IN THE SUPREME COURT OF THE STATE OF OREGON

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

PETITIONER'S BRIEF ON THE MERITS

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 Defendant-Appellant,
Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
ERIN K. GALLI #952696
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 Plaintiff-Respondent,
Respondent on Review

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STATEMENT OF THE CASE

The criminal offense of endangering the welfare of a minor includes knowingly permitting a minor to enter or remain in a place where illegal drug activity is maintained or conducted. Petitioner (defendant hereafter) was convicted of two counts of that offense based on a single instance of allowing her two children to be in the same car with her while she possessed drugs concealed in her purse. The Court of Appeals affirmed, concluding that the car under those circumstances was such a place. The question is whether that interpretation accurately reflects the legislature's intent.

Question Presented and Proposed Rule of Law

Question Presented. An adult commits the Class A misdemeanor of endangering the welfare of a minor, ORS 163.575(1)(b), if the adult "permits a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled substances is maintained or conducted."

Does subsection (1)(b) describe places characterized by open and regular drug activity such as would contribute to the delinquency of a minor, or did the legislature intend to sweep in any and all places where any amount of illegal drugs or drug-related activity happens to be, even if concealed from the minor's view?

Proposed Rule of Law. The subsection describes places and locations characterized by regular and open drug activity.

Summary of Argument

A person is not guilty of endangering the welfare of a minor if the person merely permitted a minor to be in a place while an isolated instance of drug possession occurred unbeknownst to the minor. The text and context of ORS 163.575(1)(b) and its legislative history demonstrate that the legislature intended the statutory phrase, "a place where unlawful activity involving controlled substances is maintained or conducted," to refer to a place characterized by regular and open drug activity.

The plain text of the statutory subsection at issue suggests that it was intended to require more than concealed possession of a controlled substance in the same place as a minor, because it describes the place as one where unlawful drug activity is "maintained or conducted." The definitions of those words suggest that the legislature's intent was to reach places where drug-related activities take place regularly and openly over a prolonged duration.

Context confirms that interpretation by indicating that the statute was intended to protect children from exposure to conduct that, if pursued, would be detrimental to their welfare. The other provisions of the same statute apply only when the child sees or is included in the objectionable activity. Subsection (1)(a) imposes criminal liability on any person who permits an unmarried minor

to "witness an act of sexual misconduct or sadomasochistic abuse." Subsection (1)(c) applies when a person "[i]nduces, causes or permits a person under 18 years of age to participate in gambling." Subsection (1)(d) applies to a person who sells 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. Taken together, the provisions indicate that the statute was designed to preserve minors' moral and physical development by shielding them from immoral and unhealthy activities.

The 1971 legislature enacted the endangering the welfare of a minor statute to replace—yet achieve the same ends as—the "contributing to the delinquency of a minor" statute that this court declared vague in *State v. Hodges*, 254 Or 21, 22, 457 P2d 491 (1969). The contributing to the delinquency of a minor statute worked to limit minors' exposure to conduct and activity that could corrupt or inhibit their development and welfare. Only a handful of cases decided under the former contributing statute involved drugs or alcohol. From those cases, it appears that the breadth of the crime was strictly limited to conduct and circumstances that could cause a child to pursue a path toward delinquency.

The legislative history discloses that the express purpose of the endangering the welfare of a minor statute was to proscribe with more specificity those acts that previously would have been prosecutable under the

contributing to the delinquency of a minor statute and were not already prohibited by another statute in the revision. The endangering statute, thus, was intended to be a "contributing statute" and reach only that conduct that fell within the scope of the predecessor contributing statute. Thus, the legislative history points toward interpreting the statute consistently with its intended function: to prevent children from becoming delinquents.

Consequently, when the text, context, and legislative history are considered, it appears that the legislative intent driving the statute was to prevent minors from exposure to certain activities that could have a negative influence on them and thereby endanger their long-term welfare. For that harm to be threatened, a place where drug activity "is maintained or conducted" means a place that contains open, regular, and significant drug activity—not a place where a single incident of concealed drug possession incidentally occurred.

Statement of Historical and Procedural Facts

On the morning of February 10, 2012, defendant was taking her two daughters, (17 years old) and (5 years old), to school when police pulled them over for a traffic violation. Tr 14, 25. had been driving, and was in the front passenger seat. Tr 15. Defendant sat in the back, directly behind the driver. Tr 15. The car belonged to defendant's friend. Tr 16.

During the course of the stop, defendant consented to a search of her purse, which revealed 0.45 grams of methamphetamine, heroin residue, and six methadone pills in a prescription bottle. Tr 25-26; State's Exhibit 8.

Defendant was convicted of, *inter alia*, two counts of endangering the welfare of a minor for "[permit[ting] a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled substances is maintained or conducted[.]" ORS 163.575(1)(b).

Defendant appealed, contending that the act of possession was passive conduct that did not constitute unlawful activity involving controlled substances within the meaning of the statute. The Court of Appeals disagreed, holding:

> "[D]efendant's continued possession, transportation, storage, and concealment of the controlled substances constituted the maintenance of an 'unlawful activity involving controlled substances'—that is, a continuance of her original commission of the act of possession of the controlled substances by the continued exercise of dominion and control over them."

State v. Gonzalez-Valenzuela, 258 Or App 263, 267, 308 P3d 1096 (2013).

In a separate concurrence, Judge Haselton observed that the court's construction of the provision was arguably inconsistent with the legislature's intent, because mere "surreptitious possession" is not injurious to minors, directed at minors, nor contributory to their delinquency. *Id.* at 273 (Haselton, J., concurring). The concurrence also noted that the court's holding leads to

"incongruous results" for a statute designed to protect children from the harm caused by being in places where drug activity is maintained or conducted:

> "[I]f a person who possesses drugs walks into a school, a supermarket, a church, or a synagogue--or, for that matter, our courtroom, Reser Stadium, or the Rose Festival Fun Center--that 'place' becomes one in which 'unlawful activity involving controlled substances is being maintained or conducted.'"

Id.

Argument

I. The intent of the legislature was to protect children's welfare by shielding them from observing behaviors that could cause them to become delinquents.

Defendant was found guilty of violating ORS 163.575(1)(b); the statute provides:

> "**Endangering the welfare of a minor.**
>
> "(1) A person commits the crime of endangering the welfare of a minor if the person knowingly:
>
> "(a) Induces, causes or permits an unmarried person under 18 years of age to witness an act of sexual conduct or sadomasochistic abuse as defined by ORS 167.060; or
>
> "(b) *Permits a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled substances is maintained or conducted*; or
>
> "(c) Induces, causes or permits a person under 18 years of age to participate in gambling as defined by ORS 167.117; or
>
> "(d) Distributes, sells, or causes to be sold, tobacco in any form to a person under 18 years of age; or
>
> "(e) Sells to a person under 18 years of age any device in which tobacco, marijuana, cocaine or any controlled substance, as

> defined in ORS 475.005, is burned and the principal design and use of which is directly or indirectly to deliver tobacco smoke, marijuana smoke, cocaine smoke or smoke from any controlled substance into the human body[.]"

ORS 163.575 (emphasis added).

This court's objective is to ascertain and declare the law's substance as intended by the enacting legislature. ORS 174.010; ORS 174.020(1)(a). The court first considers the statute's text and context. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). This court will also consider any legislative history that it finds helpful. *Id.* If the legislature's intent remains unclear after such review, the court may resort to general maxims of statutory construction. *Id*. at 172. Applying that methodology to the statute will show that the legislature's goal was to protect children from the corruptive influence of a place characterized by open and regular drug activity, such as an "opium den," "crack house," or "meth lab."

II. Textual Analysis: The words "maintained or conducted" drive the textual analysis and provide insight into the legislature's intent.

First-level analysis begins with an examination of the text of the statute in context. *Gaines*, 346 Or at 171. When analyzing the text, common words should generally be given their ordinary meaning, as reflected in a dictionary. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006).

The statutory provision at issue prohibits any person from permitting a minor to enter or remain in a place of a particular nature—"a *place* where

unlawful *activity* involving controlled substances is *maintained* or *conducted*."

Here, the textual analysis suggests that a place where unlawful drug activity is maintained or conducted is a structure or location characterized by regular drug sales, use, or manufacture over a protracted duration.

A. The words "maintained or conducted" limit the reach of the statute to places characterized by drug activity.

The verbs maintained and conducted are used transitively with respect to the direct object of the sentence: "unlawful activity involving controlled substances." That said, as used in the statute, the verb "maintain" has four ordinary transitive senses that could apply:

> **"1 :** to keep in a state of repair, efficiency, or validity **:** preserve from failure or decline <exercise . . . sufficient to ~ bodily and mental vigor --H.G. Armstrong>
>
> **"2 a :** to sustain against opposition or danger **:** back up **:** DEFEND, UPHOLD < only fast ironclad cruisers could ~ the position of the Union against other naval powers --H.K Beale> * * *
>
> **"3 :** to persevere in **:** carry on **:** keep up **:** CONTINUE <members of the . . . tribe ~ native customs with ceremonial dances -- N.Y. Times> < the husband could be certain of ~ing a certain standard of living --Saturday Rev> < in addition to ~ing his news schedule he served as a fire warden --current biog>
>
> **"4 :** to provide for **:** bear the expense of **:** SUPPORT * * *[.]"

Webster's Third New Int'l Dictionary 1362 (unabridged ed 1971).

The third sense appears to be the most apt. The words used to define the third sense describe an affirmative effort to cause something to persist or continue on an ongoing basis. "To keep up" means "to go on with **:** persevere

in **:** continue usu. with persistence." *Id.* at 1236. And "continue" means "**1:** to carry onward or extend : keep up or maintain (as an activity)* * *: PROLONG **:** add to or draw out in length, or development * * * **2 :** to cause to last, endure, or keep on[.]" *Id.* at 493. When applied to the statute, those definitions suggest drug activity that is continued with persistence, carried forward steadfastly, or enduring uninterrupted into the future.

If the word maintain was merely intended to mean "occur," the word "conducted" would have no independent meaning—a person cannot conduct drug activity in a place if drug activity is not simultaneously occurring in the place. Consequently, "maintained" more likely refers to ongoing drug activity within or associated with a place.

The other critical verb is "conducted." It also has four transitive senses and several subsenses:

> "**1 :** to bring by or as if by leading **:** LEAD, GUIDE, ESCORT * * * **2 a :** to lead as a commander <~a siege> **b :** to have the direction of **:** RUN, MANAGE, DIRECT <~ a scientific experiment> <~a daily newspaper column> <~a small business enterprise> * * * **c :** TREAT, HANDLE, EXECUTE **d :** to direct as leader the performance or execution of (as a musical work or group of musicians) **3 a :** to convey in or as if in a channel * * * **b :** to act as a medium for conveying (as heat or electricity) **:** TRANSMIT **4 :** to behave or comport (oneself) **:** ACQUIT * * *
>
> "**syn** MANAGE, CONTROL, DIRECT: CONDUCT: may imply a leader's supervision, his responsible guidance in a course which he determines * * *."

Id. at 474.

Subsense 2b appears the most appropriate in context. Thus, if a person in charge of organized drug activity directs its course from a particular place, it is a crime to knowingly permit a minor to enter that place. As a consequence, a purely textual analysis of the dictionary definitions of the key words in the statute appears to signal a legislative intent to reach places where drug-related activities take place at a regular, continual, persistent level with some degree of historical or anticipated future endurance over time.

Moreover, to the extent that it bears on the textual analysis, the phrase "maintained or conducted," or a variant thereof, is routinely used by state legislatures across the country in regulatory licensing schemes and nuisance statutes.[1] In those contexts, the phrase "maintained or conducted" projects a

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[1] For example, nuisance related statutes often employ the phrase "maintained or conducted": ORS 471.640 (requiring an officer to serve an order to enjoin a nuisance and to return to the court an inventory of the personal property used in "conducting or maintaining such nuisance"); NY Penal Law § 240.45 (establishing a criminal nuisance if a person "knowingly conducts or maintains any premises," where persons gather to engage in unlawful conduct); Mich Comp Laws 600.3805 (authorizing attorney general to enjoin any person from "permitting such building * * * conducted or maintained by him" to be used for certain unlawful purposes); Cal Civil Code § 3482.5 (stating that agricultural operations "maintained and conducted for commercial purposes" for three years shall not become a nuisance due to a change in the locality); Shoreline Municipal Code 5.10.120 (stating that "any adult cabaret operated, conducted, or maintained" in violation of law is a public nuisance).

….*footnote continued*

sense that the actor is carrying on the regulated activity with repetition over time.

B. Drug "activity" means a drug related pursuit, and "place" means the physical structure or location in which the activity occurs.

"Activity" is another word of common usage. Here, it could mean:

> **"1 :** the quality or state of being active * * * **2 :** physical motion or the exercise of force as **a :** vigorous or energetic action **:** LIVELINESS *** * * 3 :** natural or normal function or operation <~ on the stock exchange> * * * **5 a :** an occupation, pursuit, or recreation in which a person is active * * * **7 :** an organizational unit for performing a specific function; *also* **:** its function or duties[.]"

Id. at 22.

As used here, it appears to mean, "an occupation, pursuit, or recreation in which a person is active." Thus, drug "activity," like social, gang, criminal, police, or sexual "activity," denotes a pursuit of the specified variety in which a

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Licensing related statutes also commonly employ the phrase: ORS 167.118 (requiring an organization that "maintains, conducts, or operates any bingo" game to obtain a license); ORS 443.860 (requiring a license to "conduct or maintain a hospice program"); ORS 441.015 (requiring a license to "conduct, maintain, manage or operate a health care facility"); ORS 679.020 (requiring a licensed dentist to "conduct or maintain" a dental practice); RCW 66.24.481 (requiring liquor license for any public place or club, to keep any liquor in "any place maintained or conducted by such public place or club"); *see also* ORS 658.065 (prohibiting the business of an employment agency from being "conducted or maintained" in certain places); ORS 344.530 (requiring DHS to "conduct and maintain" facilities for employment of disabled people).

person is active. Specifically, drug "activity" means doing some action related to drugs, such as making them, growing them, packaging them, selling them, storing or transporting them for sale, or using them.

However, even if the status of possessing drugs in some or all circumstances qualifies as a drug-related activity, the child-endangerment statute does not attempt to describe every single place in which an instance of drug activity happens to occur. It describes places of a particular character—places where illegal drug activity *is maintained or conducted*.

Finally, "place" can have many meanings. Among them are these: " **2 a :** an indefinite region or expanse," "**b :** (1) a building or locality used for a special purpose," "**3 : a** a particular region or center of population," or "**b :** an individual dwelling or estate : HOUSE * * *." *Id.* at 1727. This statute prohibits permitting a minor to "*enter* or *remain in* a place," which suggests an intent to reach physical structures, such as a building, house, or dwelling that accommodates generalized, repetitive, and overt drug activity over a prolonged duration.

As will be demonstrated below, defendant's interpretation of the text effectuates the intent of the legislature—to protect children from moral and civil degeneracy and its consequences to their welfare.

III. Context: The provision was intended to protect children from observing behavior that, if emulated, would be detrimental to their welfare.

A statute's context includes other provisions of the same or other related statutes, the pre-existing statutory framework within which the statute was enacted, and prior opinions of this court interpreting the pertinent statutory wording. *In re Marriage of Polacek*, 349 Or 278, 284, 243 P3d 1190 (2010).

A. Other Provisions of the Statute: The statute's other provisions require the minor to watch or participate in the adult behavior.

Other provisions of the same statute contextually support the proposition that the legislature was concerned with exposing minors to certain activities (sexual conduct, illegal drugs, illegal gambling, and tobacco) that would damage their health or moral development.

The statute was originally enacted as Oregon Laws 1971, c 743, § 177, which provided:

> "Section 177. Endangering the welfare of a minor. (1) A person commits the crime of endangering the welfare of a minor if he knowingly:
>
> "(a) Induces, causes or permits an unmarried person under 18 years of age to witness an act of sexual conduct or sado-masochistic abuse as defined by section 255 of this Act; or
>
> "(b) Permits a person under 21 years of age to enter or remain in a place where unlawful narcotic or dangerous drug activity is maintained or conducted; or

> "(c) Induces, causes or permits a person under 21 years of age to participate in gambling as defined by section 263 of this Act; or
>
> "(d) Sells, or causes to be sold, tobacco in any form to a person under 18 years of age."[2]

Each of the other provisions describes the minor's actual participation in the activity or direct observation of the activity. The statute prohibited adults from permitting minors to witness sexual conduct, participate in illegal gambling, or buy tobacco. The whole statute was designed to preserve minors' moral and physical development. By penalizing adults for allowing minors to enter or remain in places where drug activity was "maintained or conducted," the legislature envisioned shielding children from places typified by open and regular drug-related activities that, if observed by minors, could induce them to pursue an unsavory path that would threaten their welfare.

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[2] In 1979, the legislature changed the wording of subsection (b) from "he" to "the person" and "unlawful narcotic or dangerous drug activity" to "unlawful activity involving controlled substances." Or Laws 1979, ch 744, § 8. The change was not intended to be substantive. Minutes, Senate Committee on Judiciary, SB 903, May 1, 1979, 3 (statement of Senator Kafoury) ("this bill is a housekeeping bill in the best sense of the word, that there are no substantive changes in the bill").

B. Pre-existing Statutory Scheme: The endangering statute was intended to reach conduct that had previously been prosecutable as contributing to the delinquency of a minor.

The endangering the welfare of a minor statute was enacted in the wake of *State v. Hodges*, 254 Or 21, 22, 457 P2d 491 (1969), which declared the predecessor statute, contributing to the delinquency of a minor, *former* ORS 167.210 (1907), *repealed by* Or Laws 1971, ch 743, § 432, facially unconstitutional for vagueness.[3]

The endangering statute was drafted to replace the contributing statute and intended to "criminalize conduct that previously was proscribed as 'contributing to the delinquency of a minor,' but to do so with sufficient specificity to avoid unconstitutional vagueness." *State v. McBride*, 352 Or 159, 164, 281 P3d 605 (2012). The legislature did that by more particularly

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[3] *Former* ORS 167.210 provided:

> "When a child is a delinquent child as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, *Or any person who does any act which manifestly tends to cause any child to become a delinquent child*, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the penitentiary for a period not exceeding five years."

identifying the specific acts that would have a deleterious effect on the welfare of minors.

The Criminal Law Revision Commission extensively researched the history, development, and downfall of the contributing statute and included a thorough summary in its commentary to the proposed criminal code. Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 117, 124-28 (July 1970) (hereinafter Commentary). That statute's history provides significant clues as to the scope that the legislature intended with the endangering statute.

The crime of contributing to the delinquency of a minor was intended to protect "children from becoming criminal, by extending to them proper environment and placing them under proper constraint, control and protection." *State v. Du Bois*, 175 Or 341, 350, 153 P2d 521 (1944). Its primary purpose was

> "to prevent the type of conduct condemned by the act which, if pursued, would be injurious to children and lead them upon a downward course. The welfare of the State demands that youth ripen into wholesome, useful citizenship."

State v. Doud, 190 Or 218, 225, 225 P2d 400 (1950).

The contributing statute made it a misdemeanor to do "any act which manifestly tends to cause any child to become a delinquent child[.]" *Former* ORS 167.210.

In *State v. Hodges*, this court declared the "manifest tendency" standard unconstitutionally vague. *Hodges*, 254 Or at 27-28. The court explained that the legislature had failed to provide a sufficiently definite standard for conviction, permitting uncertainty in adjudication and discriminatory prosecutions:

> "*Without a legislative declaration of standards*, the trial court would have no basis for submitting one case to a jury and refusing to submit another case to a jury." * * *.
>
> "*It is the looseness of the language which offends due process* and makes the catchall clause of the statute an instrument of potential abuse."

Id. at 27-28 (emphasis added).

As emphasized above, this court signaled to the legislature both the problem with the contributing statute and how to correct it. The legislature thereafter took up the task of maintaining the substance of the contributing statute without violating the vagueness principle. The legislature attempted to accomplish that goal by better identifying the concrete acts that fell within the statute's ambit.

In sum, the statute concerns the harm that exposure to or participation in certain kinds of conduct can have on a child's prospects for a healthy and successful future. There is no precedent in the history of the contributing statute suggesting that concealing the possession of a controlled substance from a minor child, *i.e.*, conduct that the minor never observes or experiences, would

manifestly tend to cause the child to become a delinquent child. Only three appellate cases decided under the prior law involved drugs: *State v. Holleman*, 225 Or 1, 3, 357 P2d 262, (1960) (affirming conviction for directly injecting the barbiturate Sodium Nembutal into the arm of a 17-year-old boy); *State v. Eisen*, 53 Or 297, 300, 99 P 282, 283 (1909) (reversing conviction for administering certain drugs intended to cause a 17-year-old girl to miscarry); and *Du Bois*, 175 Or at 350 (affirming conviction for supplying minor with drugs intended to prevent pregnancy and having sexual intercourse with her). Additionally, two cases involved adults who furnished alcohol to minors: *State v. Gordineer*, 229 Or 105, 110-11, 366 P2d 161 (1961) (holding that "merely * * * plying the minor with alcoholic drinks" was not sufficient unless the jury concluded that "under all the circumstances of the case that this act would tend to cause this child to become delinquent"); and *State v. Williams*, 236 Or 18, 386 P2d 461 (1963) (same).

From the drug and alcohol cases decided under the contributing to the delinquency of a minor statute, it appears that the scope of the crime was limited to conduct that had a directly injurious impact upon the welfare of minors because of the causative role it could play in turning a child toward delinquency. That is, the statute sought to prevent minors from exposure to certain activities that could have a negative influence on them and lead them to misbehave or break the law, endangering their long-term welfare. Without

some level of participation or observation on the part of the minor, the adult's conduct could not affect a change in the minor's behavior from good to bad, moral to immoral, or law-abiding to criminal.

Indeed, the title of the new crime, "endangering the *welfare* of a minor," indicates that its modern purpose remains consistent with its history, as "welfare" can mean, "**1 a :** the state of doing or faring well **:** thriving or successful progress in life[.]" *Webster's* at 2594. Thus, the title suggests that the statute's purpose remains what it had always been: to promote the successful development of children toward upstanding, law-abiding citizenship.

C. Related Statutes: The commission created three separate crimes: selling drugs; maintaining a drug house; and permitting a minor to enter a drug house.

Statutes *in pari materia* include those statutes concerning the same general subject that were enacted at the same time or before the statute in contention was enacted. *Stull v. Hoke*, 326 Or 72, 79-80, 326 P2d 72 (1997).

In the official commentary to subsection (1)(b) of the child-endangering statute, the commission noted that the proposed criminal law revision contains two other crimes that cover different conduct: "'If a minor is sold or given illegal drugs, or if the actor maintains a place resorted to by drug users or used for the unlawful keeping or sale of drugs, the crime of criminal activity in drugs or criminal drug promotion would be committed'—not the crime of endangering the welfare of a minor." *State v. McBride*, 352 Or at165 (quoting

Commentary, §166, 162). The endangering statute, by contrast, is about conduct directed at minors that exposes them to activity that is *per se* harmful to their successful progression in life; it requires victimization, but no further victimization than that.

Likewise, the commentary's reference to the related drug statutes provides insight into the type of "activity" that it envisioned: the selling or giving of illegal drugs, or the keeping of drugs for the purpose of sale, or the using of drugs by those who rely on the place for that purpose. It also links the provision to the corollary crime of criminal drug promotion. Thus, not only is it a crime for a person to maintain a place for the purpose of conducting drug activity, it is a separate crime—endangering the welfare of a minor—for any person to permit a minor to enter such a place.

IV. Legislative History: The express purpose of the law was to set forth with specificity those acts that would have been prosecutable under the prior contributing statute that were not otherwise prohibited by another provision of the criminal code revision.

A. Criminal Law Revision Commission Minutes: The law was intended to be a "contributing statute" with the same reach as the prior contributing statute.

The minutes from the commission's meetings establish that the scope of the endangering the welfare of a minor statute was intended to remain equivalent to what had existed under the contributing to the delinquency of a minor statute.

On March 6, 1970, Subcommittee No. 2 discussed for the first time the

initial draft of the proposed crime of endangering the welfare of a minor. The intent was to prevent adults from exposing minors to certain socially objectionable activities that were generally deemed to be detrimental to their welfare: sexual displays, gambling, smoking, drinking, drugs, tattoos, and explosives.[4] At that hearing, the subcommittee recommended deleting (1)(a),

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[4] The pertinent portions of the first draft of the endangering statute are set forth below:

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

(a) Being an owner, lessee, manager or employe (sic) 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

"(b) He knowingly induces, causes or permits an unmarried person less than 18 years of age to witness an act of sexual conduct or sadomasochistic abuse. The definitions of 'sexual conduct' and 'sado-masochistic abuse' in Article __, section 1, apply to this section; 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; or

"(d) He knowingly induces, causes or permits a person less than 21 years of age to participate in unlawful gambling activity; or

….*footnote continued*

permitting a minor to enter or remain on premises where alcohol is consumed, believing that license revocation was a sufficient deterrent. The subcommittee recommended deleting (1)(g), tattooing the body of a minor, because there were too few tattoo parlors in the state to render it a problem. And it recommended moving (1)(h), selling or furnishing gunpowder and other explosives to a minor, to the section of the proposed code on firearms. Minutes, Criminal Law Revision Commission, March 6, 1970, 10-13.

> "(e) He knowingly gives or sells, or causes to be given or sold, any alcoholic liquor to a person less than 21 years of age, except that this subsection shall not apply to the parent or lawful guardian of such person if the act in question does not occur on licensed, premises, or to duly licensed physicians who dispense alcoholic liquor by prescription; or
>
> "(f) He knowingly sells, or causes to be sold, tobacco in any form to a person less than 18 years of age, except that this subsection shall not apply to the parent or lawful guardian of such person; or
>
> "(g) He intentionally marks the body of a person less than 18 years of age with indelible ink or pigments by means of a tattooing device; or
>
> "(h) He knowingly sells or furnishes to a person less than 18 years of age, without the written consent of the person's parent or lawful guardian, bulk gunpowder, dynamite, blasting caps or nitroglycerine."

Article 20 Offenses Against the Family Preliminary Draft No. 1 § 8, 30 (Feb 1970), *available at* http://arcweb.sos.state.or.us/pages/records/legislative/legislativeminutes/crimlaw/articles.html.

During that meeting, Mr. Roger D. Wallingford, research counsel for the commission, explained the purpose of the endangering the welfare of a minor statute:

> "[T]his section attempts to cover everything the statute on contributing to the delinquency of a minor *encompassed* which has not been provided for elsewhere in the proposed code. *It is a "contributing" statute set out in specific language.*"

Id. at 10.

On April 3, 1970, the full committee revisited the proposed statute with the changes fully incorporated. At the second hearing, Mr. Wallingford reiterated that the purpose of the law was to "cover everything the statute on contributing to the delinquency of a minor encompassed which had not been provided for elsewhere in the proposed code." Minutes, Criminal Law Revision Commission, April 3, 1970, 17. Later in the hearing, Mr. Paillette reiterated that the purpose of the section was to cover acts "previously prosecutable" under the contributing statute. *Id.*

The legislative history that exists under Senate Bill (SB) 40 (1971)[5] that is relevant to this particular statute establishes that the legislature understood the statute's intended scope as well. Mr. Paillette reported to the Senate Criminal Law and Procedures Committee that the endangering the welfare of a

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[5] SB 40 carried the entire revised criminal code into law.

minor statute describes "some of the types of acts which previously could have been prosecuted under the contributing statute." Minutes, Criminal Law and Procedures Committee, SB 40, March 24, 1971, 4.

B. Commentary to the Proposed Criminal Code: The endangering statute describes specific acts injurious to the welfare of minors.

The official commentary to the final draft and report confirms that the statute's function was to carry forward the breadth of the contributing statute, not to expand it.

> "An examination of cases prosecuted under ORS 167.210 (contributing to delinquency of a minor) reveals that in almost every instance the same conduct could be prosecuted under [one of the other sections of the proposed code]. [This section] is designed to provide coverage for specific acts injurious to the welfare of minors not specifically prohibited elsewhere in the proposed Code.
>
> "For a discussion of [ORS 167.210] and *States v. Hodges*, 88 Or Adv Sh 721, Or -, 457 P2d 491 (1969), see commentary under §117 supra."

Commentary § 177, 178.

Moreover, it retained the requirement that the conduct endanger a minor's welfare. To that point, the commentary explains that although contrary to the plain text of paragraph (a), the statute was not intended to reach the act of permitting one's children to see "lawful sexual activity between parents within the ambit of family privacy." *Id.* It was only intended to reach "aggravated instances" that actually endanger the minor's welfare. *Id.*

The commentary also referred to the "place" in paragraph (b) as "premises" where drug activity is conducted or maintained. *Id.* That history evidences that the statute was intended to reach physical locations or structures that have some degree of permanence and are notable for containing a level of persistent drug activity that would be damaging to a minor's welfare.

C. The words and structure of the statute were copied from a statute designed to protect children from certain types of business transactions with adults.

The precise wording and structure of the endangering statute is derived from New York Penal Law § 260.20, "Criminal *dealings* with children." Article 20 Offenses Against the Family Preliminary Draft No. 1 § 8, 29 (Feb 1970). It is also nearly identical to a Michigan statute titled "Criminal *transactions* with children." Both the New York and Michigan laws were set forth in their entirety following the supplemental commentary in both the first and second preliminary drafts of the statute. The New York law provides, in pertinent part:

> "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; or*

> "3. He marks the body of a child less than eighteen years old with indelible ink or pigments by means of tattooing; or
>
> "4. He gives or sells or causes to be given or sold any alcoholic beverage, as defined by section three of the a1coholic beverage control law, to a child less than eighteen years old; except that this subdivision does not apply to the parent or guardian of such a child; or
>
> "5. He sells or causes to be sold tobacco in any form to a child less than eighteen years old."

NY Penal Law § 260.20(2).

The second subsection was intended to retain the prohibition that had existed under New York Penal Law § 484(2), Commission Staff Notes Proposed New York Penal Law, 396 (Edward Thompson Co. 1964), which made it a crime to "suffer or permit 'any such child * * * to remain in any reputed house of prostitution or assignation, or in any place where opium or any preparation thereof is smoked.'" *People v. Rose*, 284 NYS 962 (1935). There is no indication in the staff notes to the New York revision that the modern statute was intended to cover sexual or narcotic activity in places of a qualitatively different character than the brothels and opium-den type establishments that had been historically targeted by the law.

Additionally, New York's similarly phrased criminal nuisance statute has consistently been interpreted to require more than a single instance of illegal

activity in the place.[6] *People v. Alsaidi*, 957 NYS 2d 265 (2012) ("According to * * * how the term 'conducts or maintains' is commonly understood, it is clear that a single incident of unlawful conduct is not enough to sustain [the] charge"); *People v. Fiedler*, 31 NY2d 176 (1972) (Court of Appeals of New York held, "The word 'maintains' * * * excludes the notion that an isolated misuse is sufficient to stigmatize the premises.").

Although those cases were decided after the Oregon legislature adopted its revision, they evidence that the words "maintained or conducted" tend to denote repetitive activity over a protracted time span and were used that way by the New York legislature.

Consequently, based on the provision's New York origin, other provisions of the same statute, the title of the statute, and its relationship to the prior contributing statute, the Oregon legislature did not intend to reach mere concealed possession of a controlled substance in a car on an isolated occasion. Rather, the text, context, and legislative history, disclose that the legislature was

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[6] "A person commits criminal nuisance when "[h]e knowingly *conducts or maintains* any premises, place or resort where persons gather for purposes of engaging in unlawful conduct." NY Penal Law PL § 240.45(2).

attempting to protect children from certain harms caused by being in a certain kind of place—a place where drug activity was routinely and openly happening.

The phrase "a place where unlawful narcotic or dangerous drug activity is maintained of conducted" was the legislature's attempt to describe the kind of place where drug activity would negatively affect a child's moral development if the child were permitted to enter. Drug activity, thus, must be a defining characteristic of the place. A "drug house," "opium den," "crack house," or "meth lab" all aptly describe places where drug activity is maintained or conducted. The relationship between the drug activity and the place must be substantial enough both qualitatively and temporally as to be a defining characteristic of the place. One person walking into a church, shopping mall, or grocery store with drugs in her pocket does not transform the character of the place into one where drug activity is maintained or conducted. Thus, the size of the place, the extent of the drug activity, and the other non-drug related characteristics of the place are all relevant to whether it is the type of place the legislature described. Stated slightly differently, the concentration and flagrancy of the drug activity in the place directly bears on the harm that would befall a child's development if the child were permitted to enter the place.

V. Maxims of Last Resort: If the legislature's intent remains ambiguous, this court should adopt a construction of the statute that avoids unreasonable results.

When two or more plausible constructions of a statute remain, this court presumes that the legislature did not intend the construction that leads to absurd or unreasonable results. *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996).

If the provision is interpreted to reach places that are not characterized by extensive drug use, sale, production, or distribution, the statute creates unreasonable liability that the legislature never intended and disconnects the provision from the harm that the legislature sought to prevent.

For example, a parent would be in constant violation if she kept a prescription pain pill provided by a friend or a small amount of marijuana in a locked box in her bedroom closet, regardless of whether her children ever learned of it. A Tri-Met bus driver would not be allowed to permit a teenager to board his bus if he saw another passenger put a marijuana joint into his pocket. A teacher would be prohibited from allowing a group of high-school seniors to remain at Portland's Saturday Market, Salem's Riverfront Park, or any soup kitchen, homeless shelter, needle exchange, or methadone clinic, if the teacher became aware of the presence of any illegal drugs. A restaurant hostess would be required to turn a family away if the hostess knew that a cook or server possessed a controlled substance. Moreover, if a family with children happened

to be visiting relatives or family friends, the hosts would be in violation of the statute for allowing the children to enter their house if the hosts possessed a user amount of controlled substances, unbeknownst to the children or their parents.

The most striking irony created by the Court of Appeals' opinion is that its interpretation re-injects vagueness into the statute by expanding its scope beyond conduct manifestly injurious to minors. Thus, rather that giving voice to the legislature's intent, the Court of Appeals' interpretation frustrates and ignores the goal that the legislature was attempting to achieve.

VI. Application: Defendant did not commit endangering the welfare of a minor.

Defendant's conviction should be reversed because having a user quantity of drugs hidden in her purse did not transform the character of the otherwise untainted car into a place where illegal drug activity is maintained or conducted within the legislature's intended meaning of the words in this statute.

CONCLUSION

For the foregoing reasons, defendant respectfully asks this court to reverse the decision of the Court of Appeals and to reverse her convictions for endangering the welfare of a minor.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

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

Attorneys for Defendant-Appellant
Petitioner on Review
Jackelin Gonzalez-Valenzuela

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

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,288 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 Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 6, 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 Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

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