May 2, 2017

The Honorable Senator Floyd Prozanski, Chair
The Honorable Senator Kim Thatcher, Vice-Chair
Senate Committee on Judiciary, Members

RE: HB 2616, Testimony of Tim Curry, National Juvenile Defender Center

Dear Chair Prozanski and Members of the Committee:

Thank you for giving the National Juvenile Defender Center the opportunity to provide this written testimony on the potential impact of Section 2 of Bill HB 2616 and how it comports with national best practices regarding waiver of counsel in juvenile court.

I write on behalf of the National Juvenile Defender Center (NJDC). Our mission is to promote justice for all children by ensuring excellence in juvenile defense. NJDC believes that all youth have the right to ardent, well-resourced representation and we work to improve access to and quality of counsel for all young people in delinquency court; provide technical assistance, training, and support to juvenile defenders across the country; and support the reform of court systems and policies that negatively impact our nation's youth. NJDC also promulgated the *National Juvenile Defense Standards*[1] in 2012, which outline the principles for ethical juvenile defense representation and which have been used across the country as a basis for creating or amending state-based juvenile defense standards.

NJDC has also supported effective and developmentally appropriate juvenile court reform through assessments of access to and quality of juvenile defense counsel at the state level. To date, we've conducted such assessments in 22 states and are currently undertaking two more. While we have not yet had the opportunity to conduct a full assessment of Oregon's juvenile defense system, we are familiar with practice here, through our work with juvenile defenders and reform advocates across the state. Moreover, our other state assessments and our work at the national level provide us with a unique perspective on wavier of counsel in juvenile court and the efforts to protect the due process rights of youth across the country.

Fifty years ago this May, the U.S. Supreme Court, in a case called *In re Gault*,[2] affirmed that the Due Process Clause of the Fourteenth Amendment guarantees to youth the right to counsel in juvenile proceedings. In the five decades since then, state legislatures and courts have been grappling with how to implement that right for a population that is developmentally different

[1] Nat'l Juvenile Defender Ctr., National Juvenile Defense Standards (2012), available at: http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf
[2] 387 U.S. 1 (1967).

than adult criminal defendants and which needs extra safeguards to protect the exercise of their rights.

If a youth is accused of a crime and faces the awesome power and resources of the state that are dedicated to prosecuting him, most of us would expect that he at least gets to talk to a lawyer. But the sad reality is that thousands of young people across this country never get a lawyer, either because one is not provided or because the young person has waived the right to attorney without any real understanding of what was happening. Excessive waiver of counsel, or an absence of counsel, was observed as a problem in nearly two-thirds of the states in which NJDC has conducted assessments.[3] Though many states have subsequently worked towards reform, jurisdictions across the country continue to struggle with this issue.

To understand why we need to treat youth differently in terms of the right to counsel is to understand the developmental science about how youth make decisions. Adolescence is a time of significant development, not only in the structures of the brain, but also with regard to how one processes information, regulates emotions, and is able to make informed decision.[4] Scientific research shows that psychological and behavioral development begins to change and advance at about age 11 or 12, and doesn't peek until early adulthood.[5] As the U.S. Supreme Court has pointed out, adolescence is a time marked by distinctly youthful characteristics that are transient in nature, youth are more reckless and more prone to peer influence[6] and that because of this, children as a class are different from adults.[7]

One of the most important developmental concepts at play with respect to a child's right to counsel is the concept of "hot cognition" vs. "cold cognition." Hot cognition is decision-making done under heightened stimulus, such as fear, stress, confusion, anxiety, or excitement.[8] Functional MRIs have demonstrated that youth who make choices in times of hot cognition are using the parts of their brain that have yet to fully develop in terms of being able to assess risk, appreciate consequences of their action, or be able to adequately weigh the benefits of immediate gain versus delayed advantages. To paraphrase some of the leading researchers in this field, if decision-making were like driving a car, when adolescents are behind the wheel, they can't reach the breaks.

Conversely, when adolescents are placed in calmer environments and provided with help in understanding the many choices they are being asked to make, we see cold cognition – that is,

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[3] *See generally*, NJDC State Assessments, available at: http://njdc.info/our-work/juvenile-indigent-defense-assessments.

[4] *See, for example*, L. Steinberg, RISK TAKING IN ADOLESCENCE: WHAT CHANGES AND WHY? Ann. NY Acad. Sci. 2004;1021:51–58; L. Steinberg, L, COGNITIVE AND AFFECTIVE DEVELOPMENT IN ADOLESCENCE, Trends Cogn. Sci. 2005;9(2):69–76.

[5] L. Steinberg, et al., ARE ADOLESCENTS LESS MATURE THAN ADULTS? MINORS' ACCESS TO ABORTION, THE JUVENILE DEATH PENALTY, AND THE ALLEGED APA "FLIP-FLOP', 64 Am. Psychol.583 (2009).

[6] Roper v. Simmons, 543 U.S. 551, 553 (2005).

[7] Montgomery v. Louisiana, 136 S.Ct. 718, 733(2016).

[8] P. Kambam & C. Thompson, THE DEVELOPMENT OF DECISION-MAKING CAPACITIES IN CHILDREN AND ADOLESCENTS: PSYCHOLOGICAL AND NEUROLOGICAL PERSPECTIVES AND THEIR IMPLICATIONS FOR JUVENILE DEFENDANTS, Behav. Sci. Law 27: 173–190 (2009).

times when youth are using the parts of their brains that are more able to process information and decisions. This is what happens when youth have access to a qualified lawyer who is able to help them navigate system, they can calmly access the executive functions to make important decisions about the legal case. The juvenile defense attorney's ultimate job is to empower youth, help them to make key decisions, and give them a voice in the system.

If a youth has a lawyer, that lawyer can explain what people are asking him to do and help the young person understand the consequence of each choice. The Supreme Court has been very clear, that the defense attorney alone is qualified to guide the youth.[9] Judges, probation officers, and even parents may have different priorities or obligations. Only the defense attorney is the dedicated advocate for the juvenile client.[10] The Department of Justice succinctly articulated national best practice in this area in 2015 when it said, in a statement of interest in Georgia lawsuit on the right counsel for juveniles, "A juvenile's waiver of counsel cannot be knowing, intelligent, and voluntary without first consulting counsel."[11]

Section 2 of HB 2616 is in line with national best practices for developmentally appropriate juvenile justice because it ensures that the lawyer needed to help a youth take advantage of effective decision making (a.k.a., cold cognition) is in place. Under this bill, the Oregon courts could not consider the question of waiver of counsel until after a child has discussed the right and the ramifications of waiving it with a lawyer – the one person who is uniquely placed to help the youth weigh the pros and cons of that decision, both legal and non-legal, and who is required to help the youth figure out what his long- and short-term goals are and decide whether the continued assistance of a lawyer can help achieve them.

Oregon is not the first state to tackle this issue. Florida rules now provide that the juvenile court *shall* appoint counsel and that waiver is not possible unless a juvenile has "had a meaningful opportunity to confer with counsel regarding the child's right to counsel, the consequences of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel."[12] Under Maryland statute, juvenile waiver of counsel is not allowed unless the child appears in court with counsel and unless that counsel has had the opportunity to consult with the child about waiving the right.[13] The Maryland statute goes further to outline the things that would constitute, at a minimum, what meaningful consultation would look like, such as understanding that even if a client wants to plead guilty, a lawyer can still help advocate for a more appropriate disposition.[14] In 2015, Kansas limited uncounseled waiver by amending a combination of statutes so that they now provide for appointment of counsel whenever a child appears unrepresented,[15] and then expressly prohibiting any plea—guilty or otherwise—without

[9] In Re Gault, 387 U.S. at 36.
[10] Id., *see also* National Juvenile Defense Standards, at *supra* 1; Oregon Rules of Professional Conduct, R 1.2.
[11] U.S. Dep't of Justice Statement of Interest for N.P. et al. v. Georgia, No. 2014-CV-241025 at 12-15 (Ga. Super. Ct. 2014).
[12] Fla. R. Juv. Pro. 8.165(a).
[13] Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(3).
[14] Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(4)(I-V).
[15] K.S.A. 38-2306(a).

counsel being appointed to properly advise the youth about the consequences of giving up any rights.[16]

These are just some of the variety of mechanisms that states have used to place limits on juvenile waiver of counsel. But looking to Washington can be informative of how enacting the specific provisions of HB 2616 would create change. The language in Section 2 of the bill is virtually identical to a rule promulgated by the Washington Supreme Court.[17] Prior to the rule going into effect in 2008, our colleagues in Washington report that, though statistics were imprecise, it was estimated that between 2,000 and 3,000 youth waived counsel each year. Today, that number has dropped to less than 100 annually.

If this legislature passes HB 2616, Oregon will take its place alongside the more than twenty other states that have created significant safeguards for protecting a juvenile's right to counsel and ensuring their juvenile codes reflect a developmentally appropriate approach. I am happy to answer any questions the Committee may have.

Sincerely,

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[16] K.S.A. 38-2344(a).
[17] Washington State Court Rules, JuCR 7.15.