



Oregon

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March 1, 2017

Representative Jeff Barker, Chair
Representative Andy Olson, Vice-Chair
Representative Jennifer Williamson, Vice-Chair
House Committee on Judiciary
Oregon State Legislature

Dear Members of the Committee,

In its 1967 landmark decision *In re Gault*, the U.S. Supreme Court established a constitutional right to counsel in the juvenile justice system.¹ But for many years following this decision, legal scholars and policy advocates debated how youth can meaningfully exercise that right in juvenile justice matters.² Over the past decade, the U.S. Supreme Court has increasingly recognized the significance of the science of adolescent development to legal analysis, with the consequence that youth are no longer treated as simply young adults.³

Yet in many ways courts in Oregon have continued to treat youth as exactly that, young adults, in how it approaches a youth's decision to waive counsel. In Oregon, no law exists that prevents a youth from waiving counsel. However, the law does require the court to discuss the decision with each youth on the record or in writing. Before waiving counsel, each youth must understand the charges filed and the risks of proceeding without counsel.⁴ Because the actual practice of appointment and implementation of procedural safeguards varies by county, gaps exist. Most notably, there is no requirement that the youth consult with counsel prior to waiving the right to counsel.

¹ *In re Gault*, 387 U.S. 1, 27 (1967).

² Pokempner, Shah, Houldin, Dale, and Schwartz, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, Harvard Civil Rights-Civil Liberties Law Review Vol. 4 (2012).

³ *Roper v. Simmons*, 543 U.S. 551 (2005), holding capital punishment unconstitutional for crimes committed under age 18. *Graham v. Florida*, 560 U.S. 48 (2010), holding juveniles cannot be sentenced to life imprisonment without parole for non-homicide offenses. *J.D.B. v North Carolina*, 564 U.S. 261 (2011), holding age is relevant for *Miranda* waiver purposes. *Miller v. Alabama*, 567 U.S. ____ (2012), holding mandatory life without parole sentences are unconstitutional for juveniles. *Montgomery v. Louisiana*, 577 U.S. ____ (2016), holding *Miller* applies retroactively.

⁴ *State v. Riggins*, 180 Or. App. 525 (Or. Ct. App. 2002).

The ability of a youth to waive counsel without first consulting with counsel is problematic. A youth who is the subject of a juvenile court petition may be required to make decisions with significant long-term consequences at a time when the youth is ill-equipped to do so. Because adolescent brains are still developing, they are unable to process information and consider consequences in the same fashion as adults. Stress and psychosocial factors influence their perceptions and judgments. As a result, youth are less likely to perceive the long-term consequences of their actions without guidance and feedback.⁵ They are more susceptible to influence and more likely to defer to authority figures who may have their own reasons for discouraging appointment of counsel.⁶

In 2010, several University of Oregon Law School Child Advocacy Fellows presented research on waiver of counsel in Oregon to PDSC. The students gathered data from the Oregon Judicial Department and surveyed individual juvenile department directors regarding waiver of counsel. While practices varied widely across the state, the students reported between 32% and 39% of youth appeared in court unrepresented. The waiver rate ranged from 12% in felony cases to 97% in formal accountability agreements.

As a result of this testimony, PDSC directed OPDS then-director Ingrid Swenson to convene an informal advisory group to gather information and propose solutions. This group worked in partnership with the Oregon Judicial Department and, in particular, Chief Justice Demuniz, to develop a uniform, developmentally appropriate, waiver colloquy to be read by the court prior to a waiver of counsel. Ms. Swenson reported to PDSC in 2011 that anecdotal information suggested an increase in appointments of counsel in delinquency cases.

Data on court appointment in delinquency cases confirms both a reduction in the waiver of counsel by youth and continued county inconsistencies in the procedures of appointment and waiver. In 2015, 3% of youth (103) were unrepresented in either felony or misdemeanor cases. However, the rate of waiver is significantly higher for probation violation proceedings and formal accountability agreements. The frequency of waiver in probation violation proceedings is noteworthy; sanctions often include placement in juvenile detention and may include commitment to the Oregon Youth Authority.

In recognition of the fundamental differences between juveniles and adults, a number of states have imposed procedural protections on waiver of counsel in the juvenile justice system. Often in the form of legislation or rule, these strategies include prohibition on waiver of counsel, parental permission, and consultation with counsel prior to waiver. Oregon is one of 13 states that do not provide additional procedural safeguards for youth.

⁵ *Supra* n 2.

⁶ *Id.*

Requiring consultation with counsel prior to waiver is a best practice. The National Juvenile Defender Center suggests waiver should of counsel should be rare and only after meaningful consultation with counsel.⁷ The Institute of Judicial Administration-American Bar Association Standards for Juvenile Justice state that youth should have counsel appointed at every stage of the proceedings.⁸ In 2015, the US Department of Justice filed a Statement of Interest in a Georgia class action case challenging the adequacy of counsel for youth, *N.P. v Georgia*.⁹ The Department found waiver of counsel without first speaking with counsel to be a denial of the constitutionally protected right to counsel. According to the Department, “a state further deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.”

The Constitution guarantees every youth accused of delinquency whose liberty interest is at stake the right to counsel. This right is fundamental to the fair operation of the juvenile justice system. Juvenile waivers must be afforded particular scrutiny in view of the unique characteristics of age and immaturity. Caselaw, scientific research, and practical experience reinforce the conclusion that children must have safeguards which acknowledge their vulnerability. The procedural safeguard of ensuring consultation with counsel prior to waiver is a concrete recognition that youth are different than adults and must be afforded special consideration.

Thank you for your consideration of this important issue.

Sincerely,

Amy S. Miller
Deputy General Counsel
Office of Public Defense Services

⁷ National Juvenile Defender Center Juvenile Defense Standards (2013), <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>.

⁸ The Institute of Judicial Administration-American Bar Association Standards for Juvenile Justice (1996), <https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf>.

⁹ US Department of Justice Statement of Interest in *N.P. v Georgia* (2015), <http://njdc.info/wp-content/uploads/2015/03/DOJ-Statement-of-Interest-in-NP-v-State-of-Georgia-Filed-Copy.pdf>.