



DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE DIVISION

November 14, 2019

MEMORANDUM REFERENCE SB 1008

Or. Laws 2019 ch. 634 (hereinafter SB 1008) made major changes to how juveniles enter into and are sentenced in the criminal justice system. Although the bill was effective on Sep. 29, 2019, SB 1008 § 34, the only provision operative on that date was the victim notification provision, SB 1008 § 30. Additionally, subsequent bills late in the session amended different portions of SB 1008. Or. Laws 2019 ch. 685, §4 (hereinafter SB 1005) excluded the applicability of SB 1008 to cases resentenced after the operative date for any reason. Or. Laws 2019 ch. 635, §§ 3b-3e (hereinafter SB 1013) also amended other provisions of SB 1008. These bills provide a clear path for cases sentenced prior to Jan. 1, 2020, as well as cases charged after the operative date. The bills do not expressly address whether SB 1008 applies to cases pending but not yet sentenced on the operative date. Nonetheless, the text and context of the bills strongly suggest that the legislature intended the jurisdictional provisions to apply even to pending cases that were properly charged under ORS 137.707 (2011), but which have not been sentenced before Jan. 1, 2020. In other words, the key effect of SB 1008 is that jurisdiction will “shift” to juvenile court if the case otherwise falls within the terms of the bill.

Before beginning, it is important to understand some limitations of this memo. This memo is intended to provide foundational information for continued research and discussion. Given the complexity and the overlapping nature of the bills, the analysis may continue to develop over time. Additionally, as always, prosecutors implementing SB 1008 will need to apply local policies and practices in exercising their discretionary functions.

1. Effect of SB 1008 on jurisdiction of cases currently charged per ORS 137.707 that will be sentenced after Jan. 1, 2020.

- Summary of conclusions related to a defendant¹ who committed an offense subject to ORS 137.707 (2011) before Jan. 1, 2020 (regardless of age after Jan. 1, 2020):
 - Defendant arrested and/or charged before 18 years old – Juvenile
 - Defendant arrested and charged over 18 years old – Criminal
 - Defendant sentenced before, and resentenced after Jan. 1, 2020 – Criminal

The first question is how the legislature intended SB 1008 to affect jurisdiction over cases charged under ORS 137.707 (2011) but not yet sentenced before the bill’s effective date. Although the legislature did not expressly state how SB 1008 would apply to those cases, the text, context, and legislative history support the conclusion that it intended that jurisdiction over cases currently charged under ORS 137.707 (2011) be returned to the juvenile court, unless juvenile jurisdiction never attached to the person before the charges were filed in criminal court. The legislature also specifically created an exception to the application of SB 1008 for offenders

¹ This memo uses the term defendant when describing a person charged in adult court and youth, as defined in ORS 419A.004(38), when referring to a person who is the subject of a juvenile petition.

who were sentenced prior to Jan. 1, 2020, but who will be resentenced after that date for any reason. Those conclusions flow from the following analysis.

a. Jurisdiction is a creature of statute, subject only to constitutional limitations.

“Subject matter jurisdiction defines the scope of proceedings that may be heard by a particular court of law and is conferred by statute or the constitution.” State v. Terry, 333 Or 163, 186 (2001). In general, “circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction.” Id., citing Or Const Art VII(Amended), § 2; Or Const Art VII (Original), § 9. More specifically, “once a person has been indicted by a grand jury, that person can be charged in a circuit court with the commission of any crime punishable as a felony.” Id. citing Or Const Art VII(Amended), § 5(3).

The juvenile court “exercises jurisdiction as a court of general and equitable jurisdiction and not as a court of limited or inferior jurisdiction.” ORS 419B.090. Thereby, the juvenile court has subject matter jurisdiction over such matters provided to it by statute. See In re E. C.-P., 289 Or App 569, 573 (2017).

Thus, at bottom, whether SB 1008 applies to pending cases poses an issue of statutory interpretation, which requires examination of the text and context first, the legislative history that appears useful next, and as a last resort, general maxims of statutory construction. PGE v BOLI, 317 Or 606, 610-12 (1993), as modified by State v Gaines, 346 Or 160, 172 (2009).

b. The text of SB 1008 demonstrates the legislative intent was to return exclusive original jurisdiction to juvenile courts, subject to waiver determinations.

The provisions that govern juvenile jurisdiction after the effective date of SB 1008 demonstrate the legislative intent to keep cases in juvenile court unless the juvenile judge waives the youth to criminal court. First, they provide that “[t]he juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and who has committed” a crime. SB 1008 § 14.² That jurisdiction attaches “from the time the youth is taken into custody.” ORS 419C.094. Jurisdiction remains in the juvenile court unless the juvenile is waived to the “circuit”³ court by order of the juvenile judge. SB 1013 § 3e.⁴

Before SB 1008, *former* ORS 137.705(2)(c) (2011) provided an exception to traditional jurisdiction over juveniles. It expressly provided that “[t]he filing of an accusatory instrument in a criminal court under ORS 137.707 divests the juvenile court of jurisdiction in the matter if juvenile court jurisdiction is based on the conduct alleged in the accusatory instrument or any conduct arising out of the same act or transaction.” As a result, even when juvenile jurisdiction

² For ease of the reader’s ability to locate the amendments, this memo cites to the section of the SB that amends the statutory provision, rather than citing the 2019 version of the amended statute.

³ There appears to be a discrepancy in the naming of the courts in the statutes. While ORS 419C.349 permits transfer to “circuit” court, ORS 3.260 provides that “[t]he circuit courts and the judges thereof shall exercise all juvenile court jurisdiction, authority, powers, functions and duties.” For the sake of clarity, this memo will use the term “criminal court” when referring to the circuit court division that handles criminal matters, and “juvenile court” when referring to the circuit court division that handles juvenile delinquency and dependency matters.

⁴ ORS 419C.349 was amended by both SB 1008 and SB 1013. This citation references the final version of the law.

originally attached as the result of an arrest or a charge, that jurisdiction was divested by operation of law with the filing of charges under ORS 137.707 (2011).

Although SB 1008 does not expressly terminate criminal court jurisdiction lawfully obtained prior to the operative date or restore juvenile jurisdiction to cases pending in criminal court, it eliminates the provision in ORS 137.705(2)(c) (2011) that provided for the divestment of juvenile jurisdiction by the filing of charges in criminal court. The legislature clearly set the “effective” date of this provision as the operative date. SB 1008 § 31.

It is arguable that by further stating that SB 1008 applies to “sentences imposed” on or after the operative date, that the legislature did not intend the amendments to apply to other proceedings in a pending case. *See* SB 1008 § 32⁵ However, the general presumption is that the legislature was aware of existing case law when it adopted a law. *State v. Warren*, 364 Or 105, 140 (2018). In *State v. McDonnell*, the court clarified the rule on which law must be applied when sentencing a defendant. 329 Or 375 (1999). The court held that the applicable sentencing law is not exclusively the law that was in effect when the crime was committed; rather it is the law in which the legislature intended the defendant to be sentenced. *Id.* at 492. Hence, had the legislature not provided the clause that SB 1008 applies to sentences imposed after the operative date, acts committed prior to Jan. 1, 2020 could have been sentenced under ORS 137.707 (2011). Therefore, the sentencing provision of § 32 should be seen as an expansion of the operative date clause in § 31, rather than a limitation to that provision. In other words, SB 1008 is in full effect on Jan. 1, 2020, *and* it applies to sentences imposed after Jan. 1, 2020 for acts committed before that date which are not subject to an exception.

This returns to the question of whether the legislature intended to apply the juvenile jurisdiction provisions to cases in which the criminal court already had jurisdiction based on the divesting provision of ORS 137.705 (2011). Under both SB 1008 and preexisting law, a criminal court has the authority to transfer jurisdiction to the juvenile court if it determines that the matter is within the exclusive jurisdiction of the juvenile court. Moreover, SB 1008 amended the provision in ORS 419C.050 that precluded the operation of the transfer provision to cases charged under ORS 137.707. That is, SB 1008 amended that provision to unqualifiedly state that when a court learns that the age of the defendant “is such that the matter is within the exclusive jurisdiction of the juvenile court, it is the duty of the court ... to transfer the proceeding to the juvenile court.” SB 1008, § 15. That is not inconsistent with the long-recognized rule that a court’s “lack of subject matter jurisdiction can be raised at any stage of the proceedings.” *Terry*, 333 Or at 185. Therefore, the mere fact that the criminal court previously lawfully obtained jurisdiction does not mean that jurisdiction is properly maintained after legislative changes to the jurisdictional statutes.

As stated above, even before SB 1008, juvenile court jurisdiction attached “from the time the youth is taken into custody.” ORS 419C.094. This includes cases where an officer took a youth into custody per ORS 419C.080, which, while not legally deemed to be an arrest, is functionally equivalent to one. ORS 419C.091. And, although ORS 137.705 (2011) *divested* the juvenile court of jurisdiction over defendants who were properly charged in criminal court, SB 1008 has eliminated that provision and expressly provides that the juvenile court has exclusive

⁵ While SB 1005 §4 amended SB 1008 § 32, those amendments do not impact this portion of the analysis. Further citations will reference to SB 1008 unless SB 1005 amended the provision in a manner that impacts the analysis.

jurisdiction over cases involving offenders who were under 18 years of age when charged or arrested. Given that context, it appears the legislature intended SB 1008 to return jurisdiction to the juvenile court over those cases, even if they already were properly charged in criminal court.

That conclusion does not apply to cases in which a defendant was not taken into custody prior to 18 years of age, and was charged after reaching the age of 18 in the absence of any intentional delay by the prosecution. State v Davis, 197 Or App 246, 250 (2005). Absent that exception, however, after Jan. 1, 2020, if the criminal court determines the defendant is within the exclusive jurisdiction of juvenile court under SB 1008 § 14, the criminal court must transfer that person to juvenile court.

2. Transfer from criminal to juvenile court.

- Summary of potential process:
 - Motion to suspend criminal case and transfer to juvenile court
 - If appropriate, file juvenile petition and request waiver hearing
 - If judge grants waiver, lift suspension and continue criminal proceedings
 - If judge denies waiver, former jeopardy applies once evidence taken in juvenile adjudicatory hearing

As discussed in section 1, above, if the criminal court determines that a defendant is within the exclusive jurisdiction of the juvenile court, the criminal court must transfer that person to the juvenile court. ORS 419C.050. The statute does not provide specific procedures for such a transfer other than the receiving court is initially the juvenile court for the county in which the criminal case is pending. That being said, the “court, on its own motion or on the motion of a party made at any time prior to disposition, may transfer a proceeding to the court of the county where a youth resides if ... [t]he proceeding was initiated in a court of a county other than the county where the youth resides.” ORS 419C.053. The statute does not mandate transfer and the court in the county where the act occurs would also be an appropriate venue. ORS 419C.013(1).

As there is no specific process, the court has the authority to adopt any legally sufficient method to perform the duty conferred by statute. *See* ORS 1.260. When transfer is contested, the court may consider following the procedures of an omnibus hearing. ORS 135.037; UTCR 4.010, 4.050. In such a hearing, challenges to jurisdictional facts could start with the burden of production on the defendant, but with the state bearing the burden of persuasion. *See State v. Hill*, 277 Or App 751, 770-71 (2016) (describing a similar procedure for challenges to jurisdiction due to defendant’s status as an Indian). The court would ultimately make the jurisdictional determination as a matter of law. *Id.* at 763.

In addition, ORS 419C.050 does not indicate whether the pending indictment remains valid after the case is transferred to juvenile court. However, the Scurlock court previously determined “there is no statutory authority for dismissal of an indictment” when a case is transferred to juvenile court. 286 Or at 282; *see also Hadlock v. Cupp*, 1 Or App 62 (1969) (original indictment remained viable when case transferred to juvenile court and waived back to criminal court). Therefore, while dismissal is not appropriate, the question remains what should happen to the indictment while the matter is pending in juvenile court. Given that delay in criminal prosecution can affect statutory and constitutional rights, the court may choose to

“suspend” the criminal case while the juvenile matter is proceeding. *See generally* ORS 161.370 (providing that criminal proceedings are suspended when defendant lacks fitness to proceed).

When a case is suspended in criminal court and transferred to juvenile court, the prosecutor may decide to seek a waiver hearing. If the state believes a waiver hearing is appropriate, the prosecutor should file a petition⁶ and request a waiver hearing as provided in ORS 419C.349. SB 1013 § 3e. If the juvenile court enters an order waiving the youth to criminal court, the criminal court could lift the suspension and continue the proceedings. If the juvenile court determined that waiver was inappropriate, former jeopardy would bar the criminal proceedings after the juvenile court had begun to take evidence in an adjudicatory hearing. ORS 419A.190; *see also* State v. Thornton, 41 Or App 469 (1979) (where juvenile court denied waiver and dismissed petition, state had no authority to seek an indictment on the same matter).

3. Sentencing cases subject to SB 1008 after Jan. 1, 2020.

- Summary for defendants sentenced on offenses committed while under 18:
 - May not be sentenced to life without parole;
 - Is eligible for a second look hearing; and
 - Is eligible for a parole hearing after serving 15 years.

After Jan. 1, 2020, cases resolved in juvenile court will continue to proceed to a disposition hearing per ORS 419C.440, *et seq.* As noted, cases involving a defendant who was originally sentenced before the operative date, and who is resentenced on or after Jan. 1, 2020 for any reason, will apply the law in effect at the time of the original case. Lastly, cases sentenced in criminal court after the operative date must follow the general sentencing procedures in ORS 137.010, *et seq.*, as amended by SB 1008.

a. Sentences imposed per SB 1008 after waiver to criminal court.

In addition to the above-described amendments, SB 1008 changed sentencing terms for youth who are waived into criminal court. The bill prohibits a person sentenced under ORS 137.707 from being subject to life without the possibility of parole. SB 1008 §§ 5, 24. Additionally, a person sentenced under ORS 137.707 is eligible for a second look hearing under ORS 420A.203. SB 1008 §§5, 22. That second look provision was expanded to include persons who are in Oregon Youth Authority (OYA) custody with a projected release date “on or after the person’s 25th birthday and before the person’s 27th birthday.” SB 1008 § 22. Lastly, any person who was under 18 years of age at the time of the offense, and who is sentenced to a prison term exceeding 15 years for any reason⁷, is eligible for a parole release hearing after the person has served 15 years of imprisonment.⁸ SB 1008 § 25.

b. Placement of offenders sentenced per SB 1008.

In terms of placement, SB 1008 permits placement of a convicted offender in OYA when that person was under 18 years of age at the time of the offense, and the person is sentenced before 20 years of age – regardless of when the charges were filed – so long as the person will

⁶ An indictment will likely not be sufficient given the requirements of a juvenile petition in ORS 419C.255

⁷ This includes all levels of murder, mandatory minimum or determinate sentences under any provision of law, as well as consecutive sentences.

⁸ This includes pre-trial incarceration, but excludes any reduction in sentence.

complete the sentence before attaining 25 years of age. § 2. The bill also permits an offender to continue serving custody in OYA when the person is resentenced on the same charges after attaining 20 years of age. *Id.* The person's age is determined by the earliest date within the date range of the offenses in which the person was convicted. SB 1008 §§ 2, 3.

4. OJD authority to take action prior to Jan. 1, 2020.

- Summary of potential actions before operative date:
 - May conduct juvenile transfer, waiver hearings, and other motions.
 - Should not sentence under SB 1008 until after operative date

The difference between the effective date and the operative date indicates the legislative intent to permit agencies, including the Oregon Judicial Dept. (OJD) to take action before Jan. 1, 2020 to effectuate the bill after that date. Turning to the text of SB 1008, the bill takes effect on the 91st day after *sine die*, SB 1008 § 34, with an operative date of Jan. 1, 2020, for a majority of the provisions, SB 1008 § 31⁹. It is accepted that “[a] measure may become a law on a determined date, and yet that law may not go into active operation until some later date or until the happening of some contingency.” *State v. Hecker*, 109 Or 520, 545 (1923); *Hazell v. Brown*, 352 Or 455, 470 (2012) (applying *Hecker*). Considering the operative clause in SB 1008 § 31(1) in context with SB 1008 § 31(2) provides a more clear rationale. The second paragraph of this section provides that the Parole Board, OYA, Dept. of Corrections, and OJD may take action before the operative date necessary to enable those agencies to exercise duties after the operative date. Considered in this context, the legislature likely intended to suspend the application of SB 1008 to allow the affected agencies to amend rules, change policies, or implement new practices or business procedures, in order to prepare for Jan. 1, 2020 when the law goes into full effect.

With that in mind, the question remains on what actions the OJD can take prior to the operative date. The text of the bill provides only one clear limitation. The court may not impose a sentence under SB 1008 prior to Jan. 1, 2020. SB 1008 § 32; *see also McDonnell*, 329 Or at 386 (parties cannot stipulate to a sentence that is clearly inapplicable). Given there are no other express limitations, the court would likely have discretion to conduct other proceedings prior to the operative date that are necessary to exercise that future sentencing duty. *See* ORS 1.260. This would likely include omnibus hearings to determine jurisdiction, and orders to suspend and transfer matters. It presumably also includes filing a juvenile petition and conducting a waiver hearing. With this in mind, as prosecutors assess cases for jurisdictional issues, and considering sentencing implications, it would likely be beneficial to coordinate with defense and the court to determine what, if any, actions are appropriate to be taken prior to Jan. 1, 2020, in order to be prepared for the full effective date of SB 1008.

⁹ While SB 1013, § 3b amended SB 1008 § 31, those amendments do not impact this portion of the analysis. Further citations will reference SB 1008 unless SB 1013 amended the provision in a manner that impacts the analysis.