IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Respondent,<br>Respondent on Review,<br><br>v.<br><br>JACKELIN GONZALEZ-VALENZUELA,<br><br>Defendant-Appellant,<br>Petitioner on Review. | Washington County Circuit Court<br>Case No. C100316CR<br><br>Appellate Court No. A146278<br><br>Supreme Court No. S061751 |

# PETITIONER'S REPLY BRIEF

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Washington County
Honorable Steven L. Price, Judge

Opinion Filed: August 21, 2013
Author of Opinion: Sercombe, Judge
Author of Concurring Opinion: Haselton, Chief Judge
Before: Ortega, Presiding Judge, Haselton, Chief Judge, and Sercombe, Judge

PETER GARTLAN #870467
Chief Defender
DAVID SHERBO-HUGGINS #105016
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
David.Sherbo-Huggins@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
ERIN K. GALLI #952696
Senior Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
erin.k.galli@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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# PETITIONER'S REPLY BRIEF

## Introduction

The state argues that the endangering the welfare of a minor statute was not primarily intended to shield youth from conduct or activities that could lead them to delinquency. The state also argues that the word "place," not the phrase "maintained or conducted," limits the reach of the statute to only those locations where a minor would be endangered by drug activity. Lastly, the state argues that the substance of the provision at issue does not derive from New York Penal Law 260.20. Defendant disputes each of those arguments in turn.

## Argument

### I. The former contributing to the delinquency of a minor statute defines the outer limits of the endangering the welfare of a minor statute.

The state argues that the legislature did not draft the endangering the welfare of a minor statute to address conduct that previously had been covered by the contributing to the delinquency of a minor statute:

> "Because the legislature understood that most of the offenses previously covered by former ORS 167.210 (1969) would be covered by other statutes in the proposed revised criminal code, it could not have intended ORS 163.575 to address those same concerns."

Res BOM, 21.

The state misapprehends the purpose and scope of the endangering statute. Its purpose was not to occupy the entire field previously covered by the

contributing statute. Rather, its object was to proscribe those residual acts that did not fall within the scope of another provision of the proposed revision, but that would have been covered under the prior contributing statute.

In *State v. Hodges*, this court held *former* ORS 167.210 (1907) (contributing to the delinquency of a minor) unconstitutionally vague. 254 Or 21, 457 P2d 491 (1969). Prior to that decision, a wide variety of misconduct had been prosecuted under that statute.[1] Under the contributing statute, the standard for conviction required conduct that "manifestly tends to cause any child to become a delinquent child." Without the coverage that had been provided by that statute, the commission was left to fill a substantial void in Oregon's criminal law.

Each provision of the endangering statute specifically targets a form of misconduct that contributes to the delinquency of minors and is not prohibited by another statute in the revision. That is, ORS 163.575(1) identifies five ways that a person can criminally endanger the welfare of a minor. Subsection (1)(a) imposes criminal liability for permitting an unmarried minor to "witness an act of sexual misconduct or sadomasochistic abuse." Subsection (1)(b) prohibits permitting a minor to "enter or remain in a place" where unlawful drug activity

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[1] *See* Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 117, 124-28 (July 1970) (compiling appellate decisions under that statute and categorizing the underlying conduct).

"is maintained or conducted." Subsection (1)(c) applies when a person permits a minor to participate in illegal gambling. Subsection (1)(d) applies to the sale of tobacco to a minor. And subsection (1)(e) applies when a person sells to a minor a device designed for smoking tobacco or controlled substances. The observation that no provision of the statute was covered elsewhere in the revision and that each is directly targeted toward preventing conduct that unequivocally contributes to delinquency in minors directly refutes the state's argument that the statute was designed to accomplish some other purpose.

In creating the endangering statute, the commission sought to identify the remaining misconduct that would have been prosecutable under the former contributing statute, but could not be reached by another section of the criminal code revision. The commission expressed that singular purpose at nearly every recorded meeting or hearing on the proposed section. *See* Pet BOM, 20-23 (setting forth quotations to that effect from the legislative history). The goal was to reestablish the breadth of coverage provided by the prior law—not to expand liability—and to do so by concretely defining the specific types of prohibited conduct to avoid running afoul of the overbreadth and vagueness problems identified in *Hodges*.

The logical outgrowth is that if the conduct at issue would not have been prosecutable under the contributing statute, the commission did not likely intend to reach it. Consequently, the former contributing statute marks the

bounds of the conduct that the legislature attempted to criminalize through the endangering statute. Any purported interpretation of subsection (b) that extends to conduct beyond that which directly contributes to delinquency, thus, appears to conflict irreconcilably with legislative intent.

## II. The statute describes *places* that are contaminated by drug activity, not mere proximity to isolated instances of drug possession.

The state also makes a contextual argument to support its position that the purpose of ORS 163.575 was not to curb delinquency but to protect minors from other harms associated with being in the proximity of drug activity. Res BOM, 9-10. The state argues that the reason subsection (b) contains no express requirement that the minor observe the adults engaging in the drug activity is because the legislature concluded that being in the same place as a person in possession of a controlled substance is inherently more dangerous than the conduct criminalized by the statute's other provisions, such as allowing a minor to *witness* live sadomasochistic abuse, permitting minors to *participate* in illegal gambling, or *selling* minors cigarettes or implements of drug use. *Id.*

Accordingly, the state concludes that the legislature's concern was not merely to protect minors from the corrosive influence that observing drug activity could have on them, but to protect them from secondary risks of physical harm associated with drug activity:

> "Exposing a child to drug activity often results in the child being around unsafe people and unsafe places. That exposure increases

> the risks that the child will be neglected or abused, that the child will ingest and possibly overdose on a drug, and that the child will be exposed to violence. Also, exposure to the drug culture makes it more likely that the child will become inured to it, increasing the chance that the child will himself or herself become an illegal drug user."

Res BOM, 10.

However, in light of the legislation's purpose to fill the void left by the absence of the contributing statute, it seems more likely that the commission envisioned the phrase "maintained or conducted" as sufficient to supply the requirement that the adult's conduct have a tendency to contribute to the minor's delinquency. That interpretation harmonizes subsection (b) with the other provisions of the statute and is consistent with the statute's overarching purpose. Thus, a place where drug activity "is maintained or conducted" is one where the extent and nature of the drug activity would be apparent to anyone who entered. Or, at minimum, the level and flagrancy of the drug activity must create an impermissibly high risk that a child would be exposed to the activity.

Consequently, when the text is read in context and with the benefit of legislative history, the provision appears plainly aimed at deterring adults from permitting children to enter a particular kind of place because of the negative effect that exposure to that kind of place has on a child's prospects for successful development. The distinguishing feature of the *place* is that drug activity *is maintained or conducted* therein. The underlying rationale being that

if minors are allowed into places where adults congregate to openly engage in drug activity, the exposed minors will be more likely to pursue those activities, which directly endangers their development.

There is scant support in the text, context, or legislative history suggesting that the primary purpose of the statute is to protect children from hypothetical secondary harms that could befall a child who is in close proximity to drugs or a person who uses drugs. The endangering the welfare of a minor statute does not criminalize knowingly possessing, using, or even delivering drugs in the presence of a minor. *See State v. McBride*, 352 Or 159, 164, 281 P3d 605 (2012) (contrasting the endangering statute with ORS 163.160(3)(c), which elevates fourth-degree assault to third-degree assault if committed in the immediate presence of, or witnessed by, the person's minor child).

If the legislature adopted subsection (1)(b) to protect children from secondary dangers associated with merely being in proximity to drugs or drug users, it presumably would have styled the statute in the manner of the third-degree assault statute (*e.g.*, knowingly permitting a minor to witness or come into the immediate presence of drug activity). The child-endangering statute, by contrast, protects minors from a readily identifiable type of *place* that would contribute to the delinquency of any minor allowed to enter. It does not prohibit allowing a minor to come into the vicinity of an isolated instance of drug possession.

## III. The state's textual analysis divests the phrase "is maintained or conducted" of its substance and requires the word "place" to do all of the work of limiting the breadth of the statute.

The state's initial textual analysis has three steps: (1) "maintain" means "continue;" (2) an activity continues while it is occurring; thus, (3) if an activity is occurring in a place, the place is one where the activity is maintained. Res BOM, 5-6.

That analysis reduces the phrase "is maintained or conducted" to mean *occurring*. But if that was what the legislature meant, presumably it would have used that word or a similar one instead of a phrase that connotes substantially more. Under that analysis, during the time it takes for a person to take a single drag from a marijuana cigarette, the place would be transformed into one in which drug activity *is maintained or conducted.* The state's interpretation discounts the significance of the on-going relationship that the drug activity has to the place. The phrase *is maintained or conducted* suggests that the place and the drug activity are intertwined through time, such that the place is characterized in part by the drug activity that it houses. Such a place stands in stark contrast to a place where drug activity occurred on a single date, for a single minute.

Instead of giving the phrase "is maintained or conducted" the full scope of its natural meaning (*i.e.* orchestrated or enduring activity over a significant duration), the state suggests that the legislature intended to limit the breadth of

the statute with the word "place." The state suggests that the term "place" should be defined "situationally and contextually":

> "[I]f an individual possesses cocaine while attending a college football game, the football stadium is not necessarily a "place" within the meaning of ORS 163.575(1)(b) because, in that situation and context—a multitude of strangers spread out over a large area for the purpose of attending a public event—the children present are not endangered by the individual's activity."

Res BOM, 17.

The state contrasts that example with a person who knows that the individual sitting next to his child at the football game always possesses drugs. In that situation, the state suggests that the stadium in that context might qualify as a "place" because the child is endangered by being there. *Id.*

The state supports its suggested analysis of the word "place" by referring to this court's efforts to define "place" for the purposes of the kidnapping statute. *See State v. Murray*, 340 Or 599, 136 P3d 10 (2006) (stating that whether a defendant "[t]akes the person from one *place* to another" is "situational and contextual"). Here, unlike in the kidnapping statute, the endangering statute expressly describes those places that an adult may not permit a child to enter. It criminalizes knowingly permitting a child to enter or remain in a place where drug activity *is maintained or conducted*. Whether a place qualifies as that kind of place thus turns on the meaning of the phrase, "maintained or conducted" not the meaning of the word "place."

It is an even farther stretch to suggest that the legislature purposefully intended the word "place" to define the scope of the crime and for the phrase "is maintained or conducted" to play virtually no role in establishing the limits of the statute's reach, considering that a predominant goal of the statute was to avoid vagueness.

Defendant's interpretation, by contrast, uses the more natural definitions of "maintain" and "conduct," which describe drug activity that is organized, regular, or prolonged. The state correctly observes that so defined, a person would not be guilty of the crime for permitting a child to be present the first, second, or third time that drugs are sold because, at that point, it is not a regular activity. Res BOM, 19. However, that does not mean that the person has not committed several other crimes designed to protect children from secondary harms associated with individual instances of drug delivery or manufacture. *See* ORS 163.547 (child neglect in the first degree) (making it a Class B felony to allow one's child to stay in a vehicle where drugs are being delivered or manufactured or on premises in the immediate proximity of drugs being delivered or manufactured for profit, if the child is under 16); ORS 163.205 (criminal mistreatment in the first degree) (causing a dependent person to enter or remain in or upon premises where a chemical reaction related to drug manufacture is occurring); ORS 475.910 (applying a controlled substance to the body of minor by any means); ORS 475.908 (causing another person to ingest a

controlled substance other than marijuana smoke without the person's consent); ORS 475.904 (manufacturing or delivering a controlled substance within 1,000 feet of school).

The difference between those statutes and the child-endangering statute is that the preceding statutes punish a person for exposing a minor to a single instance of particular types of drug activity because of the risks associated with those activities. The endangering statute protects children from places associated with long-term, regular drug activity because of the corrosive influence that such places can have on a minor's development.

## IV. The substance of the provision at issue is based on New York Revised Penal Law section 260.20.

The state argues that only the title of the endangering statute is derived from New York law, not its substance. Res BOM at 21-22. However, the state is mistaken. In the first preliminary draft of the endangering the welfare of a minor statute, the commission set forth its origin. Article 20 Offenses Against the Family Preliminary Draft No. 1 § 8, 29 (Feb 1970).

At that time, Section 8, subsection (1) contained paragraphs (a) through (h). Each paragraph described an activity that was deemed detrimental to the welfare of minors (*e.g.* (1)(a) entering a place where alcohol is consumed; (1)(b) witnessing sexual conduct or sadomasochistic abuse; (1)(c) entering a place where drug activity is maintained or conducted).

The commission explained that subsection (1) was based on New York Revised Penal Law section 260.20, but that paragraphs (b) and (d) had no derivative source and that (e) and (h) were taken from a similar Michigan law. Consequently, paragraphs (a) and (c) were based on the New York Law.

> "B. Derivation
>
> > "The title of the offense is taken from New York Revised Penal Law section 260.10, except that the word "child" has been changed to "minor."
> >
> > "*Subsection (1) is based on New York Revised Penal Law section 260.20 with substantial alteration and addition.*
> >
> > "Paragraphs (b) and (d) of subsection (1) have no derivative source.
> >
> > "Paragraphs (e) and (h) are taken in part from Michigan Revised Criminal Code section 7045."

Preliminary Draft No. 1 § 8, 29.

Subsection (1), paragraph (c) was the provision related to permitting minors to enter places where drug activity is maintained or conducted. Thus, it was based on the New York law. A side-by-side comparison of the structure and text of both statutes leaves little doubt of that conclusion.

The first preliminary draft of the Oregon statute provided:

> "(1) * * * [A] person commits the crime of endangering the welfare of a minor if:

> "(a) Being an owner, lessee, manager or employe of a public place where alcoholic liquor is consumed on the premises, he knowingly permits a person less than 21 years of age to enter or remain on the premises, unless the minor is accompanied by his parent or lawful guardian, or by an adult authorized by his parent or lawful guardian, or unless otherwise permitted by law to do so; or
>
> "* * * * *
>
> "(c) He knowingly permits a person less than 18 years of age to enter or remain in a place where unlawful narcotic or dangerous drug activity is maintained or conducted[.]"

Preliminary Draft No. 1 § 8, 25.

New York Revised Penal Law section 260.20 similarly provided:

> "A person is guilty of unlawfully dealing with a child when:
>
> "1. Being an owner lessee, manager or employee of a public dance hall, public pool or billiard room, public bowling alley, theatre, motion picture theatre, skating rink, or of a place where alcoholic beverages are sold or given away, he permits a child less than sixteen years old to enter or remain in such place * * *; or
>
> "2. He knowingly permits a child less than eighteen years old to enter or remain in a place where illicit sexual activity or illegal narcotics activity is maintained or conducted[.]"

NY Penal Law § 260.20(2).

Consequently, the historical origins of the New York statute, which pertained expressly to houses of prostitution and opium dens, as well as subsequent judicial decisions from that state, interpreting the phrase "conducts or maintains" to require more than an isolated instance of prohibited activity, are relevant to discerning the meaning that the Oregon legislature intended to convey through the same words.

## CONCLUSION

Defendant's interpretation allows the words of the statute to convey their plain meaning and recognizes that the legislative history and context point toward an overarching legislative purpose of shielding children from places harmful to their welfare. Taken together, those sources establish that subsection (1)(b) describes places characterized by open and regular drug activity such as would contribute to minor's delinquency, not places where isolated or sporadic instances of drug possession or use happen to occur in the presence of a minor.

For the foregoing reasons, and those asserted in Petitioner's Brief on the Merits, this court should reverse the decision of the Court of Appeals.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

DAVID SHERBO-HUGGINS OSB #105016
DEPUTY PUBLIC DEFENDER
David.Sherbo-Huggins@opds.state.or.us

Attorneys for Petitioner on Review
Jackelin Gonzalez-Valenzuela

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,038 words.

Type size

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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 10, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, and Erin K. Galli, #952696, Senior Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned
_____
DAVID SHERBO-HUGGINS OSB #105016
DEPUTY PUBLIC DEFENDER
David.Sherbo-Huggins@opds.state.or.us

Attorneys for Petitioner on Review
Jackelin Gonzalez-Valenzuela