982*, Politico (Oct 14 2010), https://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552; *see also* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 5 (2010); Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* 433 (2016) ("It was an astonishing move. Drug crime was declining. Only 2 percent of Americans viewed drugs as the nation's most pressing problem. Few considered marijuana to be a particularly dangerous drug . . . Substance-abuse therapists were shocked by Reagan's unfounded claim that America could 'put drug abuse on the run though stronger law enforcement.'").

[24] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), https://www.ojp.gov/pdffiles1/Digitization/149068NCJRS.pdf; Kendi, *supra*, at 435 ("By signing the bill, [President Reagan] put the presidential seal on the 'Just say no' campaign and on the 'tough laws' that would now supposedly deter drug abuse. […] The bipartisan act led to the mass incarceration of Americans).

[25] Glass, *supra*.

[26] Howard Kohn, *Cowboy in the Capital: Drug Czar Bill Bennett*, Rolling Stone (Nov 2 1989), https://www.rollingstone.com/politics/politics-news/cowboy-in-the-capital-drug-czar-bill-bennett-45472/

acknowledged the racial disparities in prison sentencing for cocaine versus crack[27] and unsuccessfully suggested a reduction to address the discrepancy.[28]

History has not been kind to the War on Drugs. In addition to its abject failure as a law enforcement and public policy strategy—evidenced by increasing drug overdose deaths despite the vast incarceration of drug users and sellers[29]—it is now generally accepted that the War on Drugs was never borne out of a genuine concern over the use or sale of illegal drugs. Rather, it was a racially-motivated political tool designed to maintain political power. Nixon's Assistant for Domestic Affairs, John Ehrlichman candidly explained the rationale for the War on Drugs:

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[27] U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (1995), https://www.ussc.gov/research/ congressional -reports/1995-report-congress-cocaine-and-federal-sentencing-policy.

[28] *Timeline: America's War on Drugs*, National Public Radio (Apr 2, 2007), https://www.npr.org/ templates/story/story.php?storyId=9252490. For the first time in history, Congress overrode the Sentencing Commission's recommendations in order to maintain these disparities. It was not until 2010 (15 years after the U.S. Sentencing Commission's recommendation) that Congress finally acted to reduce the disparity between the amount of crack cocaine and powder cocaine for federal sentencing. *Id.*

[29] *Drug Overdose Deaths in the U.S. Top 100,000 Annually*, Centers for Disease Control & Prevention (Nov 17, 2021), https://www.cdc.gov/nchs /pressroom/nchs_press_releases/2021/20211117.htm.

> "You want to know what this [war on drugs] was really all about? . . . The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."[30]

Dan Baum, *Legalize it All*, Harper's Magazine (Apr 2016), https://harpers.org/ archive/ 2016/04/legalize-it-all/.

As Professor Michelle Alexander explained in her 2013 University of Chicago George E. Kent lecture, "[n]umerous historians and political scientists have now documented that the war on drugs was part of a grand Republican Party strategy known as the Southern Strategy of using racially-coded, get-tough appeals on issues of crime and welfare to appeal to poor and working-class whites, particularly in the South, who were anxious about, resentful of,

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[30] This sentiment was also expressed by H.R. Haldeman, President Nixon's chief of staff. Halderman wrote in his diary that President Nixon "emphasized that you have to face the fact that the whole problem is really the Blacks. The key is to devise a system that recognizes this while not appearing to." H.R. Halderman, *H. R. Haldeman Diaries Collection, January 18, 1969 – April 30, 1973*, National Archives, https://www.nixonlibrary.gov/sites /default/files/virtual library/documents/haldeman-diaries/37-hrhd-journal-vol02-19690428.pdf

fearful of many of the gain of African Americans in the Civil Rights movement." Michelle Alexander, *The New Jim Crow*, The 30th Annual George E. Kent Lecture at the University of Chicago (Feb 21, 2013), available at https://www.youtube.com/watch?v=Gln1JwDUI64 ("The New Jim Crow Lecture"). Historians, political scientists, and legal scholars like Professor Alexander have stated that this political strategy infiltrated and infected the entire criminal legal system with a racially-coded, tough on drug crime narrative that manifested in the laws passed, the crimes prosecuted, the defendants convicted and sent away for decades, and the decisions rendered by courts. *Id.*

As a result, the War on Drugs' impact has far exceeded the realm of politics. "Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States." Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 5 (2010) ("The New Jim Crow"). Within 30 years, the prison population expanded from 300,000 to more than 2 million people. Alexander, *supra*, The New Jim Crow

Lecture.[31] Drug convictions accounted for two-thirds of the federal prison population increase and more than half of the state prison population increase. *Id.*

These felony convictions have been responsible for generations of people—disproportionately Black and male—becoming disenfranchised and experiencing a panoply of "invisible punishments"—collateral consequences that are so all-encompassing that they have been described as "a variant on the tradition of 'civil death' in which the offender is defined as unworthy of the

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[31] "Within a 30-year period of time we went from a prison population of roughly 300,000 to now we're now, have an incarcerated population of well over 2 million. . . . Most criminologists and sociologists today will acknowledge that crime rates and incarceration rates in the United States have moved independently of one another. Incarceration rates, especially Black incarceration rates have soared regardless of whether crime is going up or down in any given community or the nation as a whole. So, what explains the sudden explosion in incarceration rates, the birth of a prison system unprecedented in world history if not simply crime and crime rates? Well, the answer is the War on Drugs and the get-tough movement. That wave of punitiveness that washed over the United States. Drug convictions alone, just drug convictions alone, accounted for about 2/3rds of the increase in the federal prison system and more than half of the increase in the state prison system between 1985 and 2000. The period of our prison system's most dramatic expansion. Drug convictions have increased more than a 1000 percent since the drug war began. I mean to get a sense of how large a contribution the drug war has made to mass incarceration consider this, there are more people in prisons and jails today just for drug offenses than were incarcerated for all reasons in 1980." Alexander, *supra*, The New Jim Crow Lecture.

benefits of society, and is excluded from the social compact." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion* 25 (Marc Mauer & Meda Chesney-Lind eds, 2002), https://www.urban.org/sites/default/files /publication/59901/1000557-Invisible-Punishment-An-Instrument-of-Social-Exclusion.PDF. As Professor Alexander observed, once a person is convicted of a felony drug offense, they "have scarcely more rights, and arguably less respect, than a freed slave or a black person living 'free' in Mississippi at the height of Jim Crow . . . A criminal record today authorizes precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service." Alexander, *supra*, The New Jim Crow, at 141.

The Court of Appeals decided *Boyd* against that backdrop. As *amici* set forth below, *Boyd* has contributed to the failed War on Drugs from its inception. Jocelyn Boyd, the defendant, is a Black woman whose house was searched pursuant to a warrant. According to a stipulated narrative, Ms. Boyd admitted that there were 13 or 14 baggies of heroin on her kitchen counter, which she planned to sell in the future. Brief of Appellant at 3-4, *State v. Boyd*, 92 Or App 51 (1988) (CA A44606) ("Boyd Appellate Brief"). "No evidence of a specific sale was presented or relied upon by the state." *Id.* at 4. In arguing against a

decision that would upend fundamental understandings of criminal law, Ms. Boyd's attorney presciently identified the risk of a bad decision resulting from the "present political hysteria" caused by the War on Drugs:

> **"Mere preparation has not been held sufficient by this court to establish an attempt in any other area of criminal law and should not be done in the area of drugs merely because of *present political hysteria*."**

Id. at 6 (emphasis added). Still, the court determined Ms. Boyd's possession of heroin with intent to sell at some unspecified future date to some unspecified future buyer constituted a completed delivery, creating the Oregon anomaly.

As *amici*'s review of data makes clear (*see supra* at I), *Boyd* has been a major contributor to the harms of Oregon's War on Drugs. *Boyd* delivery convictions have disproportionately affected Black and Hispanic people. Black and Hispanic people convicted of all types of delivery have been sentenced more harshly than similarly situated white people. *Boyd* delivery convictions have increased while other delivery-based prosecutions have decreased. Thousands of people and their family members have suffered long term and far-reaching consequences from these convictions.

This case comes before this court at a dramatically different moment in time. The work of historians, political scientists, lawyers, scholars, activists,

and those directly harmed has revealed the detrimental effects of the War on Drugs and its failure to meet even its purported goals. Oregonians from every corner of the state, every racial and ethnic group, and all walks of life have been negatively affected: "[a]lthough the war on drugs was clearly born with Black folks in mind, it is a war that has destroyed the lives of people in communities of all colors." Alexander, *supra*, The New Jim Crow Lecture. And, perhaps most importantly, in the 33 years since *Boyd* was decided, Oregonians' views about drugs and how the state should treat people who use and/or sell drugs have changed dramatically. This sentiment is reflected in Oregon's Drug Addiction Treatment and Recovery Act (Measure 110), which in 2020 "adopt[ed] a health approach to drug addiction by removing criminal penalties for low-level drug possession." *Drug Addiction Treatment and Recovery Act (Measure 110)*, Oregon Health Authority, Behavioral Health Services, https://www.oregon.gov/oha/hsd/amh/pages/measure110.aspx.

It is undeniable that *Boyd* is an artifact of the War on Drugs and has harmed tens of thousands of Oregonians at a racially disproportionate rate. This case presents an opportunity for the Court to correct the *Boyd* court's mistake and to provide a needed remedy for those wrongfully convicted under *Boyd*'s flawed holding.

III. This court should fashion a remedy that will repair *Boyd's* damage.

In *Hubbell*, the Court of Appeals declared that "*Boyd* was our mistake, and it is one that we can and should fix." 314 Or App at 867. *Hubbell* fixes the law; this court should also remedy the harm. *See Marbury v. Madison*, 5 US 137, 147, 2 LEd 60 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress").[32] From enhanced sentences and criminal history scores to lost wages and parental rights, *Boyd* has negatively impacted the lives of the tens of thousands of people who were wrongfully convicted in ways too numerous to fully document. While crafting a remedy that could begin to repair communities may seem novel, the "fear of too much justice" should not deter this court from creating a thoughtful pathway to relief. *See McCleskey v. Kemp*, 481 US 279, 339, 107 S Ct 1756, 1791, 95 LEd 2d 262 (1987) (Brennan, J., dissenting).

Without deliberate action from this court, most of the more than 24,000 *Boyd* convictions since 1990 will likely be ineligible for relief except through

[32] *See also State v. Kuznetsov*, 345 Or 479, 487, 199 P3d 311, 315–16 (2008) ("[A]bsent some legislative or constitutional impediment, courts possess inherent authority to issue those rulings necessary to decide the issues before them.").

executive clemency or a joint motion for resentencing under SB 819.[33] Relief from a judicial error, however, should not be left to the discretionary and political decision-making of the governor and the elected district attorneys who sought convictions in the first place.[34]

A holistic, group remedy—addressing both direct and collateral consequences—provides the court with an opportunity to address the harms stemming from this judicial error, bolster the court's legitimacy, create accountability, and deter future injustices. Such a comprehensive remedy could involve mass case dismissals, consolidating a class of cases, or appointing a

[33] Ordinarily, people with *Boyd* convictions in direct appellate proceedings would have those convictions reversed and dealt with in the trial court to determine the proper conviction and sentence. People with *Boyd* convictions in post-conviction and federal habeas proceedings would need to overcome various procedural and substantive barriers to receive a new trial. People with *Boyd* convictions who have exhausted all avenues of relief or who have missed statutes of limitation to do so, may seek relief via executive clemency or a joint motion for resentencing with their district attorney.

[34] SB 819 has significant limits; not only must a district attorney agree to a resentencing, most district attorneys require extensive applications and documentation that may be onerous for individuals. Oregon Justice Resource Center, *Senate Bill 819: Policies by County* (May 20, 2022), https://ojrc.info/s/Senate-Bill-819-Website-PDF-Updated-52022.pdf

special master. While this court has never fashioned a remedy for a group harmed by a wrongful conviction, there is out-of-state precedent for doing so.

Judges, prosecutors, and defense attorneys across the country have begun to recognize that systemic injustices require systemic solutions. As Professor Bryan Stevenson has observed, civil legal practice is centered around the determination of remedies: "when it comes to wealth, when it comes to property, when it comes to contracts, when it comes to commerce, when it comes to business, when it comes to international relations, if a right is violated, we are interested in how to remedy the violation of that right." *Vox Conversations: Bryan Stevenson on the Legacy of Enslavement*, Vox Media (October 2021). Such a practice should also be applied to the criminal legal system, particularly where systemic issues, such as those affecting civil rights, have created harm en masse. Given the judicial source of the error in this case, *Hubbell*, 314 Or App at 848, 867, a holistic group remedy is vital to repairing *Boyd*'s destruction.

A. Courts across the country have successfully used group remedies to correct systemic injustices.

Courts across the country have imposed group remedies to address systemic injustices in the criminal legal system that have affected large groups

of people. These remedies include mass case dismissals, case consolidation for resolution of common issues, use of special masters, declaratory or injunctive orders, and special rules of evidence. As with aggregation in civil matters, group remedies in criminal cases may provide efficiencies that would benefit both the people to whom a remedy is owed and the impacted systems. These sorts of remedies may be particularly beneficial in Oregon where avenues of post-conviction and federal habeas relief are narrow and defense and prosecution offices are deeply financially strained.

Mass case dismissals offer the most efficient and equitable relief. In Massachusetts, for example, the Supreme Judicial Court faced years of litigation stemming from the misconduct of two different lab analysts. *See, e.g.*, *Bridgeman v. District Att'y Suffolk District*, 476 Mass 298, 301-13, 67 NE3d 673, 677-85 (Mass 2017) (describing course of litigation) ("*Bridgeman II*"). While the litigation began with individual post-conviction motions that were heard in specialty courts, the court ultimately imposed a group remedy, dismissing with prejudice all cases where (1) the lab analyst at issue signed the certificate of analysis, (2) the conviction was based on methamphetamine and the drugs were tested during the lab analyst's tenure, or (3) the drugs were tested between 2009 and 2013. *Id.* at 304; *Committee for Pub Couns Servs v.*

Attorney Gen, 480 Mass 700, 729, 108 NE3d 966, 989 (Mass 2018). While this outcome is exemplary, it does not address the additional consequences stemming from the conviction.[35]

While less comprehensive and efficient, courts have also consolidated classes of cases to resolve issues common to the group. In Connecticut, for example, a court facing proportionality challenges to racial disparities in capital sentencing ordered the consolidation of these claims. Brandon L. Garrett, *Aggregation in Criminal Law*, 95 Calif L Rev 383, 419 (2007) (quoting *State v. Reynolds*, 836 A2d 224, 376-86 (Conn 2003)); *see also id.* at 420-21 (describing the New Jersey Supreme Court's decision to consolidate capital cases raising race discrimination claims, appoint a special master, and "convene[] an ongoing project to refine capital sentencing and improve proportionality[.]").

Courts have also relied on special masters to distill large amounts of information, facilitate negotiations, develop investigations, and understand scientific principles for application across cases. In Oaklyn, New Jersey, for

[35] The initial cost of waiting for litigants to initiate a cause of action and the litigation process itself also resulted in a significant drain on judicial, prosecutorial, and defense resources.

example, at least 150 convictions were dismissed based on police misconduct. *Dickerson v. Kane*, Civ. A. No. 92–2528, 1995 WL 428647, *1 (DNJ 1995). A special master reviewed individual cases to determine whether convictions should be reversed. *Id.* In Texas, a special master was appointed to review whether problems within the serology section of the lab compromised convictions in nearly 200 sexual assault and homicide cases from the 1980s. Brief of Applicant at 31, *Ex Parte Coty*, 418 SW3d 597 (2014) (No. WR–79, 318–02) (available at http://harriscountypublic defender. org/Coty_Brief.pdf) ("Coty Applicant Brief"). Ultimately, "the district courts appointed a team of attorneys to review the records from old convictions to determine whether, in each case, DNA testing was necessary to ensure the validity of the conviction. *Id.* Similarly, in West Virginia, the court assigned a special master to investigate misconduct at the serology division of the state police crime laboratory. *Matter of Investigation of West Virginia St Police Crime Laboratory*, 190 WVa 321, 323 438 SE2d 501, 503 (2014) ("*West Virginia*").

Courts can also create rules and presumptions. In West Virginia, the court determined that all evidence related to the misconduct of a single state trooper who tampered with evidence would be "deemed invalid, unreliable, and inadmissible in determining whether to award a new trial in any subsequent

habeas corpus proceeding." *Id.* at 526. Thus, the only issue to litigate in individual habeas cases would be whether the remaining evidence "would have been sufficient to support the verdict." *Id.* Following the 2012 Texas lab scandal, the Texas Court of Appeals created a presumption that a due process clause violation occurred in all cases where a defendant could show that, at some point, the analyst at issue had sole custody of the evidence. *E.g.*, *Ex Parte Owens*, 515 SW3d 891, 896 (2017) (describing the court's "common findings" of a "presumptive due-process violation in each case in which Salvador was the laboratory technician," as well as the court's later decision to re-evaluate that presumption); s*ee also* Garrett, supra, at 417 (Louisiana Supreme Court used "its inherent power to fashion remedies to administer justice" by relying on "a 'rebuttable presumption' that indigent criminal defendants represented by the OIDP lacked effective assistance of counsel."). In Massachusetts, the court concluded that the defendants at issue could not be charged with a more serious offense or receive a more serious sentence following vacatur; suspended the rule against lawyers as witnesses so that attorneys could testify at evidentiary hearings; and limited the purposes for which a defendant's testimony could later be used. *Bridgeman v. District Att'y Suffolk District*, 471 Mass 465, 494, 30 NE3d 806, 830 (Mass 2015).

As a general matter, courts have also fashioned remedies through injunctions. In West Virginia, the court directed the clerk of court to distribute a targeted habeas corpus form to incarcerated people and to publish and distribute the complete investigation file to all correctional facilities. *West Virginia*, 190 WVa at 327. In Massachusetts, the court created a detailed protocol that included directions for district attorneys to conduct individual reviews. *Bridgeman II*, 476 Mass at 327-32.

Courts have called upon other branches of government to be active partners in remedying the harms caused by systemic failures of the criminal legal system. In Louisiana, for example, the legislature created a state-funded Louisiana Indigent Defense Assistance Board, allocating millions of dollars in additional funding, after a court reviewing claims of widespread ineffective assistance of counsel recommended legislative action. Garrett, *supra*, at 417; *see also* App 3 (*Blake* Letter).

B. Traditional, individualized remedies are often ineffective, inefficient, entrench existing inequities, and should be avoided.

Traditional judicial remedies to systemic injustices in the criminal legal system are individualized and depend on access to relief. They face significant drawbacks, however, including severe resource constraints on institutional

players such as defense attorneys and court staff; inefficient and piecemeal litigation of the same issues in different cases; inconsistent and inequitable outcomes; and a systemic failure to recognize and track system-wide errors.

While some prosecutors' offices have responded to reports of systemic error or misconduct by initiating individualized reviews of qualifying cases, these reviews face similar disadvantages. Prosecutors' offices generally have more resources and political power than public defense offices—as well as superior access to relevant case materials—but they still struggle with finite resources, competing priorities, conflicting incentives, and few mechanisms to ensure accountability and transparency. The discretion involved in these reviews can also exacerbate pre-existing disparities. Different prosecutors' offices may apply different standards, review different classes of cases, or refuse reviews all together. Following the 2012 Houston Crime Lab and the Texas Forensic Science Commission's finding that a former employee may have fabricated the results of thousands of drug tests, for example, different Texas counties took different approaches to remedy the resulting harm. The Harris County District Attorney refused to review cases until an individual filed a post-conviction writ, while the Galveston County District Attorney proactively concluded that the misconduct "so tainted prosecutions in that

county that all convictions relying upon his work should be vacated through agreed findings on post-conviction writs." Coty Applicant Brief at 32.

Even in cases where all parties agree that a remedy is warranted, many hurdles can prevent efficient resolution for all who deserve it. Notification alone can be surprisingly complex. OJRC's own post-conviction reviews have revealed common economic hurdles that impact communication, such as the ability to maintain the same phone number and a stable residence over time. Beyond accurate contact information, communication must be thoughtful, strategic, and involve the input of organizations that work with indigent populations. *See, e.g.*, *Bridgeman II*, 476 Mass at 319-21 (discussing deficiencies in prosecutors' attempts to notify impacted individuals, and the extremely low response rate). Where systems require defendants file habeas petitions or motions to initiate remedy, defendants without attorneys may struggle to satisfy filing requirements or lack resources to pay filing or other fees. In Oregon, for example, post-conviction petitions require a $281 filing fee that can be deferred but not waived. ORS 138.560(1); ORS 138.560(8)(a); ORS

21.135(1).[36] In addition, jurisdictions sometimes lack appropriate vehicles to reopen cases. In Baltimore, for example, the District Attorney's Office was initially unable to remedy misconduct by the Gun Trace Task Force in many cases due to limits on when a judge could vacate a conviction. *State's Attorney Mosby Will Ask Courts to Toss Nearly 800 Cases Tainted by Rogue Gun Trace Task Force Cops,* The Baltimore Sun, Sep 5, 2019, https://www.baltimoresun.com/news/crime/bs-md-ci-cr-gun-trace-task-force-cases-vacated-20190905-57fohmkwj5hkln45uhlpnmd5fu-story.html. While the legislature eventually voted to expand the scope of the available cause of action, *id.*, the harm perpetuated by these unjust convictions continued to affect the lives of people in limbo.

Importantly, individual solutions do not include global studies of the causes of the errors or misconduct, which means that an opportunity to understand systemic failures and consequences may be lost. Without a clear blueprint for handling cases, legal wrangling over standards and procedures leave individual defendants waiting for relief—languishing in prison or

[36] Petitioners who prevail on post-conviction recover the filing fee. ORS 138.560(1).

continuing to experience unnecessary adverse consequences of their convictions. A failure to investigate these errors also makes it impossible to advance policy change and prevent such injustices from continuing.

C. Failure to provide a group remedy will result in future litigation that will tax an already overwhelmed system.

Without a unified, group-based solution, unfairness and uncertainty will prevail. Washington's dis-unified response to the *State v. Blake* decision is instructive. *See* App 3. In *Blake*, the Washington Supreme Court held that the state's "simple drug possession law violated due process protections under the state and U.S. constitution, and was therefore unconstitutionally void." *Id.* at 1. While every person with a conviction for simple possession is theoretically eligible for relief, the decision is neither automatic nor self-executing. *Id.* Stakeholders have scrambled to figure out how to address the estimated 150,000 to 250,000 convictions at issue. *Id.* Public defenders immediately began reviewing cases to identify incarcerated people eligible for a reduced sentence. *Id.* at 2-3. Workgroups were created to focus on resentencing, legal financial obligation refunds, and legislative efforts. *Id.* at 3. The Washington State Legislature appropriated millions of dollars to address individual *Blake*

representation, county costs, and legal financial obligation repayments. *Id.* at 3-4.

Despite efforts to streamline relief and achieve some measure of state-wide consistency, these attempts have remained largely unsuccessful. Significantly, Washington's disunified system and county-by county-reviews have resulted in unequal justice by geography:

- "In some counties, prosecutors will re-file dismissed charges that were plead down when an incarcerated person moves for resentencing relief, chilling individuals from seeking relief. In other counties, prosecutors do not make this threat.

- Some counties have greater defense attorney capacity than others, sometimes significantly so. The counties with better capacity are faster at reviewing the cases of incarcerated people for potential resentencing, and faster at bringing motions.

- In some counties, prosecutors are proactively vacating old convictions with the input of defense counsel as to the form of the order. In other counties, prosecutors are proactively vacating old convictions without the input of defense counsel as to the form of the order. The scope of relief varies widely amongst these counties—do the orders include discussion of an LFO refund? Do they explicitly restore voting right where appropriate? Do they require the Clerk to transmit notice of the vacate order to Washington State Patrol to ensure the individual's record is updated? In counties where defense was involved in developing a form order, relief tends to be more complete. Additionally, in still other counties, prosecutors do not take proactive steps at all toward vacating old convictions, and instead await petitioners to come forward.

- In some counties, prosecutors are willing to sign on to an agreed order to vacate inchoate possession offenses. In others, defense must bring a motion, with different judges making different decisions in different counties."

Id. at 5.

In pursuing a comprehensive remedy, our neighbors in Washington were not deterred by the scope of the harm or the weight of the solution. While they continue to work through mistakes and procedural obstacles, there is much to learn from their commitment to the people they have harmed. This court should follow Washington's lead—and learn from Washington's mistakes—to create a holistic, group remedy for the people wrongly convicted under *Boyd*.

CONCLUSION

Amici Curiae respectfully asks this court to affirm the decision of the Court of Appeals and fashion a holistic, group remedy that provides efficient and equitable relief to the tens of thousands of Oregonians wrongly convicted under *Boyd*.

Respectfully submitted,

/s/ Brittney Plesser_____
BRITTNEY PLESSER, OSB #154030

/s/ Claire Powers_____
CLAIRE POWERS, OSB #192788

Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

/s/ Karen Newirth
KAREN NEWIRTH, NY REG #4115903

/s/ Malori Maloney
MALORI MALONEY, OSB #175899

amicus@ojrc.info
Attorneys for *Amicus Curiae*
Oregon Justice Resource Center

/s/ Rosalind Lee
ROSALIND LEE, OSB #055566

Attorney for *Amicus Curiae*
Oregon Criminal Defense Lawyers Association

NOTICE OF FILING AND PROOF OF SERVICE

I certify that, on September 2, 2022, I electronically filed the foregoing Amended Brief of *Amici Curiae*, Oregon Justice Resource Center and Oregon Criminal Defense Lawyers Association, with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Anne F. Munsey, attorney for Respondent on Review, and Rolf Moan, attorney for Petitioner on Review, by using the appellate electronic filing system.

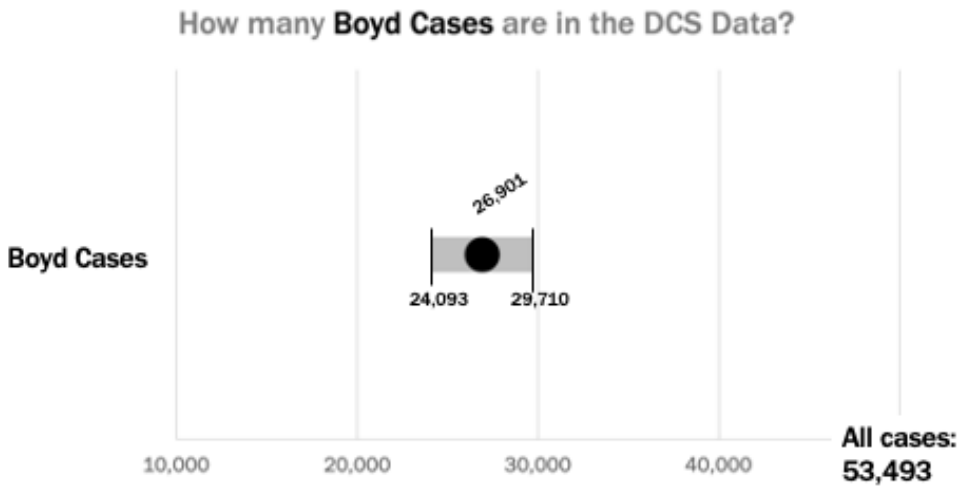
CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(1)(b) and (2) the word count of this brief, as described in ORAP 5.05(1)(a), is 11,600 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(1)(d). The appendix does not exceed 25 pages as required by ORAP 5.05(1)(e).

/s/ Claire Powers
CLAIRE POWERS, OSB #192788
Attorney for *Amicus Curiae*
Oregon Justice Resource Center

Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info



50.29% of cases in the sample are Boyd cases. With a sample size of 346, we are 95% confident that there are between 24,093 and 29,710 Boyd delivery cases from 1990-present in Oregon. It is also important to note that in the sample, 10.40% were determined to not be delivery cases and 3.47% were undetermined or did OJRC did not receive the complete information.

Race and Boyd

The case review sample was not large enough to make statistical conclusions about race and all DCS cases in Oregon. Still, comparing the representation of Black, Hispanic, and Native Americans in the Boyd sample data to statewide racial demographics, there appears to be disproportionate impacts that should be investigated further.

Note: Statewide racial demographics come from 2010 Census data. Because the full DCS dataset ranges from 1990-present, during which there are shifts in racial demographics, 2010 census data was chosen as a reasonable comparison point during the time period. Statewide demographics shifts over the period from 1990-2020 show increasing representation of non-White races.

	All DCS cases	Case Review Sample	Boyd cases	2010 Statewide Race
Asian	398 (0.75%)	6	4 (2.30%)	3.7%
Black	4,713 (8.82%)	35	12 (6.90%)	1.8%
Hispanic	13,925 (26.07%)	78	33 (18.97%)	11.7%
Native American	691 (1.29%)	14	8 (4.60%)	1.4%
White	33,670 (63.04%)	213	117 (67.24%)	83.6%

Note: We include the data on all racial categories present in the DOC data here, though Asian and Native American are too small for meaningful analysis.

Source: U.S. Census Bureau, 2010 Census, Summary File 1; Tabulated by Population Research Center, Portland State University. https://www.pdx.edu/population-research/sites/g/files/znldhr3261/files/2021-02/Oregon%20State%20and%20its%20Counties.pdf (accessed August 18, 2022).

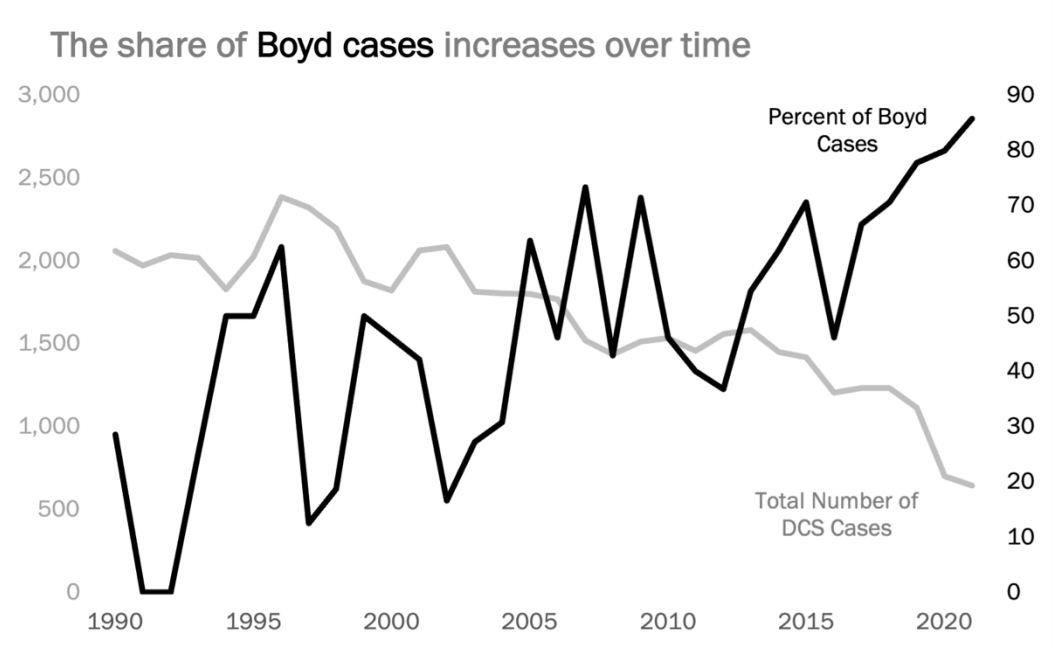
Grid Severity	Race						
	Asian	Black	Hispanic	Native American	Unknown	White	Total
1	10 0.24	323 7.68	1,351 32.13	61 1.45	0 0	2,460 58.5	4,205 100
2	10 1.36	38 5.17	70 9.52	6 0.82	0 0	611 83.13	735 100
3	2 0.7	16 5.61	45 15.79	4 1.4	0 0	218 76.49	285 100
4	91 0.68	763 5.74	1,714 12.89	175 1.32	1 0.01	10,551 79.36	13,295 100
5	0 0	54 21.34	24 9.49	9 3.56	0 0	166 65.61	253 100
6	104 0.73	2,559 17.87	4,578 31.97	186 1.3	1 0.01	6,891 48.12	14,319 100
7	9 1.91	76 16.14	58 12.31	9 1.91	0 0	319 67.73	471 100
8	201 1.06	1,156 6.1	4,281 22.58	264 1.39	6 0.03	13,054 68.84	18,962 100
9	11 0.82	73 5.46	474 35.45	23 1.72	0 0	756 56.54	1,337 100
10	3 0.76	15 3.8	213 53.92	1 0.25	0 0	163 41.27	395 100
Total	441 0.81	5,073 9.35	12,808 23.61	738 1.36	8 0.01	35,189 64.86	54,257 100

This chart shows the number of convictions in each crime seriousness grid block by racial category. The lower number in each cell is the percentage of that grid score represented by that racial category. Overall the most common crime seriousness ranking for delivery

convictions since January 1, 1990 is an 8 (*n* = 18,995), followed by 6 (*n* = 14,336), followed by 4 (*n* = 13,305). In those categories, white people are clustered around the least serious grid score of 4, Black people are clustered around the grid score of 6, and Hispanic people are clustered around the more serious grid score of 8.

Boyd Over Time

In the case review sample, the percentage of Boyd cases in a given year shows compelling evidence of an increasing trend over time. At the same time, in the full DCS data, the total number of cases each year declines from a high point of 2,384 in 1996 to a pre-pandemic low of 1,113 in 2019.



Boyd by County

The case review sample was selected from 13 counties that overall represent 80.83% of all cases in the full DCS dataset. This table displays the data on DCS convictions from each county along with the results of the sample review. While sample sizes for each individual county are too small to make statistically definitive conclusions about differences between counties, there is enough evidence to suggest that further review is warranted.

County	Total Convictions	Percent of All Convictions	Percent of Oregon Population	Total Boyd Cases in Sample	Percent of Sample Cases that are Boyd Delivery
Baker	194	0.36	0.46		

Benton	476	0.89	2.29		
Clackamas	1,948	3.64	9.9	6	31.58%
Clatsop	479	0.9	1.02		
Columbia	390	0.73	1.28		
Coos	692	1.29	1.75		
Crook	230	0.43	0.54		
Curry	235	0.44	0.6		
Deschutes	2,132	3.99	3.73	0	0.00%
Douglas	2,025	3.79	2.9		
Gilliam	24	0.04	0.05		
Grant	74	0.14	0.21		
Harney	113	0.21	0.2		
Hood River	281	0.53	0.59		
Jackson	3,207	6	5.26	22	81.48%
Jefferson	225	0.42	0.55	2	40.00%
Josephine	1,701	3.18	2.16		
Klamath	1,299	2.43	1.79	18	56.25%
Lake	143	0.27	0.21		
Lane	4,620	8.64	9.32	16	61.54%
Lincoln	832	1.56	1.26	10	76.92%
Linn	1,677	3.13	3.05	9	64.29%
Malheur	455	0.85	0.86		
Marion	5,178	9.68	8.21	14	60.87%
Morrow	76	0.14	0.3		
Multnomah	17,629	32.96	19.47	48	44.44%
Polk	743	1.39	1.89	4	30.77%
Sherman	28	0.05	0.05		
Tillamook	314	0.59	0.68		
Umatilla	974	1.82	2.01		
Union	330	0.62	0.71		
Wallowa	50	0.09	0.2		
Wasco	405	0.76	0.68	12	37.50%
Washington	3,331	6.23	13.27	13	43.33%
Wheeler	10	0.02	0.04		
Yamhill	973	1.82	2.5		

RESEARCHER BIOGRAPHY

Ann Shirley Leymon was awarded her Ph.D. from University of Oregon in 2012. She is an applied methods specialist, focusing on using qualitative and quantitative techniques to answer practical research questions using administrative data. Her work has concentrated on the criminal justice system since 2013, including serving as the Research Criminologist for the Oregon Criminal Justice Commission from 2014-2018.

SAMPLING

The Oregon Criminal Justice Commission (CJC) provided us with a dataset with 62,370 felony convictions of Delivery of a Controlled Substance cases for sentences that started after January 1st, 1990.

OJRC was interested in the subset of DCS cases that were Boyd cases. After determining there was no way to identify Boyd cases from the dataset alone, I recommended they draw a random sample of DCS cases and code the corresponding case files, and we could use that information to make inferences about prevalence of the Boyd cases in the full dataset of DCS convictions.

I was asked to draw a statistically representative sample of court cases for OJRC to request from counties and then to code.

To determine the sample size we needed, I used a significance threshold of 95% confidence and estimated that 70% of the cases would be Boyd cases. Power Analysis indicated 289 cases would be needed to achieve the 95% significance threshold based on this 70% estimate.

We believed this to be a conservative estimate after receiving anecdotal information that the number of Boyd cases would likely be around 90%. To achieve a 95% significance threshold, larger numbers of cases are needed when the variable of interest is closer to 50%, while if the variable of interest is closer to 0% or 100%, significance can be achieved with a smaller sample size.

Because these cases would need to be requested from each county, we drew a sample from a subset of counties that had the largest number of cases in the DCS dataset. The practices and policies of those counties will have a larger impact on the dataset. Multnomah, Marion, Lane, Washington, Jackson, Deschutes, Douglas, Clackamas, Josephine, and Linn counties were chosen as the 10 counties with the largest number of convictions in the dataset. We also added Malheur, Jefferson, and Umatilla to include representation from Eastern and rural counties in the data.

After initial requests were made, it was necessary to expand the sampled case files in order to get to our sample threshold in time for the court brief's submission date (see Malori Maloney's brief for more detail on county's responses to case file requests). We added Wasco, Polk,

Yamhill, Lincoln, and Klamath. In total, these 18 counties sampled represented 92.29% of all convictions in the full DCS dataset.

Both times we pulled a sample I followed the same procedure. A random number was assigned to each of the cases in these counties. Cases from smaller counties were weighted in order to make sure they ended up represented in the random sample. I sorted cases by the weighted random number and selected the first 500, with the understanding that some cases would likely be unavailable due to records retention policies or other challenges with retrieving records from the counties. This procedure captures a random sample of cases while ensuring replicability.

The sample I provided to the OJRC was ranked in order to provide guidance in the event that they received more case files than needed. This ensured that the final coded dataset maintained fidelity to the random sample in the event more case files were received than could be coded.

Some counties were unable to provide the case files in a timely and/or affordable manner, and some case files were unavailable due to record retention policies or other administrative factors. This was expected, and introduced some random and unrelated error in the sample. It does not affect the validity of the sample in this particular case, because it is unrelated to the question of whether cases are Boyd cases or non-Boyd cases.

The final sample consists of 346 case files from counties representing 80.83% of all convictions in the full DCS dataset. See Malori Maloney's brief for detail on the coding procedure OJRC implemented.

ANALYSIS

I used Stata, a statistical software package, to verify and check the data and to examine descriptive statistics of the full DCS data. I saved all coding language for replicability purposes. During this initial step we found duplicate case files due to revocations, and removed all revocation sentences whose original sentence was in the same dataset. This resulted in a total of 53,493 unique cases.

I focused on examining descriptive statistics to identify patterns of difference in the data that could not be explained by details of the court cases, emphasizing race, annual quantity of cases over time, and county differences. I also include grid severity score by race.

Data on the race of individuals in the dataset is provided by the Oregon Department of Corrections. Adults in custody are categorized as Asian, Black, Hispanic, Native American, White, and Unknown. The CJC recodes this using an evidence-based strategy that improves the accuracy of Hispanic identification in their race variable – more information is here: (https://www.oregon.gov/cjc/CJC%20Document%20Library/RaceCorrectionTechDocFinal-8-6-18.pdf).

To consider whether the data on convictions by race might be showing evidence of disparate treatment, I compared the data to 2010 Census data on racial demographics in Oregon (Source: U.S. Census Bureau, 2010 Census, Summary File 1; Tabulated by Population Research Center, Portland State University. https://www.pdx.edu/population-research/sites/g/files/znldhr3261/files/2021-02/Oregon%20State%20and%20its%20Counties.pdf; accessed August 18, 2022).

To analyze the data over time, I used the year of the start date of the sentence. Of the time variables in the dataset, this was the most consistently available and was the variable the CJC used to restrict the sample to the time period we needed.

In the sample of 346 case files, 50.29% of cases were determined to be Boyd cases. The remaining 49.71% of cases include 35.84% that were non-Boyd delivery cases, 10.40% that were not delivery cases (due to the number of convictions charged under ORS codes that do not distinguish between manufacturing and delivery), and 3.47% that were otherwise unable to be determined.

We are 95% confident that between 45.27% - 55.31% of DCS cases are Boyd cases, meaning that there are between 24,093 and 29,710 Boyd delivery cases from 1990-present in Oregon in the full DCS dataset. The rest of the cases in the dataset will include 16,491-21,851 non-Boyd delivery cases and 3,878-7,248 manufacturing cases, with the remainder being cases that cannot be determined due to insufficient or unclear information.

Because these are confidence intervals, the sum of the high end of each of these confidence intervals adds up to more than the total number of cases in the full dataset. This is typical with confidence intervals. Each of these is a probabilistic range and it would not be expected that each of these categories would be at the high end.

The proportion of Boyd cases in the sample ended up close to 50%, rather than the 70% we estimated. Because of this we were not able to make reliable statistical inferences on variables beyond the type of cases; when looking closer at variables such as race, county, and over time differences, the sample sizes for each category are too small given this measure.

We still have provided information on breakdown of the Boyd sample over time, by race, and by county. Because each of these variables has multiple categories, the sample size for each value is reduced to a point where statistical significance could only be achieved with a very large discrepancy. In each of these variables, there are results that appear worthy of further consideration. With a larger sample size, it is very possible that there are statistically significant results in some categories.

Ann Shirley Leymon, Ph.D

Curriculum Vitae
August 2022

ann@researchpdx.org
2133 NE 15th Ave
Portland, OR 97212
971.373.0438

EDUCATION

Ph.D., Sociology, University of Oregon, March 2012.

MS, Sociology, University of Oregon, 2007.

BA, Sociology and Music, Truman State University, 2004.

PROFESSIONAL EXPERIENCE

2018 - present. Research Scientist (Consultant).
Oregon Justice Resource Center: Data Analysis and Inferential Statistics.
Multnomah County Health Department: Program Evaluation for Center for Disease Control and Prevention Violence Prevention Grant.
Oregon Criminal Justice Commission: Validation of Risk Assessment Tool for Columbia County.
Oregon Public Defense Services: Data Analysis Evaluation and Strategy for Forecasting.
American Civil Liberties Union – Oregon: Performance Measurement, Data Analysis, and Policy Analysis.
Portland State University: Qualitative Interviews and Analysis for National Institute of Justice DuBois Grant.

2014 - 2022. Instructor, Portland State University (CCJ 410: Crime Myths)

2015 - 2018. Criminologist, Oregon Criminal Justice Commission.
Primary duties: Design and participate in research studies and analyses.

2014. Research Consultant:
Oregon Criminal Justice Commission: Program Evaluation and Cost-Benefit Analysis.
SMART Probation Study: Focus Group Program Evaluation

2014-2015. Managing Editor, Criminal Justice and Behavior.

2012 - 2014. Instructor, Washington State University at Vancouver (SOC 310: Development of Social Theory, SOC 321: Quantitative Techniques in Sociology, PSYCH 311: Elementary Statistics in Psychology)

2012. Research Assistant in Planning, Research, and Policy Analysis, Illinois State University.

2011. Instructor, University of Oregon (SOC 451: Social Stratification).

2011. Instructor, Illinois State University (SOA 255: Sociology of Work and Occupations).

2008. Instructor, University of Oregon (SOC 457: Sex and Society).

RESEARCH ACTIVITY

Peer-Reviewed Publications

2013. Scott, Ellen K. and Ann Shirley Leymon. "Making Ends Meet during the Great Recession: how child care subsidies matter to single low-wage working parents." *Journal of Poverty* 17: 63-85.
2011. Leymon, Ann Shirley. "Unions and Social Inclusiveness: A Comparison of Changes in Union Member Attitudes." *Labor Studies Journal* 36: 388-407.

Research Reports and Policy Briefs

2022. Leymon, Ann Shirley. "Assessment of the Virginia Pretrial Risk Assessment Instrument and its predictive validity with pretrial outcomes in Columbia County." For Oregon Criminal Justice Commission and Columbia County.
2020. Leymon, Ann Shirley. "Full Documentation of Workload Projections," "OPDS Data Quality Assessment,"and "PCRP Data Report." For Oregon Public Defense Services.
2018. Leymon, Ann Shirley. "Final Benefit-Cost Analysis Report on Department of Corrections." For Oregon Criminal Justice Commission.
2011. Ellen K. Scott, Ann Shirley Leymon, and Miriam Abelson. "Oregon's Employment-Related Child-Care Subsidy Program: An Investment That Makes Employment Work for Low-Wage Families." (Policy Brief, 4 pages)
2010. Ellen K. Scott, Ann Shirley Leymon, and Miriam Abelson. "The Heart of Making Work Work: Oregon's Employment-Related Child Care Subsidy Program." (Research Report, 35 pages)

GRANTS AND AWARDS

2011. **National Science Foundation** Dissertation Improvement Award #1102823.
2010. University of Oregon **Doctoral Research Fellowship**. Department of Sociology nominee.
2009. **Wasby-Johnson Dissertation Fellowship**. Department of Sociology, University of Oregon.

INVITED TALKS

2013. Leymon, Ann Shirley. "Challenges Facing Labor Unions in the Current Economic Context." Paper presented at the annual conference of the Pacific Sociological Association, Reno, NV. **Invited paper session**.
2010. Leymon, Ann Shirley. "Fighting for a Fair Economy? Union Political Action During the Great Depression." Paper presented at the annual convention of the Pacific Northwest Labor History Association, Portland, OR. **Plenary session**.

CONFERENCE PRESENTATIONS

2019. Leymon, Ann Shirley. "Risk Assessment and Racial Disparities: Do Presentence Investigations Expand or Diminish Racial Disparities?" Paper presented at the biannual conference of the International Association of Law and Mental Health, Rome, Italy.
2018. Leymon, Ann Shirley. "One Easy Step to Bridging the Gap Between Research and Policy." Paper presented at the annual conference of the Academy of Criminal Justice Sciences, New Orleans, LA.
2017. Leymon, Ann Shirley. "Statewide 416 Mini-Retreat." Presented at the semi-annual Oregon Justice Reinvestment Summit, Salem, OR.
2014. Leymon, Ann Shirley. "Fighting for a Fair Economy? Labor Unions and the Construction of Meaningful Work During the Economic Crisis of 2008." Paper presented at the annual conference of the Pacific Sociological Association, Portland, OR.
2012. Leymon, Ann Shirley. "Fighting for a Fair Economy? The Organizational Response of Labor Unions to the Economic Crisis of 2008." Paper presented at the annual convention of the American Sociological Association, Denver, CO. Paper session.
2011. Scott, Ellen K. and Ann Shirley Leymon. "Making Ends Meet during the Great Recession: how child care subsidies matter to single low-wage working parents." Paper presented at the annual convention of the American Sociological Association, Las Vegas, NV. Paper session.

2011. Leymon, Ann Shirley. "Fighting for a Fair Economy? The Political Response of Labor Unions to the Economic Crisis of 2008." Paper accepted to annual conference of the United Association of Labor Educators, New Orleans, LA. Paper session.
2011. Leymon, Ann Shirley. "Fighting for a Fair Economy? The Organizational Response of Labor Unions to the Great Depression." Paper accepted to annual conference of Pacific Sociological Association, Seattle, WA. Paper session.
2009. Leymon, Ann Shirley. "Unions and Social Inclusiveness: A Comparison of Changes in Union Member Attitudes." Paper presented at the annual convention of the American Sociological Association, San Francisco, CA. Paper session.
2008. Shirley, Ann. "The Effect of Union Density on Wage Dispersion, 1949-2000." Paper presented at the annual convention of the American Sociological Association, Boston, MA. Roundtable session.
2008. Leymon, Ann Shirley. "Democracy or Autocracy? Leadership Turnover in National Unions, 1982-2000." Paper presented at the annual convention of the Pacific Sociological Association, Portland, OR. Roundtable Session.
2007. Shirley, Ann. "The Effect of Union Density on Wage Dispersion, 1949-2000." Paper presented at the annual convention of the Pacific Sociological Association, Oakland, CA. Paper session.
2004. Shirley, Ann. "The Effects of Gender on the Blues Industry, 1920-1940." Paper presented at Truman State University's annual Undergraduate Research Symposium. Paper session.

RESEARCH EXPERIENCE

2009-2010. Research Assistant, University of Oregon. **State of Oregon Child Care and Development Fund grant**. Principle Investigator Ellen Scott. Semi-structured interviews with child care subsidy recipients to determine effect of changes in subsidy policy.
Primary responsibilities: coordinated with multi-institutional team of researchers and transcriptionist; extracted random sample of Oregon child care subsidy recipients; traveled around the state of Oregon to complete 40 semi-structured interviews with child care subsidy recipients and their providers; developed coding scheme; used Atlas.ti software to code and analyze 44 interviews; coordinated presented findings to advisory board; assisted in preparation of grant report and policy briefs.
2007-2008. Research Assistant. **National Science Foundation grant**. Principle Investigators Caleb Southworth and Judy Stepan-Norris. Archival research geared towards creation of a dataset on organizational and leadership characteristics of national labor unions, 1900-2005.
Primary responsibilities: researched sample of US unions to determine dates of organizational foundings and deaths, name changes, mergers,

and splits; traveled to multiple archives in New York and Washington, DC to collect union records; developed coding scheme for union constitutions; coded hundreds of union constitutions and convention proceedings; supervised undergraduate coders located in Irvine, CA; searched library holdings around the world to locate rare union constitutions.

Professional Development

2018. Evergreen Data Visualization Academy (12 months).
2017. Justice Research and Statistics Association Annual Conference in Long Beach, CA.
2017. Visual Data Analysis workshop with Edward Tufte in Portland, OR.
2016. Results First Conference with Pew Charitable Trusts and the MacArthur Foundation in Portland, OR.
2015. Results First Conference with Pew Charitable Trusts and the MacArthur Foundation in Washington, DC.
2015. International Association of Law and Mental Health conference in Vienna, Austria.
2015. Data Visualization workshop with Stephanie Evergreen.
2014. Evidence-Based Decision Making training by the National Institute of Corrections in Aurora, CO.
2014. Results First Conference with Pew Charitable Trusts and the MacArthur Foundation in Santa Fe, NM.
2012. Faculty Success Program, National Center for Faculty Development and Diversity with Kerry Anne Rockquemore.
2011. Arizona Methods Workshop at University of Arizona in Tucson, AZ. Qualitative Comparative Analysis with Charles Ragin, and Categorical Data Analysis with Scott Eliason.

SERVICE

Journal Reviewer

Gender and Society
Journal of Poverty

University and Departmental Service

2013. Presider for "Getting into Graduate School." Session at the annual meeting of the Pacific Sociological Association, March 22.
2011. Member, Staff Development Committee, Department of Sociology, University of Oregon.

2011. Panelist for "Getting into Graduate School." Session at the annual meeting of the Pacific Sociological Association, March 11.
2010. Panelist for "Career Decisions: Applying to Graduate School." Department of Anthropology, Geography, and Sociology, Truman State University.
2009. Panelist for "Research Process in Graduate School." Department of Sociology, University of Oregon.
2008 - 2009. Graduate Student Forum Representative, Department of Sociology, University of Oregon
2006 - 2007. Managing Editor for 'Work in Progress,' the semi-annual newsletter for the Organizations, Occupations, and Work section of ASA.
2005 - 2006. Graduate Student Forum Representative, Department of Sociology, University of Oregon

Community Participation

2019-present. Volunteer Pruner, Friends of Trees.
2012. Volunteer Judge, Bloomington-Normal Academic Cultural, Technological, and Scientific Olympics, NAACP.
2011-2012. Member, Vision 2020, Bloomington-Normal.
2007-2009. Vice President, American Federation of Teachers-Oregon.
2007-2009. Delegate, Lane County Central Labor Council.
2007-2008. Executive Board Member, Eugene-Springfield Solidarity Network, Jobs with Justice
2007-2008. Vice President of External Relations, Graduate Teaching Fellows Federation

Academic Affiliations

Oregon Program Evaluators Network
Academy of Criminal Justice Science
American Sociological Association

- Organizations, Occupations, and Work section member
- Political Sociology section member
- Labor and Labor Movements section member

OJRC Case Review Statement

1. I, Malori Maloney, am employed by amicus Oregon Justice Resource Center (OJRC) as a Staff Attorney.

2. Since March 2022, I have overseen data collection for a project that endeavors to determine the impact of *State v. Boyd*, 92 Or. App. 51 (1988) and its progeny. We sought to approximate the number of delivery of a controlled substance convictions based on a *Boyd* theory of prosecution in the years between the decisions in *Boyd* and *State v. Hubbell*, 314 Or. App. 844 (2021). We also wanted to understand whether there were racial or gender disparities in delivery prosecutions and sentencing generally, as well as delivery prosecutions based on a *Boyd* theory and sentencing for the same.

3. Determining whether a conviction relied on *Boyd* is impossible absent an analysis of the underlying facts of the case, so we suspected that we would need to examine a representative sample of cases involving delivery of a controlled substance convictions in order to approximate how many total cases have been based on a *Boyd* theory between 1988, when *Boyd* was decided, and 2021, when *Boyd* was overturned. OJRC contracted with research scientist Ann Leymon, who confirmed that this process was appropriate.

4. Dr. Leymon requested that the Oregon Criminal Justice Commission (CJC) provide a list of all cases involving one or more delivery of a controlled substance convictions with sentence start dates after January 1, 1990, and before December 31, 2021. We used that date range in order to capture as many cases that could have been prosecuted under *Boyd* as possible. Due to error-prone data prior to 1990, as well as the sentencing guidelines change in 1989, the a representative from the CJC suggested OJRC's review begin in 1990.

5. The CJC provided Dr. Leymon with a list of 62,370 cases that purportedly included convictions for delivery of a controlled substance.[1] From speaking with Dr. Leymon, we learned that we would need to analyze 289 of those cases in order to reliably approximate the total number of delivery of a controlled substance convictions prosecuted under a *Boyd* theory since 1990.

6. We consulted with Dr. Leymon to determine the counties from which we should request records and the number of cases we should request. See Dr. Leymon's statement for details.

7. From the CJC list of 62,370 cases involving delivery of a controlled substance convictions, Ann Leymon provided us with a list of 500 cases originating from 13 counties: Clackamas, Deschutes, Douglas, Jackson, Jefferson, Josephine, Lane, Linn, Malheur, Marion, Multnomah, Umatilla, and Washington. I submitted public requests to the district attorneys' offices in 12 of the 13 counties on or between March 30, 2022, and April 1, 2022. The requested records included charging instruments, police reports, search warrants and supporting affidavits, and lab reports. A colleague submitted a request to the Deschutes

[1] We later learned that the list was overinclusive. This is explained in detail in paragraph 17.

County District Attorney's Office on April 13, 2022.

8. Responses to this first set of requests were as follows.

   a. The Clackamas County District Attorney's Office provided materials related to 20 of 21 requested cases on May 10, 2022, for a cost of $375.30.

   b. The Deschutes County District Attorney's Office allowed access to materials related to four of 24 requested cases in April 2022 at no cost. A representative from the Deschutes County District Attorney's Office indicated that materials from the remaining cases could be viewed in person. OJRC was unable to review said materials.

   c. Public records requests for materials held by the Douglas County District Attorney's Office are routed through the Douglas County Public Affairs Office. The Douglas County Public Affairs Office indicated that the requested materials from 20 cases could be provided for a total cost of $1,600. In an unsuccessful attempt to obtain a more reasonable cost, I exchanged emails with a representative from the Douglas County Public Affairs Office. OJRC did not obtain records for cases from Douglas County due to the cost.

   d. The Jackson County District Attorney's Office provided materials related to 27 of 38 requested cases between April 20, 2022, and April 27, 2022, for a cost of $339.75.

   e. The Jefferson County District Attorney's Office provided materials related to five of eight requested cases on April 12, 2022, for a cost of $120.

   f. On April 1, 2022, the District Attorney for Josephine County informed me that his office is not the custodian of the requested records.

   g. The Lane County District Attorney's Office provided materials related to 25 of 46 requested cases on May 18, 2022, for a cost of $486.18.

   h. The Linn County District Attorney's Office provided materials related to 14 of 17 requested cases on July 14, 2022, for a cost of $540.

   i. As of the filing date of this document, the Malheur County District Attorney's Office has neither denied the records request I submitted, nor provided records related to the nine cases from which materials were requested.

   j. The Marion County District Attorney's Office provided materials related to 24 of 47 cases on May 10, 2022, for a total cost of $434.75.

   k. As of the filing of this document, the Multnomah County District Attorney's Office

has provided materials related to 110 of 197 cases. These materials were provided between May 16, 2022, and July 12, 2022. OJRC expects to receive materials related to 15 additional cases. As of the filing date of this document, the Multnomah County District Attorney's Office has not provided a cost estimate.

l. On April 15, 2022, I received a form email from the Umatilla County District Attorney's Office indicating that it "is not the custodian of state courts, law enforcement, or juvenile records (if the case is closed)."

m. The Washington County District Attorney's Office provided materials related to 30 of 39 requested cases between June 13, 2022, and July 26, 2022, for a cost of $1,958.27.

9. On May 30, 2022, OJRC had not yet received materials from enough cases to reliably approximate the total number of cases involving convictions for delivery of controlled substance based on a *Boyd* theory. To ensure that we would be able to generate reliable results, we decided to request materials from additional cases. Ann Leymon provided a second list with 500 more cases originating from five additional counties: Klamath, Lincoln, Polk, Wasco, and Yamhill. Each case had been randomly assigned a ranked number from 1 one to 500. I determined that based on the responses we received from the first set of records requests, we should request materials from 250 more cases. As such, I requested case materials related to cases ranked 1-250. I submitted public requests to the district attorneys' offices in each county between June 3, 2022, and June 16, 2022. As with the first set of requests, the requested records included charging instruments, police reports, search warrants and supporting affidavits, and lab reports.

10. Responses to this second set of requests were as follows.

a. The Klamath County District Attorney's Office provided materials related to 33 of 57 cases on July 26, 2022, for a cost of $718.20.

b. The Lincoln County District Attorney's Office provided materials related to 13 of 33 cases on August 3, 2022.

c. The Polk County District Attorney's Office provided materials related to 13 of 28 cases on August 3, 2022. As of the filing of this document, the cost of the request has not been assessed.

d. The Wasco County District Attorney's Office allowed access to materials related to 32 of 34 cases between June 16, 2022, and July 18, 2022, at no cost.

e. The Yamhill County District Attorney's Office acknowledged receipt of the request on July 6, 2022, but provided no timeline for the processing of the request. As of the filing of this document, OJRC has received neither a cost estimate nor the

requested records.

11. In consultation with my colleagues, as well as defense attorneys and prosecutors outside OJRC, I developed a form to assist with determining whether a given case was prosecuted under a *Boyd* theory.

12. To develop the form, I reviewed *Boyd*, *Hubbell*, and each opinion published between the two that cited to *Boyd*. I made note of factors relied upon to establish the intent to sell element of a "*Boyd* delivery," as well as factors that would establish a completed delivery under *Hubbell*. In a column titled "*Boyd*," I included the factors "non-user amount," "cash," "packaging materials," "scale," "paraphernalia (e.g., razor blade, clippers, etc.)," "offer to sell," and "admission of intent to sell or transfer in the future." In a column titled "Not *Boyd*," I included the factors "completed/interrupted sale or transfer (including controlled buy)," "admission of specific past sale or transfer that is subject of convicted delivery count," and "text messages indicating specific past sale(s)." Recognizing that the above lists of factors are not exhaustive, I also included a fillable "other" option under each column.

13. The review form also included instructions to guide reviewers in completing the analyses. Per the instructions, reviewers completed a separate analysis for each convicted delivery count. Dismissed counts were not analyzed. When case materials indicated that police investigated multiple incidents, reviewers ensured that the incident date on the indictment for the convicted count being analyzed matched the incident date on the corresponding police reports.

14. We set out to mark each convicted delivery of a controlled substance count from each case we analyzed as being prosecuted under a *Boyd* theory or prosecuted under a non-*Boyd* theory. Convicted counts in which only factors in the *Boyd* column were checked were counted as *Boyd* deliveries. Convicted counts in which any factor in the Not *Boyd* column were not counted as *Boyd* deliveries.

15. Reviewers included Brittney Plesser, Co-Director of the FA:IR Law Project, Adam Gregg, Paralegal, and Stevie Riley, Student Intern. To ensure consistency, I reviewed at least five of the same cases as each reviewer before the reviewers began analyzing cases on their own. The other reviewers and I discussed our process and results and confirmed they were parallel. Then, reviewers were assigned cases to analyze independently. Instructions required reviewers to check a box indicating an attorney review was necessary in three circumstances:

    i. The only factor that could take a case out of *Boyd* is a general admission to selling drugs (not on a specific date or date range); or
    ii. There are multiple theories upon which the case could be prosecuted, some of which are *Boyd* and others of which are not; or
    iii. The reviewer is unsure of whether a delivery falls under *Boyd*.

    We operated with the understanding that a general admission to selling controlled

substances, without other factors, would support a *Boyd* theory of prosecution. *See, e.g., State v. Shewell,* 178 Or App 115 (2001) (holding that defendant's possession of three bags of marijuana, a scale, and other paraphernalia, evidence that defendant was seen surrounded by a group of people outside a mall, and admission of earlier sale activity supporting a finding that defendant took a substantial step toward the commission of the crime.) However, we thought it prudent to have any cases with admissions to selling controlled substances reviewed by an attorney to double check that such admissions were not sufficiently specific to establish a non-*Boyd* delivery conviction.

We observed only a few cases in which there were multiple theories upon which a convicted delivery count could have been prosecuted, but we characterized those cases as being prosecuted under non-*Boyd* theories. We made this decision in an effort not to inadvertently overstate the impact of *Boyd*.

16. I reviewed all cases indicating that attorney review was needed. I also examined each review form and entered the data into a spreadsheet for Dr. Leymon to analyze.

17. As we began reviewing cases, we observed that some on our list did not involve convictions for delivery of a controlled substance at all. Instead, these cases involved convictions for manufacture of a controlled substance. We believe these cases ended up on the full delivery list we obtained from CJC because they were charged under ORS 475.752, which makes it "unlawful for any person to **manufacture or deliver** a controlled substance." Emphasis added. We noted these cases as not involving delivery convictions. There were also a small number of cases in which individuals had delivery of a controlled substance convictions dismissed upon completion of probation and/or drug court. We similarly marked those cases as not involving delivery convictions. Additionally, we observed that materials we received via public records requests for some cases were insufficient to determine whether a convicted delivery count was based upon a *Boyd* theory of prosecution. We marked such cases as having incomplete information for the purposes of our analysis.

18. In all, we reviewed materials from 346 cases. Thirty-five cases involved no convictions for delivery of a controlled substance. There was insufficient information to determine whether 11 cases were prosecuted under a *Boyd* theory. One hundred and seventy-four of the 346 cases we reviewed involved at least one delivery conviction prosecuted under a *Boyd* theory.

Dated: August 26, 2022

Malori Maloney
OSB 175899

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE
Larry Jefferson, Director

Email: opd@opd.wa.gov
(360) 586-3164
FAX (360) 586-8165

August 24, 2022

Dear Oregon Justice Resource Center:

As requested, I write to set forth Washington's response to the landmark Washington State Supreme Court decision in *State v. Blake*, 197 Wn.2d 170 (2021). I am the Managing Attorney for the *Blake* Defense Program at the State Office of Public Defense (State OPD). My role was funded by the state legislature in July 2021 and I started this position in September 2021. I am a 16-year practicing attorney with experience in state and local government. This letter will begin by explaining the *State v. Blake* decision, before moving into a discussion of Washington's criminal justice system and stakeholder response to *Blake*.

The* State v. Blake *Decision

In February 2021, the Washington State Supreme Court announced *Blake*, which held that Washington's simple drug possession law violated due process protections under the state and U.S. constitution because it lacked a mens rea element, and was therefore unconstitutionally void. The holding meant that any convictions obtained under the constitutionally void statute are *void ab initio*. The decision is thus retroactive, voiding convictions all the way back to the law's inception in 1971. The exact number of impacted convictions is not yet known, but estimates place the number at 150,000 to 250,000 convictions. No Washington court decision has ever impacted so many convictions.

In addition to voiding convictions, *Blake* also means that individuals can recoup any legal financial obligations (LFOs) they paid on their conviction. *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017).

But the decision is not automatic or self-executing. Every individual who is now eligible to have their simple drug possession conviction voided as a result of *Blake* is required to bring an individual motion to vacate the conviction in the superior court where they received the conviction. The vacate order is also the vehicle by which people can obtain a refund of any LFOs paid.

Additionally, people who are incarcerated for a simple drug possession are entitled to be resentenced, and people with a simple drug conviction in their history may be eligible for resentencing. People with historical convictions may be eligible for resentencing because under Washington's Sentencing Reform Act of 1981, any simple drug possession convictions in their history counted as points toward an offender score, and an individual's offender score affected

the range of months for which the judge could impose a term of confinement. When their "*Blake* points" are subtracted, people may now be serving a sentence in a range that exceeds the maximum allowable under the law.

Washington's Decentralized Criminal Justice System

Washington State is made up of 39 counties that operate independent of one another, and from the state as a governmental entity, when it comes to criminal justice. Each county in Washington has an independently elected superior court clerk, independently elected superior court judges, and an independently elected county prosecutor. Our court system is not unified; each county superior court has its own local rules. Likewise, the 39 independently elected clerks manage and control court records for each of the superior courts, meaning there is no centralized way at the state level to search for and obtain the criminal records necessary to support a vacate motion.

Additionally, 39 elected prosecutors are free to exercise prosecutorial discretion in 39 different ways. Finally, each county manages its own county-funded public defense system. Many counties in Washington do not have a centralized public defense office, and instead rely on indigent defense contract attorneys, with the contracts managed by a county employee. Thus, there is no centralized state-wide defense authority.[1]

Stakeholder Response to Blake

Given Washington's dis-unified systems, the response to *Blake* required (and requires) an unprecedented level of communication between several state and local entities, many of whom had no previous relationship with one another. These entities include: State OPD, the Washington Defender Association (WDA),[2] the Washington State Department of Corrections, the Washington Association of Prosecuting Attorneys, individual county public defense offices or contract managers, individual county prosecuting attorney offices, the Superior Court Judges' Association, the Administrative Office of the Courts, the Superior Court Clerks' Association and individual county elected clerks, the Washington State Office of Civil Legal Aid and several organizations providing civil legal aid, the Washington State Association of Counties, the Washington Association of Cities, the Washington State Patrol, and the Office of the Governor.

A brief timeline of the initial response to *Blake* follows; this list reflects only some of the work that was done to address *Blake*.

March 2021: As noted, *Blake* affects an estimated 150,000 to 250,000 convictions. Immediately following the announcement of *Blake*, public defenders recognized that the most

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[1] State OPD oversees independent-contractor attorneys for defense in appellate, child welfare, and RCW 71.09 proceedings, and provides grants to counties and cities for public defense improvement, and more recently for *Blake* defense, but counties fund the majority of day-to-day operations of public defense in Washington.

[2] WDA is a non-profit organization that provides training and technical assistance to public defenders in Washington, as well as legislative advocacy on behalf of public defense.

urgent population in need of *Blake* relief were incarcerated people. State OPD reached out to the Washington State Department of Corrections (DOC). DOC was able to provide a comprehensive spreadsheet of every person under supervision with a conviction potentially eligible for vacation under *Blake*. The number of affected incarcerated people was approximately 5,000. Public defenders suspected that many of these people were eligible for significantly reduced sentences, but attorney review in each and every case was required to know for sure.[3]

Public defenders across the state began such review, and began bringing resentencing motions where appropriate. To date, these efforts continue. DOC continues to provide State OPD with a monthly report of incarcerated people who have not yet received *Blake* relief; State OPD in turn shares the report with designated contacts in all 39 counties.

April 2021: Three workgroups comprised of various stakeholders began meeting. The workgroups were focused on resentencing, LFO refunds, and legislative efforts. The goal of each workgroup was to try to create a coordinated response to *Blake* across the state. While the resentencing and LFO workgroups met regularly through the summer and into the fall of 2021, no clear, consistent statewide process emerged.

May 2021: Recognizing the enormous impact the resentencing and vacate need would have on the criminal justice system, the Washington State Legislature appropriated $5.1 million in both Fiscal Year 2022 and 2023 to assist counties with *Blake* defense. The legislature also appropriated money to the Administrative Office of the Courts (AOC) to reimburse counties for extraordinary *Blake* costs incurred by prosecution, clerks, defense, and courts. This appropriation totaled $44.5 million for one fiscal year. The legislature also appropriated $23.5 million to AOC for one fiscal year to reimburse counties for LFO refunds.[4]

June 2021: The Washington State Supreme Court published for comment criminal court rule amendments proposed by State OPD, WDA, and Washington Association of Criminal Defense Lawyers. The amendments were designed to address a persistent access to counsel problem occurring in some counties, wherein county prosecutors took the position that incarcerated people had no right to counsel in bringing a motion for relief under *Blake*. Following a lively comment period, the state supreme court eventually adopted the amendments, with modifications, in November 2021. It is unclear how many people attempted to bring pro se resentencing motions, either successfully or unsuccessfully, while the rule change was pending.

August 2021: The Governor's Office began granting commutation for individuals still on community custody solely for invalid drug possession convictions, providing an additional avenue for some relief to a subset of the *Blake* population.[5] In addition to the incarcerated

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[3] At minimum, review is required to accurately recalculate the individual's *Blake*-adjusted offender score.
[4] In this same legislative session, the legislature also considered the criminalization of drug possession. It passed a bill that made drug possession a misdemeanor with an intent element, but also encouraged prosecutors to divert cases under the law for assessment, treatment, and other services. RCW 69.50.4013. This statute sunsets July 1, 2023.
[5] The Governor had previously issued commutations for all people who remained incarcerated at a DOC facility solely on void drug convictions as of April 2021. Many of those individuals were released or resentenced in March 2021 due to efforts at the county level.

population, at the time *Blake* was decided several hundred people were on community custody solely for drug possession convictions. DOC took the position that it could not end its court-ordered supervision of these individuals until the individual obtained a vacate order. Given the number of people seeking *Blake* relief, it was difficult for public defenders to meet the demand in a timely fashion. State OPD created a commutation program with the DOC and the Governor's Office, in an effort to end supervision for people on community custody for a drug possession offense. Individuals must petition for a commutation; to date the Governor has signed 651 of these orders.[6]

October 2021: AOC began executing agreements with individual counties governing reimbursement of *Blake* costs and LFO refunds, as appropriated by the legislature in May 2021.

Nov. 2021: Following an application and contract development period, State OPD executed agreements with most counties governing grant funds for *Blake* defense costs, as appropriated by the legislature in May 2021. Individual county funding was disbursed by formula: a county was allotted a percentage of the $5.1 million based on the percentage of drug convictions imposed in the county. State OPD's grant agreements require counties to use the funds to compensate defense attorneys for consulting with incarcerated people about their options for relief, and to appoint and compensate defense counsel for bringing resentencing motions. State OPD's grant agreements also require counties to provide a process by which non-incarcerated people can seek a vacate, with the assistance of counsel if they so elect. Eight counties declined the funding and asked State OPD to use the funds to contract directly with defense attorneys to provide *Blake* defense in the county.

January 2022: A state senator introduced a bill that attempted to streamline *Blake* relief and bring some consistency across the state. This bill died. To date, the response to *Blake* continues to vary county by county.

April 2022: The Washington State Legislature appropriated more funding for *Blake* response, earmarking an additional several million for refunding LFOs and otherwise helping the criminal justice system meet the challenge of *Blake*.

Justice by Geography

As alluded to above, Washington's 39 elected prosecutors approached *Blake* relief differently. Some took the position that counsel was not required for resentencings. Some took the position that counsel was not required for a vacate where resentencing was not at issue. These early positions are largely mooted now due to the structure of State OPD's grant agreements and the court rule amendments discussed above, but permutations of the access to counsel issue do persist in some counties.

[6] Individuals who obtain a commutation order must still obtain a vacate order in a superior court to ensure the conviction does not remain on their record, and to recoup an LFO refund.

Other disparities in treatment remain.

- In some counties, prosecutors will re-file dismissed charges that were plead down when an incarcerated person moves for resentencing relief, chilling individuals from seeking relief. In other counties, prosecutors do not make this threat.

- In some counties, prosecutors are willing to sign on to an agreed order to vacate inchoate possession offenses. In others, defense must bring a motion, with different judges making different decisions in different counties.

- Statewide, case management systems lack a vocabulary for vacates based on constitutional grounds, rather than statutory grounds, with the result that *Blake* vacates are often communicated to Washington State Patrol (WSP) as dismissals. This means that convictions may continue to show in WSP's records and thus in background checks as convictions for simple drug possession.

- In some counties, prosecutors are proactively vacating old convictions with the input of defense counsel as to the form of the order. In other counties, prosecutors are proactively vacating old convictions without the input of defense counsel as to the form of the order. The scope of ordered relief varies widely amongst these counties—do the orders include discussion of an LFO refund? Do they explicitly restore voting right where appropriate? Do they require the Clerk to transmit notice of the vacate order to Washington State Patrol to ensure the individual's record is updated? In counties where defense was involved in developing a form order, relief tends to be more complete. Additionally, in still other counties, prosecutors do not take proactive steps at all toward vacating old convictions, and instead await petitioners to come forward.

- Some counties have greater defense attorney capacity than others, sometimes significantly so. The counties with better capacity are faster at reviewing the cases of incarcerated people for potential resentencing, and faster at bringing motions.

Future Efforts

Public defenders will continue the work they began in March 2021 to ensure individuals receive complete *Blake* relief, be it resentencing, vacate, or an LFO refund. Civil legal aid attorneys will continue to assist non-incarcerated people with vacates and refunds. State OPD hired additional attorney staff to help counties review the criminal histories of incarcerated people to determine who may be eligible for resentencing. AOC is in the process of creating a Refund Bureau, which will hopefully bring consistency and centralization to obtaining an LFO refund (though individuals will still be required to obtain a vacate order from their county of conviction). In the spring of 2022, AOC was also tasked by the legislature with creating a comprehensive list of convictions by cause number. This is no easy feat, given the volume of

convictions and the different court records management practices across the state dating back to the early 1970's.

In hindsight, it might have made sense for the state supreme court to have retained jurisdiction over *Blake*. A special master might have been able to impose form orders, ensuring consistency across the state. Consistency in processes and documentation would have also helped improve communication with the public, by giving people clear directions on what steps to take to seek relief. The current differences jurisdiction by jurisdiction make community outreach more complicated and relief less accessible. A special master imbued with the authority to decide questions of law as they related to *Blake*—for example, whether a prosecutor may re-file dismissed charges—would have ensured a consistent approach across the state. Likewise, a special master might have been able to direct the work of reviewing the criminal histories of incarcerated people in a more equitable way than the current system, which relies on county public defense systems with widely varying degrees of capacity to absorb the work.

Nevertheless, work continues day-by-day, county-by-county, and will continue for years to come.

I hope this information will be useful to you.

Sincerely,

Grace O'Connor
Managing Attorney, *Blake* Defense Program