

Oregon's Juvenile Psychiatric Security Review Board

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In 2005, the Oregon Legislature passed a bill modifying the existing Psychiatric Security Review Board (PSRB) statute, creating a juvenile panel for management of juvenile insanity acquittees. Dubbed the Juvenile PSRB (JPSRB), it borrows heavily from the 30 years of experience of its adult predecessor. Statutory language was also modified to create a plea of "responsible except for insanity" for juveniles in Oregon. The authors discuss the similarities of the JPSRB to the adult PSRB system and highlight the differences that take into account the unique needs of juvenile defendants. They go on to discuss potential problems foreseen with implementation of the JPSRB system and to recommend possible solutions.

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There is very little professional literature regarding the use of the insanity defense in the juvenile justice system.¹ National trends show that the number of juvenile offenders has decreased since the recent peak in 1994. Similarly, the number of juveniles who enter the adult criminal system by judicial waiver is decreasing, consistent with fewer juveniles entering the overall justice system. The percentage of juveniles who are waived into the criminal courts has also been decreasing since the mid-1990s.² Despite this, legislators in Oregon recognized that juveniles continue to enter the legal system and were aware of the role that mental illness plays in many offending behaviors. Psychiatrically based legal defenses that negate criminal responsibility are playing an increasing role in the juvenile justice system, given the move toward a more retributive system. Until now, the small number of juveniles in Oregon who have asserted successful insanity defenses were usually placed under the guardianship of the Department of Human Services until they reached the age of majority, with their care managed at the discretion of the courts.

The 1977 Oregon Legislature created the adult Psychiatric Security Review Board (PSRB).³ The

PSRB was charged with the task of supervising insanity acquittees committed to its jurisdiction by the courts after insanity verdicts. The PSRB has been described in detail in the literature, and it has functioned well over the past 30 years without major attempts to modify its role by either the legislature or the Oregon appellate courts.^{4–8} This successful record most likely stems from the fact that there is something in this system for all interested parties and that it balances protection of the public with treatment for insanity acquittees. Over its 29 years, the PSRB has monitored approximately 2,250 insanity acquittees, with a current caseload of approximately 700 clients. Approximately half of these clients are held in a forensic hospital, and the other half are on conditional release in the community. The fact that the PSRB has been in existence for close to 30 years and has been viewed as successful, no doubt led to its being considered as a potential model for an approach to problems in the juvenile mental health and correctional systems.

With assistance from the Oregon Law Commission, created in 1997 by the Oregon Legislative Assembly to conduct a continuous program of law reform, legislators crafted a bill to expand the PSRB system to include juveniles. It took many years for the idea of extending the PSRB to juveniles to gain acceptance, but in 2005 the state legislature passed a bill to create a second panel of the PSRB to address mental health problems relating to children and ad-

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olescents. The statute established the juvenile panel of the PSRB (JPSRB), which closely resembles its adult progenitor. There are important differences, however, taking into account the unique challenges that arise for juveniles in the justice system. This commentary will first describe the statute creating the JPSRB and then discuss some of the concerns that may arise as the JPSRB begins to function.

The Statute

Because of the uniqueness of the statutory model and to facilitate the analysis of this scheme, the text of the statute is reproduced in full.

Oregon Revised Statutes (ORS) 419C.529 Finding of mental disease or defect; jurisdiction of Psychiatric Security Review Board; conditional release or commitment.

(1) After the entry of a jurisdictional order under ORS 419C.411, (2) if the court finds by a preponderance of the evidence that the young person, at the time of disposition, has a serious mental condition or has a mental disease or defect other than a serious mental condition and presents a substantial danger to others, requiring conditional release or commitment to a hospital or facility designated by the Department of Human Services, the court shall order the young person placed under the jurisdiction of the Psychiatric Security Review Board.

(2) The court shall determine whether the young person should be committed to a hospital or facility designated by the department or conditionally released pending a hearing before the juvenile panel of the Psychiatric Security Review Board as follows:

(a) If the court finds that the young person is not a proper subject for conditional release, the court shall order the young person committed to a hospital or facility designated by the department for custody, supervision and treatment pending a hearing before the juvenile panel in accordance with ORS 419C.532, 419C.535, 419C.538, 419C.540 and 419C.542 and shall order the young person placed under the jurisdiction of the board.

(b) If the court finds that the young person can be adequately controlled with supervision and treatment services if conditionally released and that necessary supervision and treatment services are available, the court may order the young person conditionally released, subject to those supervisory orders of the court that are in the best interests of justice and the young person. The court shall designate a qualified mental health treatment provider or state, county or local agency to supervise the young person on release, subject to those conditions as the court directs in the order for conditional release. Prior to the designation, the court shall notify the qualified mental health treatment provider or agency to whom conditional release is contemplated and provide the qualified mental health treatment provider or agency an opportunity to be heard before the court. After receiving an order entered under this paragraph, the qualified mental health treatment provider or agency designated shall assume supervision of the young person subject to the direction of the juvenile panel. The qualified mental health treatment

provider or agency designated as supervisor shall report in writing no less than once per month to the juvenile panel concerning the supervised young person's compliance with the conditions of release.

(c) For purposes of determining whether to order commitment to a hospital or facility or conditional release, the primary concern of the court is the protection of society.

(3) In determining whether a young person should be conditionally released, the court may order examinations or evaluations deemed necessary.

(4) Upon placing a young person on conditional release and ordering the young person placed under the jurisdiction of the board, the court shall notify the juvenile panel in writing of the court's conditional release order, the supervisor designated and all other conditions of release pending a hearing before the juvenile panel in accordance with ORS 419C.532, 419C.535, 419C.538, 419C.540 and 419C.542.

(5) When making an order under this section, the court shall:

(a) Determine whether the parent or guardian of the young person is able and willing to assist the young person in obtaining necessary mental health services and is willing to acquiesce in the decisions of the juvenile panel. If the court finds that the parent or guardian:

(A) Is able and willing to do so, the court shall order the parent or guardian to sign an irrevocable consent form in which the parent agrees to any placement decision made by the juvenile panel.

(B) Is unable or unwilling to do so, the court shall order that the young person be placed in the legal custody of the Department of Human Services for the purpose of obtaining necessary mental health services.

(b) Make specific findings on whether there is a victim and, if so, whether the victim wishes to be notified of any board hearings concerning the young person and of any conditional release, discharge or escape of the young person.

(c) Include in the order a list of the persons who wish to be notified of any board hearing concerning the young person.

(d) Determine on the record the act committed by the young person for which the young person was found responsible except for insanity.

(e) State on the record the mental disease or defense on which the young person relied for the responsible except for insanity defense.

New Provisions

Organization of the Board

The addition of the JPSRB required a revision of the original PSRB statute to establish two distinct panels, one for adults and one for juveniles. Modeled after the adult board, the juvenile board members include one child psychiatrist, one psychologist with specialized training in child psychology, one attorney with experience in juvenile law, one juvenile probation officer, and a member of the general public.³

“Responsible Except for Insanity”

Oregon’s insanity verdict was changed in 1983 from “not responsible due to mental disease or defect” to “guilty except for insanity.”⁹ This language was adopted in response to the verdict in *United States v. Hinckley*, to clarify public confusion regarding whether individuals were responsible for an act that they had clearly committed.¹⁰ Oregon is currently the only state to use this legal designation. In the 2005 statute creating the JPSRB, the Legislature termed the insanity verdict for juveniles “responsible except for insanity,” in keeping with the concept that the juvenile justice system is separate from the adult criminal system and is a system that is intended to regard juveniles in a noncriminal framework.¹¹

Qualifying Diagnoses

To be placed under the jurisdiction of the JPSRB after pleading insanity, a juvenile must have either a “serious mental condition,” or “a mental disease or defect and [present] a substantial danger to others.” The statute defines “serious mental condition” to include “psychotic disorders, bipolar disorders, and major depression.”¹² The adult statute is a derivative of the American Law Institute Test, excluding from the definition of “mental disease or defect” those abnormalities manifested only by repeated criminal or otherwise antisocial conduct.⁹ The juvenile statute follows suit, specifically excluding these categories and adding conduct disorder to the exclusions.¹² In addition, the juvenile statute includes one amendment made in 1983 to the adult statute that excluded conditions “constituting solely a personality disorder.”⁹ The 2005 Legislature, however, faced a major problem as to how to define mental defect for the purposes of this statute. It was faced with a political dilemma of how to deal with individuals who are developmentally disabled. There was concern in the legislative assembly that including mental defect would lead to an overwhelming number of mentally retarded and developmentally disabled individuals being placed under the jurisdiction of the JPSRB, leading to an untenable budgetary situation. The legislature chose a temporary measure of excluding “mental defect” which was defined as “manifesting in significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two areas or characterized by severe and pervasive impairment manifested during the developmental period.”¹²

Further scrutiny of the legislation, however, has led to the realization that this exclusion creates uncertainty as well as significant legal problems. First, the language of the statute is unclear as to who might be excluded. For example, a juvenile with a diagnosis of Asperger’s disorder, who has average intelligence, may or may not be excluded from being placed under the jurisdiction of the JPSRB (depending on whether the juvenile poses a substantial danger to others). The statutory language is simply unclear on this point. Furthermore, the exclusion creates a situation in which juvenile offenders who are mentally retarded or developmentally disabled and who successfully plead insanity are in a legal “purgatory” of sorts. There is no clear statutory guidance as to the appropriate disposition of these individuals—only the admonishment that they will not be placed under JPSRB jurisdiction. This deficiency leaves these individuals in the very situation that the legislation expanding the PSRB to include a juvenile panel was tasked to resolve.

The Oregon Law Commission recognized the difficulties that will inevitably develop from the exclusion of mental retardation and developmental disorders and plans to introduce a bill to the 2007 Oregon Legislative Assembly that creates amendments to the JPSRB statutes.¹³ The amendments will provide for the removal of the exclusion of mental retardation from the definition of “mental disease or defect.” Further, it will specify the inclusion under “serious mental conditions” of a mental deficiency manifested as “mental retardation,” if the deficiency exists concurrently with qualitative deficits in “activities of daily living.” The definition of mental retardation is taken from the *Manual on Terminology and Classification in Mental Retardation*.¹⁴ Activities of daily living are defined to include bathing and hygiene, eating, mobility, toileting, and communication. The deficits in activities of daily living cannot be a result of mental illness, substance abuse, or situational trauma.

Thus, there is confusion about which diagnoses qualify for an insanity defense for juveniles. Qualifying diagnoses include “serious mental disorders” (psychotic disorder, bipolar disorder, and major depression). Nonqualifying diagnoses include antisocial behavior, personality disorders, conduct disorders, and a confusing mixture of developmental disorders. Finally, there is the provision for inclusion of all youth with a “mental disease or defect” other

than "a serious mental condition" who also present as a "substantial danger to others." It would not be too much speculation to say that this array of those qualifying and nonqualifying diagnoses will lead to great confusion in the trial and appellate courts unless clarified soon by the legislature.

JPSRB Process

If the court finds that juvenile has a "serious mental condition, or a mental disease or defect and presents a substantial danger to others," it orders the juvenile placed under the jurisdiction of the JPSRB.¹⁵ As with the adult system the court also makes a determination of the initial placement of the juvenile either in a secure treatment facility or on conditional release in the community. Once these determinations are completed, the JPSRB takes over the management of the juvenile up to the limits of the JPSRB's jurisdiction. As with the adult board, the JPSRB controls movement of the juvenile by making determinations regarding commitments to a treatment facility, conditional release into the community, revocation of conditional release, or early discharge from the jurisdiction of the board. The JPSRB has the authority to have parents of juveniles sign an irrevocable consent form in which the parents agree to any placement decision made by the PSRB. If the parents are unwilling to consent, the court can order the juveniles placed in the custody of the Department of Human Services to obtain mental health treatment.¹⁵

It is important to note that juveniles under the jurisdiction of JPSRB must remain segregated from adults for the provision of treatment services in secure settings. Because the child and adolescent unit at the state hospital was eliminated several years ago, juveniles under JPSRB jurisdiction will be placed in a separate secure adolescent inpatient treatment facility run by a private nonprofit agency.

Length of JPSRB Jurisdiction

The time served under the jurisdiction of the board cannot exceed the maximum sentence for the charges had the individual been convicted of the crime. In the state of Oregon, the sentences are up to 1 year for a misdemeanor, 5 years for a Class C felony, 10 years for a Class B felony, and 20 years for a Class A felony.^{16,17} However, the period of any disposition may not extend beyond the date on which the youthful offender becomes 25 years of age, except

for individuals charged with murder or any aggravated form of murder. The placement of those individuals under the jurisdiction of the panel continues for life. Juveniles who become adults (age 18) during their time under JPSRB jurisdiction can be transferred to the jurisdiction of the adult panel for the remainder of the supervisory period.¹⁸

In 1994, Oregon voters approved Ballot Measure 11, which created mandatory sentence terms for 16 violent and sex-related offenses, to which an additional five offenses have since been added.¹⁹ Measure 11 also provides for mandatory waiver of youthful offenders 15 years of age or older into the adult criminal court system who commit any of the now 21 offenses covered by the law.²⁰ The PSRB statute specifies that any juvenile offender who is charged with a Measure 11 crime, receives the mandatory waiver to adult criminal court, and successfully mounts an insanity defense is placed under the jurisdiction of the adult panel of the PSRB, regardless of his or her age at that time. Similarly, any juvenile who is judicially waived to adult court and is found guilty except for insanity would be placed under the jurisdiction of the adult panel.

In effect, this creates the confusing situation of four distinct populations of insanity acquittees within the juvenile legal system. The first is any juvenile offender 15 years of age or older, charged with a Measure 11 offense, or juveniles waived to adult court. They are placed under the adult panel jurisdiction. The second is juveniles younger than 15 who are charged with murder or aggravated murder. They are placed under the juvenile panel's jurisdiction for life (though it is likely that their management will be transferred to the adult panel upon their 18th birthday). The third is juveniles younger than 15 years not waived to adult court but charged with a Measure 11 offense. They are placed under the jurisdiction of the juvenile panel, but, at most, until they are 25 years of age. The fourth is juveniles of any age charged with a non-Measure 11 crime; they also are placed under the jurisdiction of the juvenile panel, but, at most, until they are 25 years of age.

As with the adult PSRB, if while under the jurisdiction of the juvenile panel the juvenile either no longer has a serious mental condition or has a mental disease or defect other than a serious mental condition but no longer presents a substantial danger to others, that juvenile must be discharged from PSRB jurisdiction.²¹ Juveniles discharged in this way are no

longer under the control of the PSRB, and as noted earlier, have been acquitted of their crimes. They become free citizens without further restrictions placed on them. To address the concept of mental illness in remission, the 2005 statute adopted the statutory definition from the adult statute that specifies that a juvenile is still considered to have a mental disease or defect if it may, with reasonable medical probability, occasionally become active and cause him or her to be dangerous.²¹

Conditional Release

Again, as with the adult program, the primary method of insuring community protection is through institutionalization, with the safeguards in the conditional release program requiring monthly monitoring of those on conditional release and a mechanism for prompt revocation of conditional release when indicated. The primary concern for the determination of qualification for conditional release by the PSRB remains the protection of the community.¹⁵ The JPSRB is required to hold a variety of hearings on a regular basis, including hearings requested by the juveniles or by the facility director in which conditional release may be requested. The criteria for conditional release are specified in the statute and include being adequately controlled with proper available supervision and treatment services. The juvenile panel also has the power to require the juvenile to comply with treatment as a condition of release. Failure to do so could result in revocation of the conditional release status.¹⁵

The procedure for revocation of conditional release status is handled entirely by the JPSRB. If the juvenile violates the conditions of release or it appears to treatment providers or supervisors that the mental health of the juvenile is deteriorating such that the youth could pose a substantial danger to others, the juvenile panel or the chairperson of the panel can order revocation. Furthermore, in emergent situations, any supervisor of the juvenile within the community can request that the juvenile be taken into custody if he or she believes that the juvenile presents a substantial danger to the community. If conditional release status is revoked, a written order of the JPSRB is sufficient to act as a warrant and allow police to detain the juvenile and transport him or her to a designated facility. The juvenile must be transported to the treatment facility and may not be brought to jail unless charged with a new crime. A

hearing by the juvenile panel must occur within 20 days of revocation, and the state has the burden of proving the unfitness of the juvenile to remain on conditional release. As with any determinations made by the JPSRB, the burden of proof is always by a preponderance of the evidence.²¹

Legal Protections

Juveniles under the jurisdiction of the JPSRB have a multitude of civil liberty protections afforded to them throughout the supervisory period. As mentioned, juveniles have the right to periodic hearings to review their progress and current status. At these hearings, they have the right to be present with legal counsel, to have counsel appointed if they are unable to afford an attorney, to call witnesses to testify, to cross-examine witnesses, and to review any and all information available to the board for the purpose of making decisions.²¹ The decisions of the board can also be appealed to the Oregon appeals courts.

The original PSRB statute provided for mandatory periodic reviews of the status of an individual placed under the jurisdiction of the PSRB. Recognizing the limited time that juveniles might be under the jurisdiction of the PSRB (no longer than the 25th birthday unless transferred to the adult panel), the statute compresses the timeline for required hearings and review. Juveniles under the jurisdiction of the PSRB are entitled to a minimum of one hearing yearly to determine if they should be considered for discharge from supervision or conditional release. Adults are entitled to hearings every two years. Having spent three years on conditional release, juveniles are entitled to a hearing within 30 days of the expiration of the three-year period to determine whether they should be discharged from the jurisdiction of the JPSRB.²² For adults, the individual must spend five years on conditional release before a mandatory review.²³

The Future of the JPSRB

The JPSRB was appointed by the governor and began to organize on January 1, 2007. The panel is to begin to receive clients on July 1, 2007. The juvenile panel will not "inherit" jurisdiction over any juveniles who have previously successfully asserted an insanity defense. The JPSRB thus starts with a "clean slate," with an initial budget built on an estimate of up to 10 juveniles being placed under the juvenile panel's jurisdiction annually. However, there re-

mains uncertainty regarding the actual number of juveniles for which the panel will become responsible. Amendments to the PSRB legislation may create the opportunity for individuals with mental retardation to be placed under the JPSRB's jurisdiction. Some critics have voiced concern that this will lead to a flood of placements, even up to 100 or more juveniles annually. History tells us that only four juveniles who were waived into adult court have been remanded to the jurisdiction of the adult panel. Yet most in Oregon acknowledge that the juvenile justice and mental health systems are in crisis and that the JPSRB may provide a much needed opportunity for some juveniles to receive treatment services. We believe that we have seen this happen with the adult PSRB, with diversion of some mentally ill individuals into the criminal justice system when community mental health and hospital services have had severe budgetary problems.

The creation of the JPSRB is an innovative approach to an area that is much in need of attention: the interface between the juvenile mental health and criminal justice systems. As is evident from this report, there are many areas that need further clarification in the statute, not the least of which are the criteria for inclusion in the system. How this complicated statute will be viewed by lawyers and judges is yet to be determined, as is the accuracy of the prediction of 10 cases per year. In an environment where treatment needs of children often go unmet, we can envision the frequent use of this statutory mechanism. Another question is whether this statute will stand up over time in the way that the adult system has persisted with few changes. There certainly have been problems on the adult side, especially with the number of individuals who have become the responsibility of the adult PSRB. The caseload has placed a strain on Oregon's forensic mental health system, as both the forensic hospital and the community treatment systems have had to

provide the budget to treat a very large number of insanity acquittees. The number of cases seems to be the greatest problem for the treatment resources of the state of Oregon. Given that fact, it may be that the number of young individuals committed to the jurisdiction of the JPSRB determines its ultimate future and acceptance.

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