

Youth, Rights & Justice

ATTORNEYS AT LAW

To: Senate Committee on Judiciary, 2017 Oregon Legislative Assembly

From: Mark McKechnie, MSW, Executive Director

Date: May 2, 2017

Re: Support for HB 2616-A, Preventing Juvenile Waiver of Counsel

Chair Prozanski and Members of the Committee:

My name is Mark McKechnie, and I am the executive director of Youth, Rights & Justice, a non-profit public defender organization that has represented youth in the juvenile justice system since 1975. On May 15th of this year, we mark the 50th Anniversary of *In re Gault*, the U.S. Supreme Court Case which recognized the right to due process for juveniles in delinquency cases, including the right to representation by a lawyer.

Fifty years later, we have not fully realized the promise of *Gault* in Oregon. Oregon lacks specific protections to prevent juveniles from waiving their important right to counsel when facing misdemeanor or felony charges and the loss of liberty and other privileges that can result. Other states prohibit juvenile waiver altogether, require that youth consult with counsel prior to waiving this right, or have more formal procedures in place to ensure that juveniles make any decision to waive counsel knowingly, voluntarily and intelligently. Oregon is one of only 13 states which have no restrictions on waiver.

The Oregon State Bar developed specific standards of representation of juveniles in delinquency matters, which include the requirement that:

*"... a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending."*¹

It is not possible for a young person to understand the implications and potential consequences of their legal case without counsel. Further, juvenile brains are not fully developed.² There are substantial differences in structural development, brain activation and decision making. Current developmental neuroscience has determined that most humans do not have fully developed brains – particularly in the higher functions of the pre-frontal cortex, which is responsible for “executive functions” – until approximately the age of 25 years.

¹ Standard 1.2, Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases, 2014

² Eshel, et al. (2007) Neural substrates of choice selection in adults and adolescents: Development of the ventrolateral prefrontal and anterior cingulate cortices, 45 *Neuropsychologia* 1270-1279.

According to the American Academy of Child and Adolescent Psychiatry,³ adolescents are more likely to:

- act on impulse
- misread or misinterpret social cues and emotions
- engage in dangerous or risky behavior

Adolescents are less likely to:

- think before they act
- pause to consider the consequences of their actions

Adolescents tend to underestimate risks and over-estimate potential rewards, making them substantially less able to evaluate the consequences of their decisions. This is why they are more likely to get into trouble and why they very much need counsel and representation by a capable lawyer when they do.

Research in this area has found that juveniles often fail to recognize the role of their lawyer and how it differs from the roles of other adults, such as the judge, prosecutor or law enforcement:

“Lack of understanding of attorney-client privilege and zealous representation are important. If juveniles do not understand that defense attorneys are on their side and can be trusted with their secrets, they are unlikely to properly value an attorney or appreciate why having one might be in their best interest. Juveniles who do not comprehend that a lawyer is their advocate, and that the lawyer will act in their interest and not as an informant for a third party can be expected to throw away the right to a lawyer without proper consideration. Such a waiver can hardly be considered knowing, voluntary, and intelligent.”⁴

In the “Statement of Interest of the United States” in *N.P. et. al., v. Georgia*, the Department of Justice stated:

‘In the criminal justice system, children, like adults, are entitled to due process, and the rehabilitative focus of the juvenile courts cannot come at the expense of a child’s constitutional rights. As the Supreme Court declared almost fifty years ago, “[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court.” In re Gault, 387 U.S. 1, 28 (1967). To the contrary, due process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources, and time to effectively advocate the child’s interests. If a child decides to waive the right to an attorney, courts should ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver.’⁵

Oregon should join the vast majority of states in enacting reasonable protections for the due process rights of our young people. Youth, Rights & Justice urges your support of HB 2616.

³ American Academy of Child and Adolescent Psychiatry (2016) Teen Brain: Behavior, Problem Solving and Decision Making https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx

⁴ McGuire, et. al. (2015) Do juveniles understand what an attorney is supposed to do well enough to make knowing and intelligent decisions about waiving their right to counsel?: An exploratory study. Journal of applied Juvenile Justice Services. <http://njdc.info/wp-content/uploads/2015/09/Do-Juveniles-Understand-What-An-Attorney-Is-Supposed-To-Do.pdf>

⁵ <http://njdc.info/wp-content/uploads/2015/03/DOJ-Statement-of-Interest-in-NP-v-State-of-Georgia-Filed-Copy.pdf>