
IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Petitioner on Review,

v.

BRIAN G HUBBELL,
Defendant-Appellant,
Respondent on Review.

Supreme Court No. S069092
Court of Appeals No. A170143
Washington County Circuit Court Case No. 18CR43198

***AMICUS CURIAE* BRIEF**
IN SUPPORT OF RESPONDENT ON REVIEW
BY *AMICUS* DRUG POLICY ALLIANCE

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Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. OF DRUG ISSUES 132 (2017).

Alexander C. Tsai et al., *Stigma as a fundamental hindrance to the United States opioid overdose crisis response*, 16 PLOS MED. e1002969 (2019).

Amy S. Bohnert et al., *Policing and risk of overdose mortality in urban neighborhoods*, 113 DRUG & ALCOHOL DEPENDENCE 62 (2011).

Andrea Jakubowski et al., *Knowledge of the 911 Good Samaritan Law and 911-calling behavior of overdose witnesses*, 39 SUBSTANCE ABUSE 233 (2018).

Ballot Measure 110, *Drug Addiction Treatment and Recovery Act* (2020) (enacted).

CALEB J. BANTA-GREEN ET AL., UNIV. OF WASH., WASHINGTON’S 911 GOOD SAMARITAN DRUG OVERDOSE LAW - INITIAL EVALUATION RESULTS (2011).

CITY OF VANCOUVER, SUBMISSION ON THRESHOLDS: REQUEST FOR AN EXEMPTION FROM THE CONTROLLED DRUGS AND SUBSTANCES ACT (CDSA) PURSUANT TO SECTION 56(1) THAT WOULD DECRIMINALIZE PERSONAL POSSESSION OF ILLICIT SUBSTANCES WITHIN THE CITY OF VANCOUVER (2021).

Chandler McClellan et al, *Opioid-overdose laws association with opioid use and overdose mortality*, 86 ADDICTIVE BEHAV 90 (2018).

COREY DAVIS, NETWORK FOR PUB. HEALTH L., LEGAL INTERVENTIONS TO REDUCE OVERDOSE MORTALITY: OVERDOSE GOOD SAMARITAN LAWS (2021).

ERICA McADAM, FROM ILLICIT TO EQUITABLE: AN EVALUATION OF DECRIMINALIZATION MODELS FOR BRITISH COLUMBIA (2022).

- Evan Stanforth et al., *Correlates of Engaging in Drug Distribution in a National Sample*, 30 PSYCHOL. OF ADDICTIVE BEHAV. 138, 140 (2016).
- Jessica Xavier et al., “*There are solutions and I think we’re still working in the problem*”: *The limitations of decriminalization under the good Samaritan drug overdose act and lessons from an evaluation in British Columbia, Canada*, 105 INT’L J. OF DRUG POL’Y 103714 (2022).
- Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105 (2006).
- Kim Moeller, Rasmus Munksgaard & Jakob Demant, *Illicit drug prices and quantity discounts: A comparison between a cryptomarket, social media, and police data*, 91 INT’L J. OF DRUG POL’Y 102969 (2021).
- Kora DeBeck et al., *HIV and the Criminalisation of Drug Use among People Who Inject Drugs: A Systematic Review*, 4 LANCET HIV e357 (2017).
- Lallen T. Johnson & Tayler Shreve, *The ecology of overdose mortality in Philadelphia*, 66 HEALTH & PLACE 1 (2020).
- Leo Beletsky & Corey S. Davis, *Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited*, 46 INT’L J. OF DRUG POL’Y 156 (2017).
- Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. OF QUANTITATIVE CRIMINOLOGY 439 (2005)
- OR. HEALTH AUTH., UNINTENTIONAL DRUG OVERDOSE IN OREGON: THE CURRENT AND POTENTIAL IMPACTS OF THE COVID-19 PANDEMIC (2022).
- Petitioner’s Brief on the Merits, *State v. Hubbell* (SC S069092) (June 10, 2022).
- Quick Facts, United States*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/fact/table/US/PST045216>.
- RUSSELL NEWCOMBE, LIFELINE, QUANTITY THRESHOLDS FOR DISTINGUISHING DRUG POSSESSION FROM POSSESSION WITH INTENT TO SUPPLY IN BRITAIN: A REVIEW OF RELEVANT EVIDENCE (2006).
- Senate Bill (SB) 755 (2021) (enacted).

SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, U.S. BUREAU OF JUSTICE STATISTICS, *DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA* (2015).

Stephen Koester et al., *Why are some people who have received overdose education and naloxone reticent to call Emergency Medical Services in the event of overdose?*, 48 INT'L J. DRUG POL'Y 115 (2017).

U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020 – But Are Still Up 15%, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (May 11, 2022),
https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.

U.S. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 2019-2020 NATIONAL SURVEY ON DRUG USE AND HEALTH: MODEL-BASED PREVALENCE ESTIMATES (50 STATES AND THE DISTRICT OF COLUMBIA) (2020).

INTRODUCTION

In *State v. Boyd*, the Court of Appeals, without textual or legislative analysis, interpreted the term “attempted transfer” contained within ORS 475.005(8), which defines delivery of a controlled substance, to include the elements of “attempt” supplied by ORS 161.405(1). *State v. Boyd*, 92 Or App 51, 756 P2d 1276, *rev den*, 307 Or 77 (1988). The effect of this is that “the completed crime of delivery and the inchoate crime of attempted delivery have been treated as one.” *State v. Hubbell*, 314 Or App 844, 846, 500 P3d 728 (2021). For over 30 years, the “*Boyd* delivery” has permitted convictions and punishment for completed delivery based only upon proving the elements of attempt. *Id.* As a result, “the ordinary hierarchy of offenses in Oregon—that completed crimes are more serious and punished more severely than inchoate crimes, *see* ORS 161.405—does not hold true for the crime of delivery of a controlled substance.” *Id.*

The court in *Boyd* erred in its assumption that the legislature intended to punish an attempted delivery as a completed delivery. As the Court of Appeals below concluded, “*Boyd*’s leap—defining the word ‘attempt’ within a substantive statute to be the inchoate crime of attempt—was not just wrong but plainly wrong; it was a statutory interpretation with ‘deficiencies [that] are apparent with even a basic exploration of the text and context of the statute, let alone its legislative history.’” *Hubbell*, 314 Or App at 848

(quoting *State v. Civil*, 283 Or App 395, 417-18, 388 P3d 1185 (2017))
(brackets in *Hubbell*).

Defendant was convicted of a *Boyd* delivery based on 24.17 grams of fentanyl and ten zip lock bags found in his room. *Hubbell*, 314 Or App at 848-51; Petitioner’s Brief on the Merits, at 5. Recognizing the error and injustice of *Boyd*’s interpretation of attempted transfer, the Court of Appeals overturned *Boyd*, calling it a “bootstrapped doctrine” and an “Oregon oddity.” *Id.* at 846. Defendant’s conviction for completed delivery was reversed, but the Court of Appeals remanded for entry of a conviction for attempted delivery and resentencing. *Id.* at 873. The court justified this based on “the amount and circumstances in which the fentanyl was found.” *Id.* at 872.

While the Court of Appeals was correct in reversing the holding of *Boyd*, it erred in relying on drug weight and packaging alone to justify a conviction for attempted delivery under ORS 161.405. *Amicus* supports Defendant’s position that this Court should affirm the overturning of *Boyd* but reverse the order to remand for entry of a conviction of attempted delivery based on drug weight and packaging alone. We write to correct the false presumptions that drug weight and packaging are, by themselves, useful indicators of intent to deliver and therefore more evidence is required to establish a substantial step toward delivery. Quantity and packaging of

substances alone provide little insight into intent because people acquire and store controlled substances in a multitude of ways and for various reasons, many of which are consistent with possession for personal use. Relying on these factors alone risks exposing people who possess drugs for personal use to severe criminal penalties for attempted delivery. Moreover, we write to demonstrate how *Boyd* and presumptions about drug weight and packaging will likely exacerbate racial disparities in drug law enforcement and hinder efforts to reduce overdose deaths.

STATEMENT OF INTEREST

Drug Policy Alliance (DPA) is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. Established in 1994, DPA is a non-partisan organization with tens of thousands of members nationwide. DPA is dedicated to advancing policies that reduce the harms of drug use and drug prohibition and seeking solutions that promote public health and public safety. DPA is actively involved in the legislative process across the country and strives to roll back the excesses of the drug war, block new, harmful initiatives, and promote sensible drug policy reforms. The organization also regularly files legal briefs as *amicus curiae*, including in other cases pertaining to criminal penalties for drug offenses.

ARGUMENT

I. RELYING ON DRUG WEIGHT AND PACKAGING TO ESTABLISH A SUBSTANTIAL STEP TOWARD DELIVERY UNFAIRLY TREATS POSSESSION AS ATTEMPTED DELIVERY, OR UNDER *BOYD*, AS COMPLETED DELIVERY.

ORS 161.405 describes attempt as “when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.” ORS 161.405(1). To prove a defendant took a substantial step in furtherance of a criminal act, as opposed to mere preparation, the state must submit evidence which proves the defendant had a criminal intent and separate evidence of conduct which strongly corroborates that intent. *State v. Walters*, 311 Or 80, 85, 804 P2d 1164 (1991); *see also State v. Rinkin*, 141 Or App 355, 365-66, 917 P2d 1035 (1996). Oregon courts have held, without adequate consideration of alternate justifications, that aggregate drug weight can be sufficient to establish intent and the presence of individual packages can strongly corroborate that intent. *See State v. Newsted*, 297 Or App 848, 444 P3d 527, *rev den*, 365 Or 557 (2019); *see also State v. Alvarez-Garcia*, 212 Or App 663, 159 P3d 357 (2007); *State v. Fulmer*, 105 Or App 334, 804 P2d 515 (1991). The problems with this approach are numerous. Aggregate drug weight is not a useful or predictable indicator of intent because people possess larger quantities of drugs for a variety of reasons, most of which are consistent with possession for personal

use. Relying on the presence of individual packaging to establish conduct which advances an intent to deliver is similarly problematic because people may store drugs in this manner for many reasons, including the possibility that they purchased the drugs that way. Relying on quantity and packaging to infer intent to deliver can be used to unfairly turn possession into a substantial step toward delivery, and under *Boyd*, punished as a completed delivery.

A. *Drug weight is not a useful indicator of intent.*

The weight of a mixture containing controlled substances, by itself, does very little to indicate intent to distribute. The amount of controlled substances possessed does not necessarily relate to an individual's involvement in commercial drug distribution. In fact, people may possess differing quantities of controlled substances for a variety of personal and environmental reasons. Thus, it is not reliable to determine intent to sell based on quantity possessed alone.

There is no one threshold for a given controlled substance that can be used to determine possession for personal use versus possession with intent to distribute.¹ Concluding that a person intended to distribute a controlled

¹ CITY OF VANCOUVER, SUBMISSION ON THRESHOLDS: REQUEST FOR AN EXEMPTION FROM THE CONTROLLED DRUGS AND SUBSTANCES ACT (CDSA) PURSUANT TO SECTION 56(1) THAT WOULD DECRIMINALIZE PERSONAL

substance based solely on the amount possessed is therefore inappropriate.

There are numerous reasons why a person may possess larger quantities of drugs without being involved in commercial drug activity. For instance, people may buy large amounts of substances on or near the day when they receive their income.² Further, purchasing larger amounts may result in a lower unit price, meaning people may purchase in bulk to save money.³

People may also purchase larger quantities to reduce the amount of contact with their supplier, thus reducing the risk of detection by law enforcement and time and costs associated with meeting with the supplier.⁴ Especially in rural areas, considerations of the time and cost of transportation to a supplier's location may influence people to purchase larger quantities.⁵

People with severe substance use disorders are also more likely to possess larger quantities because they have higher tolerances and must consume larger quantities in order to experience the effects of the drugs and so they can minimize the risk of withdrawal.⁶ Assuming that higher quantities infer

POSSESSION OF ILLICIT SUBSTANCES WITHIN THE CITY OF VANCOUVER 5 (2021).

² ERICA MCADAM, FROM ILLICIT TO EQUITABLE: AN EVALUATION OF DECRIMINALIZATION MODELS FOR BRITISH COLUMBIA 35 (2022).

³ RUSSELL NEWCOMBE, LIFELINE, QUANTITY THRESHOLDS FOR DISTINGUISHING DRUG POSSESSION FROM POSSESSION WITH INTENT TO SUPPLY IN BRITAIN: A REVIEW OF RELEVANT EVIDENCE 4 (2006).

⁴ *Id.* at 4.

⁵ MCADAM, *supra* note 2, at 34.

⁶ NEWCOMBE, *supra* note 3, at 4.

an intent to distribute will subject people with substance use disorders, who are more likely to possess higher quantities, to prosecution and harsher criminal penalties for attempted drug delivery, even though they may be the most in need of community-based health services.

Other factors that may impact the quantity of a controlled substance possessed include the route of administration used (e.g., smoking versus injection) and the purity and price of the controlled substance. For example, a person may purchase more when the price is lower.⁷ Given the variety of reasons that a person may possess large quantities of drugs, most of which are consistent with possession for personal use, it is imprudent to assume that a certain quantity of controlled substances implies an intent to distribute.⁸

Assuming that possession of higher quantities of controlled substances indicates an intent to distribute may have negative health repercussions.

⁷ Kim Moeller, Rasmus Munksgaard & Jakob Demant, *Illicit drug prices and quantity discounts: A comparison between a cryptomarket, social media, and police data*, 91 INT'L J. OF DRUG POL'Y 102969, 4 (2021); NEWCOMBE, *supra* note 3, at 5.

⁸ Although there cannot be a single threshold to determine possession for personal use from possession with intent to distribute, it is worth noting that recent research conducted by the City of Vancouver, British Columbia indicates that nearly 44 grams of opioids, including fentanyl, would be within the higher end estimated amount that a person may possess for personal use over a 10-day period. CITY OF VANCOUVER, *supra* note 1, at 7. That is nearly double the amount possessed by the defendant in the present case (24.17 grams). Petitioner's Brief on the Merits at 5.

People may consume more or more quickly, or both, if they fear severe penalties for drug distribution based on the amount they possess. Doing so would likely increase the risk of overdose.

Because there are a multitude of reasons that people possess larger quantities of drugs, most of which are not associated with intent to distribute, it is not appropriate to assume that quantity alone equals an intent to distribute. Therefore, in the present case, intent to transfer should not have been inferred based on quantity alone.

B. *The manner in which drugs are packaged does not inherently corroborate an intent to deliver.*

Just as drug weight provides little indication of distributive intent, the manner of packaging does not inherently corroborate an intent to deliver.

People who use drugs may store their drugs in a variety of manners, including in individual containers, even if not engaging in commercial activity. If a person is making a bulk purchase to acquire a multiple day supply, there is no guarantee that they will receive such an order in bulk packaging instead of individual packages. *See State v. Wilkins*, 703 S.E.2d 807, 810 (Ct. App. N.C. 2010) (“While small bags may typically be used to package [a controlled substance], it is just as likely that the defendant was a consumer who purchased the drugs in that particular packaging from a dealer.”) One researcher noted, “It is recommended that the number of

bags/wraps should not be used as a criterion for distinguishing possession from [possession with intent to supply], because many dealers who give price reductions on larger purchases provide the user with multiple retail-size deals, rather than providing the larger amount in a single bag/wrap” (emphasis in original).⁹ The presence of individual packages may simply be indicative of the amount purchased, because greater quantities could have been bought in a greater number of packages. If so, the packaging may only reflect the amount purchased rather than corroborate intent to distribute. Smaller packaging can therefore be consistent with possession for personal use and should not be interpreted to intrinsically verify intent to distribute.

There are additional reasons why a person may store drugs in separate packages without intending to deliver the drugs. For safety reasons, they may weigh out individual use units in advance to decrease the likelihood of overdose. They may ration out a bulk quantity into individual doses to last over a certain period of time. This is particularly true of rural users, who may have to travel long distances to make purchases. They may also be mistaken about the law, and assume that their packaging into individual use units makes them less culpable than possession of a bulk quantity would.

⁹ NEWCOMBE, *supra* note 3, at 21.

Given the host of reasons that a person may possess large quantities of controlled substances and store those substance in individual packaging, most of which are not related to intent to distribute, it is inappropriate to assume that greater quantities and individual packaging translates into attempted delivery. In some circumstances, individual packaging may only reflect that a person bought a larger quantity. Treating these as separate factors indicating both an intent to deliver and verification of that intent is thus unjust. Relying on drug weight and packaging alone to confirm attempted delivery ignores the lived realities of people who use drugs and may expose them to severe drug delivery penalties for engaging in logical financial and risk management practices. More is needed to sustain a conviction for attempted delivery.

C. *Inferring intent to deliver based on factors consistent with possession for personal use results in severe and unjust punishment for possession.*

Relying on possession of certain amounts of controlled substances stored in individual packages to establish intent to deliver, thereby satisfying the substantial step requirement for attempted delivery, or under *Boyd*, punished as a completed delivery, will result in extremely harsh penalties for conduct consistent with possession for personal use. Recent changes to Oregon law reclassified possession of smaller amounts of controlled substances to a civil infraction punishable by a presumptive \$100 fine, while

simple possession of a quantity greater than statutory thresholds remains a class A misdemeanor punishable by up to 364 days imprisonment and a fine of up to \$6,250 if the amount possessed is not “a substantial quantity.” ORS 475.900(1)(a); ORS 153.019; ORS 161.615(1); ORS 161.635(1)(a); ORS 475.752(3), (7); ORS 475.854. In contrast, delivery of a certain controlled substances is a class A felony, punishable by up to 20 years imprisonment and a fine of up to \$375,000. *See* ORS 161.605(1); ORS 161.625(1)(b); ORS 475.752(1)(a); ORS 475.850(2). Depending on the state’s discretion, the same conduct could be treated as a civil infraction or one of the most serious felonies. Without adequately considering whether quantity and packaging indicates intent to deliver or simply reflects other factors consistent with possession for personal use, people will likely be prosecuted for serious drug delivery felonies, including completed delivery under *Boyd*.

The people of the State of Oregon and the legislature have determined that possession of drugs should be not be subject to criminal penalties when the amount is below certain quantities and should be punished as a misdemeanor when those quantities are exceeded (unless “a substantial amount” was possessed). *See* Senate Bill (SB) 755 (2021) (enacted); Ballot Measure 110, *Drug Addiction Treatment and Recovery Act* (2020) (enacted).

Condoning that drug weight and packaging, without more, suffices to establish a substantial step toward delivery, severely undermines the intent

of the people and legislature by authorizing law enforcement to treat conduct consistent with possession for personal use as attempted drug delivery. The *Boyd* doctrine further exacerbates this injustice by punishing the conduct as a completed delivery.

Drug weight and packaging are unreliable indicators of intent to deliver. Possession of larger quantities and individual packaging are often consistent with possession for personal use. Convictions for attempted delivery, or completed delivery under *Boyd*, should require more evidence than weight and packaging to prove a defendant took a substantial step toward delivery. Otherwise, people who possess drugs for personal use risk facing severe delivery charges at the discretion of law enforcement, an outcome contrary to the intent of the voters of Oregon and the legislature.

II. CONTINUANCE OF THE FLAWED *BOYD* DOCTRINE AND USE OF CONDUCT CONSISTENT WITH POSSESSION FOR PERSONAL USE TO ESTABLISH ATTEMPTED DELIVERY IS LIKELY TO EXACERBATE RACIAL INEQUITIES.

The Court of Appeals astutely asked, in reference to *Boyd*, “whether we risk perpetuating a construction that would not only be wrong and unjust, but one whose effects may be disproportionately borne along racial and ethnic lines.” *Hubbell*, 314 Or App at 866. Further, the court pondered “[H]as the brunt of our mistake in elevating attempted delivery to completed delivery been born, disproportionately, by Oregonians of color?” *Id.* at 867. The answer to these inquiries is almost certainly yes. Further, relying on

conduct consistent with possession for personal use to establish a substantial step toward attempted delivery similarly “raise[s] a serious question about the delivery of equal justice in Oregon.” *Id.* Affirming the overturning of *Boyd* and requiring sufficient evidence to prove a substantial step toward attempted delivery will help to reduce rampant racial disparities in Oregon drug law enforcement.

Black, Indigenous, and people of color (BIPOC) communities have long borne the brunt of drug law enforcement in Oregon and across the nation. Engagement in drug selling is consistent across racial groups. An analysis from data collected by the federal Substance Abuse and Mental Health Services Administration found that 3.4 percent of white people, 2.9 percent of Black people, 2.8 percent of Latinx people, 4.2 percent of Native Americans or Alaskan Natives, 3.5 percent of Native Hawaiians or Other Pacific Islanders, and 1.1 percent of Asian people reported selling drugs in the past year.¹⁰ Yet, 78 percent of people in federal prison for a drug offense (99.5 percent of whom were there for selling and distribution) were people of color: 38.8 percent were Black and 37.2 percent Latinx,¹¹ although these

¹⁰ Evan Stanforth et al., *Correlates of Engaging in Drug Distribution in a National Sample*, 30 PSYCHOL. OF ADDICTIVE BEHAV. 138, 140 (2016).

¹¹ SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, U.S. BUREAU OF JUSTICE STATISTICS, DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 1, 3 (2015).

groups make up only 13.6 percent and 18.9 percent of the total population, respectively.¹²

Additional research has found that Black people were more frequently charged with drug sales offenses than white people, noting that “while Blacks were significantly more likely than Whites to have been arrested most recently for drug sales, we found no statistical race difference in self-reports of ever having sold drugs.”¹³ Even in open air drug markets, where transactions are more visible, disparities persist. Regardless of racial composition of those present and levels of engagement in drug activity, Black individuals were substantially more likely to be arrested for sales offenses than white individuals.¹⁴

¹² *Quick Facts, United States*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/fact/table/US/PST045216>.¹³ Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. OF DRUG ISSUES 132, 136 (2017).

¹³ Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. OF DRUG ISSUES 132, 136 (2017).

¹⁴ Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 120 (2006). (In the drug market in a racially mixed area, 38 percent of observed drug transactions involved Black drug sellers and 39 percent involved white drug sellers, but 58.6 percent of those arrested for drug delivery were Black while only 20.8 percent were white. In a drug market in a whiter area of the city where only 4 percent of sales involved a Black seller, 32 percent of those arrested for drug delivery were Black.).

The disparities continue past arrest and charging into sentencing. A landmark meta-analysis of 71 studies concluded that Black individuals are generally sentenced more harshly than white individuals, even when all other variables are controlled for.¹⁵ The disparity grows even larger in the context of drug crimes.¹⁶

These data demonstrate that people of color are more likely to be arrested, prosecuted, and sentenced harshly for drug sales offenses. It stands to reason that the *Boyd* decision has resulted in much more severe penalties for people of color by virtue of their increased likelihood of being prosecuted for drug delivery. Should this flawed decision be allowed to stand, people of color will continue to be disproportionately exposed to harsh penalties for drug sales offenses. Permitting conduct consistent with possession for personal use to be treated as a substantial step in furtherance of delivery will similarly allow for continued racial disparities in attempted delivery prosecutions. The Court of Appeals rightly raised concerns about the racial disparities implicated by *Boyd*, but those same concerns also council against relying on drug weight and packaging to prove attempted delivery.

¹⁵ Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. OF QUANTITATIVE CRIMINOLOGY 439 (2005).

¹⁶ *Id.*

III. PUNISHING ACTS CONSISTENT WITH POSSESSION FOR PERSONAL USE AS ATTEMPTED DELIVERY, AND UNDER *BOYD* AS COMPLETED DELIVERY, REDUCES THE EFFECTIVENESS OF HARM REDUCTION APPROACHES AND FURTHER ENDANGERS INDIVIDUALS WHO USE DRUGS.

During the *Boyd* rule's existence, the number and rate of annual fatal drug overdoses in Oregon has dramatically increased and is now at its highest point in history. Punitive drug laws have failed to protect the health of Oregonians. In fact, *Boyd* and Oregon's broader discretionary criminal approach further endangers residents' health by impeding harm reduction efforts targeting the overdose crisis.

Across the United States, drug overdoses have consistently increased in the past two decades, but recent years have seen the most severe upticks. Following an increase of 30 percent in 2020, fatal overdoses further increased by nearly 15 percent to reach 107,622 overdose deaths in 2021.¹⁷ In Oregon, drug overdose deaths reflect the national trend of the past two decades, with the rate of deaths per 100,000 Oregonians tripling from 6.1 in 1999 to 18.7 in 2020.¹⁸ As with the harms of drug law enforcement, the burden of overdose deaths is most severe in communities of color. Overdose

¹⁷ *U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.

¹⁸ OR. HEALTH AUTH., UNINTENTIONAL DRUG OVERDOSE IN OREGON: THE CURRENT AND POTENTIAL IMPACTS OF THE COVID-19 PANDEMIC 1 (2022).

rates are highest among Indigenous Oregonians, at 42.8 deaths per 100,000 people, followed by non-Hispanic Black Oregonians, at 32.5 deaths per 100,000 people.¹⁹ The prevalence of substance use disorders is also high. In Oregon, 18.22 percent of residents have a substance use disorder, which is the third highest percentage in the United States.²⁰ Treatment for people with substance use disorders is also lacking. Nearly one-fifth of Oregonians needing treatment at a specialty facility did not receive it: the highest percentage of any state.²¹

Over-criminalization of drug use and enhanced enforcement of drug laws exacerbates overdose concerns. Increased neighborhood police activity has been associated with increased fatal drug overdoses.²² Criminalization may cause people to prepare and use drugs in a quicker, more private manner to avoid police detection, exposing them to greater overdose risk.²³

¹⁹ *Id.*

²⁰ U.S. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 2019-2020 NATIONAL SURVEY ON DRUG USE AND HEALTH: MODEL-BASED PREVALENCE ESTIMATES (50 STATES AND THE DISTRICT OF COLUMBIA) 47 (2020).

²¹ *Id.* at 53.

²² Amy S. Bohnert et al., *Policing and risk of overdose mortality in urban neighborhoods*, 113 DRUG & ALCOHOL DEPENDENCE 62, 66 (2011); see also Lallen T. Johnson & Tayler Shreve, *The ecology of overdose mortality in Philadelphia*, 66 HEALTH & PLACE 1, 5 (2020).

²³ Johnson & Shreve, *supra* note 22, at 5 (“[T]he fear of legal sanctions may inspire evasive behavioral adaptations that are favorable to mortality.”); Ju Nyeong Park et al., *Situating the Continuum of Overdose Risk in the Social Determinants of Health: A New Conceptual Framework*, 98 MILBANK Q. 700, 713 (2020).

As seen during the period of alcohol prohibition in the U.S. and routinely shown globally, as enforcement intensifies, the potency of the prohibited substance increases, leading to greater likelihood of overdose.²⁴ Moreover, criminalization hinders the provision of HIV prevention and care.²⁵ Criminalization also solidifies and institutionalizes stigma against people who use drugs, which has additional health implications.²⁶

For example, Good Samaritan laws are an evidence-based solution that is threatened by the prosecution standard for attempted delivery and the continuation of the *Boyd* rule. For people witnessing an overdose, fear of police is the most cited reason for not calling for assistance.²⁷ To address this concern, Good Samaritan laws provide some criminal immunity to witnesses of drug overdoses who call emergency services.²⁸ These laws may make people more likely to call 911 for help and have been associated with

²⁴ Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. OF DRUG POL'Y 156, 157 (2017).

²⁵ Kora DeBeck et al., *HIV and the Criminalisation of Drug Use among People Who Inject Drugs: A Systematic Review*, 4 LANCET HIV e357 (2017).

²⁶ Alexander C. Tsai et al., *Stigma as a fundamental hindrance to the United States opioid overdose crisis response*, 16 PLOS MED. e1002969 (2019).

²⁷ Stephen Koester et al., *Why are some people who have received overdose education and naloxone reticent to call Emergency Medical Services in the event of overdose?*, 48 INT'L J. DRUG POL'Y 115, 117 (2017).

²⁸ COREY DAVIS, NETWORK FOR PUB. HEALTH L., LEGAL INTERVENTIONS TO REDUCE OVERDOSE MORTALITY: OVERDOSE GOOD SAMARITAN LAWS 1 (2021).

lower overdose fatality.²⁹ Oregon’s Good Samaritan statute provides protection from arrest and prosecution for possession of controlled substances, possession of paraphernalia with intent to distribute, and frequenting a place where controlled substances are used. ORS 475.898(3). The protection extends to the person seeking emergency assistance and the person experiencing an overdose. ORS 475.898(1)-(2).

Permitting use of drug weight and packaging to establish a substantial step toward delivery, and under *Boyd* completed delivery, undermines Oregon’s Good Samaritan law. The protections of that law do not extend to arrest and prosecution for attempted delivery or completed delivery. Faced with the risk of being charged with a delivery offense based on factors like weight and packaging alone, bystanders are disincentivized to call for assistance.³⁰ Particularly given that people witnessing overdoses may consider the dangers that may come to others if they call the police,³¹ the

²⁹ Chandler McClellan et al, *Opioid-overdose laws association with opioid use and overdose mortality*, 86 ADDICTIVE BEHAV. 90 (2018); CALEB J. BANTA-GREEN ET AL., UNIV. OF WASH., WASHINGTON’S 911 GOOD SAMARITAN DRUG OVERDOSE LAW - INITIAL EVALUATION RESULTS 4 (2011).

³⁰ Jessica Xavier et al., “*There are solutions and I think we’re still working in the problem*”: *The limitations of decriminalization under the good Samaritan drug overdose act and lessons from an evaluation in British Columbia, Canada*, 105 INT’L J. OF DRUG POL’Y 103714, 5 (2022).

³¹ Andrea Jakubowski et al., *Knowledge of the 911 Good Samaritan Law and 911-calling behavior of overdose witnesses*, 39 SUBSTANCE ABUSE 233 (2018).

prosecution of attempted delivery may serve as further deterrence for calling emergency services.

Unless people feel they will not be arrested and prosecuted for attempted, or under *Boyd*, completed delivery, based on drug weight and packaging, they will continue to be discouraged to call for emergency aid during an overdose. Premising delivery convictions on conduct that is consistent with possession for personal use will continue to disincentivize people for calling for help at a time when all tactics are necessary to prevent the continued loss of life to overdoses.

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CONCLUSION

For the foregoing reasons, we urge the Court to affirm the Court of Appeals' overturning of *Boyd* but reverse the order to remand for entry of a conviction of attempted delivery of a controlled substance.

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Respectfully submitted by:

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