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IN THE CIRCUIT COURT OF THE STATE OF OREGON

For the County of Linn

Juvenile Department

In the Matter of:

A youth.

) Case No.:
) JDIS No.:

) MEMORANDUM RE DETERMINATION
) FITNESS TO PROCEED

Questions of competency in juvenile delinquency proceedings arise at an intersection of constitutional law (especially due process provisions), Oregon statutory law, clinical and developmental psychology, neuroscience, and social policy – how a community responds to its (arguably) delinquent children. Oregon State Bar performance standards for representation in juvenile delinquency cases require the lawyer to determine whether the client is able to aid and assist in the client’s defense because of immaturity or mental incompetence (standard 2.3) and to take steps with regard to having a determination made of the client’s ability to aid and assist (standard 2.8).

1
2 **1. Due Process**

3 Criminal prosecution of an incompetent defendant offends the Due Process
4 Clause of the Fourteenth Amendment; A defendant must be able to make a reasoned
5 choice among the alternatives available. *Godinez v. Moran*, 509 US 389, 412: 113
6 S.Ct. 2690, 2693 (1993). An accused must have a rational as well as factual
7 understanding of the proceedings against him. *Dusky v. United States*, 362 US 402, 80
8 S.Ct. 788 (1960). This includes understanding of abstractions like guilt, innocence, and
9 rights. *United States v. Hoskie*, 950 F2d 1388, 1392 (9th Cir 1991). A defendant must
10 have the capacity to understand and appreciate the rights he possesses, such as the
11 right to stand trial, the right to confront witnesses, the privilege against compulsory self-
12 incrimination, and must be able to rationally waive those rights. *Godinez*, supra. at p.
13 398.
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16 Due Process rights also apply to youth. See e.g. *In re Gault*, 387 US 1 (1967)
17 (holding that “neither the Fourteenth Amendment nor the Bill of Rights is for adults
18 alone.”); *State ex rel Juvenile Dept. of Malheur County v. Garcia*, 180 Or App 270
19 (2002). In *Garcia* the Court of Appeals stated that the Due Process Clause of the
20 Fourteenth Amendment applies to juvenile delinquency proceedings and requires those
21 proceedings to be fundamentally fair. The Court of Appeals concluded that the trial
22 court denied the Youth, through his attorney, the opportunity to explore the Youth’s
23 ability to aid and assist (among other alternatives).
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2. Competencies, Disorders, and Maturity

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2 A Youth must have the ability to understand abstractions such as: what a “right”
3 is; confrontation of witnesses; the privilege against self-incrimination; plea bargains; the
4 seriousness of the charges; the elements of charges; the ability to rationally waive
5 rights. He or she must have the ability to make complex reasoned choices among the
6 alternatives available and to understand the abstractions necessary for making choices
7 about how to proceed, the burden of proof, the manner in which his or her attorney
8 serves as an advocate, or information the attorney might require for effective
9 representation.
10

11 Though due process requirements do not to require a jury in juvenile delinquency
12 proceedings in Oregon, the consequences of juvenile adjudications have become
13 increasingly punitive and long lasting making ability to understand these consequences
14 all the more important. These consequences include in various circumstances:
15 subjecting the youth to potentially life long sex offender registration and related
16 requirements such as residency restrictions in not only this state but other states;
17 potential deportation, exclusion, or denial of naturalization; denial of certain federal
18 benefits; loss of motor vehicle privileges; use of certain offenses for enhancement in
19 later adult proceedings; use of certain adjudications under “three strike” laws in other
20 jurisdictions; impact on military service; removal from the child’s home up to age 25,
21 (depending on the adjudication); repeated detention.
22

23
24 Mental disorders and disabilities have adverse implications for a youth’s
25 competence. These include developmental disabilities, attention deficit hyperactivity
26 disorders, mood disorder, anxiety disorders and thought disorders.

1 Mental disorders can present obstacles for a youth to have competency to stand
2 trial even if they do not involve psychotic thinking. As an example, ADHD may interfere
3 with the ability to focus attention sufficiently or learning disabilities may reduce the
4 ability to grasp significance of events. *Clinical Evaluations for Juveniles' Competence to*
5 *Stand Trial. Thomas Grisso Professional Resource Press, Sarasota, FL, Copyright*
6 *2005.*
7

8 In some cases involving adolescents, deficits in competence may arise because
9 a youth's cognitive or decision making abilities and capacities have not matured
10 sufficiently to meet threshold requirements and a recent survey suggest that
11 developmental immaturity is being recognized in many juvenile courts. *Thomas Grisso*
12 *and Judith Quinlin, Juvenile Court Clinical Services: A National Description, University*
13 *of Massachusetts Medical School, Worcester, MA.*
14

15 Recent developments in neuroscience indicate that there are physical changes
16 occurring in the structure and composition of the brain which continue into adulthood
17 and the second decade of life. *Jay and Giedd, Structural Magnetic Resonance Imaging*
18 *of the Adolescent Brain, 1021 Hanoles, N.Y. ACAD. SCI. 77, 77 (2004).* In addition,
19 "gray matter" continues to grow into a person's twenties and undergoes several periods
20 of growth and shrinkage and there is some thought that growth is the brain's way to
21 prepare a young person to be able to jump from impulsive immediate childlike thinking
22 and behavior to more thoughtful and future oriented thinking and behavior. *Barbara*
23 *Strauch, The Primal Teen (2004), note 23 at 15.* These and other recent neuroscience
24 findings are discussed in a number of places including Volume 206, Number 2 of the
25 *Wisconsin Law Review* by Kenneth J. King.
26

1 Thus, immaturity may also be an obstacle to competence. Some youths have
2 not yet developed ability to form abstract concepts sufficiently. "Until they are older,
3 they think more "concretely" – that is, based on what they can actually see or
4 experience at the moment. To them, a "right" may simply be something that authority
5 figures allow them, but which authority can just as easily take away. Other aspects of
6 cognitive immaturity include the ability to handle complex information, especially
7 tracking how one event influences another in a trial process, or dealing with plea
8 agreements that have a variety of pros and cons". *Thomas Grisso, Clinical Evaluations*
9 *for Juveniles Competence to Stand Trial*, p. 12.

11 Cognitive maturation is related in large part to age. Generally speaking 12 year
12 olds will be less mature in these abilities than older teenagers and again, generally
13 speaking, the cognitive abilities of youth younger than 15 or 16 are less developed than
14 those who are 16 or older. *Grisso, supra at. p. 12.*

16 "Psychosocial maturation" also impacts competency abilities of youth. This term
17 refers to factors that have more to do with perspective in practical social situations.
18 Some factors which adolescents have not fully developed include risk perception, self
19 directedness, and an accurate perspective of time. *Grisso, at supra pg. 12-13.*

20 Thomas Grisso furnishes a number of examples of how a youth's immaturity,
21 whether it be cognitive or psychosocial, influences the youth's competence to stand
22 trial, (though it is acknowledged that age in and of itself is not the determinate because
23 youths develop at various rates).

25 Though studies have varied in the ways of assessing youth's competency
26 abilities, the results have been consistent. For example, the widely publicized McArthur

1 Research Network on Adolescents Development and Juvenile Justice Study found that
2 youth 15 and younger performed more poorly on average than did young adults and
3 that 1/3 of youths age 13 or younger demonstrated significant impairment on the
4 measure of competency abilities. For youths 13 or younger who had intelligence test
5 scores below 75, about half were significantly impaired in competency performance.
6 On the other hand, youths 16 and 17 years of age were on average no different than
7 adults in their performance. *Thomas Grisso, supra* at pgs. 13 and 14.

9 **4. Juvenile Code Remedies**

10 The Oregon Legislature has adopted competency standards and procedures for
11 adults; the Criminal Code provides detailed procedures governing not only
12 determination of fitness, but also the effect of the finding of unfitness, which calls for the
13 criminal proceedings to be suspended and the defendant to be committed to either a
14 state mental hospital or a secure intensive community inpatient facility. See ORS
15 161.360 to 161.370.
16

17 The Oregon Legislature has not yet adopted a standard of fitness to proceed for
18 youth. No Youth, who is unable to proceed, should be required to do so, and the
19 Juvenile Court should, in cases where restorative services are unlikely to timely make
20 the youth fit to proceed, dismiss the petition and if necessary proceed in a dependency
21 case.
22

23 However, the Legislature has granted the Juvenile Court the authority and
24 discretion to make decisions on the circumstances of the youth and the interests of the
25 State after a finding of unfitness.
26

1 The Court of Appeals recognized the procedural differences between the
2 Criminal Code and the Juvenile Code with respect to the affirmative defense of insanity.
3 *State ex rel. Juv. Dept. of Mult. County v. L.J.* 26 Or app 261 (1976). The same
4 procedural differences exist with respect to an inability to proceed determination. The
5 Court of Appeals held that a youth could raise the affirmative defense of not guilty
6 because of mental disease or defect. *L.J.*, at 464. The Court found that while the
7 Criminal Code provides possibilities including outright discharge, (ORS 161.329),
8 release on supervision, (ORS 161.335), and commitment to a mental hospital, (ORS
9 161.340) the Juvenile Code provides possibilities including conversion of the
10 delinquency petition to a dependency petition. *L.J.* at 465.

12 The possibilities provided by the Juvenile Code allow the court to “order a
13 disposition that is suited to the individual case.” *State ex rel. Juv. Dept. v. Dreyer*, 328
14 Or 332 (1992) (reiterating the *Bishop* holding that the Juvenile Code allows the court to
15 dismiss a delinquency petition at any stage of the proceedings). “In Juvenile
16 proceedings, the court has “greater flexibility” to dispose of cases in a manner that gives
17 primary consideration to the welfare of the child.” *State ex rel. Juv. Dept. of Mult.*
18 *County v. Alec Bishop*, 110 Or App 503, 505 (1992) (citing *State v McMaster*, 259 Or
19 291, 297 (1971)).

21 The Juvenile Court has the power and discretion to dismiss a petition alleging
22 delinquency jurisdiction in furtherance of justice, after considering the circumstances of
23 the youth and the interest of the State in having the petition adjudicated. ORS
24 419C.261(2).

1 While the Juvenile Court is required to allow the State to be fully heard as to its
2 position prior to entry of an order granting dismissal of the delinquency petition, this only
3 means that the State must have opportunity to investigate and present its case before
4 the petition is dismissed, but that opportunity need not include a complete adjudication
5 of the allegations. *State ex rel Juvenile Dept. v. Eichler*, 121 Or App 155, 159 (1993).
6

7 The Court may also continue adjudication “from time to time”. ORS 419C.400
8 (1).

9 Juvenile matters are civil, not criminal. *State ex rel Upham v. McElligott*, 326 Or
10 547, 552 (1998); *State ex rel Juv Dept v. Reynolds*, 317 Or 560 (1993); *State v.*
11 *Gullings*, 244 Or 173 (1966).

12 In order for the Juvenile Court to adequately perform its function, the legislature
13 granted it greater flexibility than may be desirable for a court functioning solely in its
14 criminal role. *State ex rel Upham v. McElligott*, supra at 552; *State v. McMaster*, 259 Or
15 291 (1971); *State ex rel Juvenile Dept v. Bishop*, 110 Or App 503 (1992). “There is no
16 reason why the welfare of the children of this State should be relegated to a system of
17 rigid rules and standards.” *State v. McMaster*, supra at p. 297. Flexibility is intended
18 by the Juvenile Code to apply to both the jurisdictional phase and the disposition phase.
19

20 The clear and unequivocal message of Oregon’s juvenile code is to notify
21 and involve parents whenever possible to focus on the family, to involve
22 schools and appropriate social agencies as early as possible, to handle
23 matters informally, and to approach each child’s alleged delinquency as
24 an equitable problem rather than as a criminal problem. The least
restrictive alternative disposition is preferred; detention, even on a
temporary basis is not favored. *State ex rel Juv Department v. Reynolds*,
317 Or 560 (1993).

25 The court may, in appropriate cases, dismiss at any stage of the proceedings.
26 *State ex rel Juvenile Dept. v. Bishop*, Supra. The Supreme Court reiterated this holding

1 in *State ex rel Juvenile Dept. v. Dreyer*, 328 Or 332 (1999), indicating that legislative
2 changes to the Juvenile Code did not affect the Court's power to dismiss even as late
3 as the postadjudication stage.

4 Assumption of jurisdiction in a juvenile dependency case has repeatedly been
5 determined not to require commitment of the child to the Department of Human
6 Services custody, but simply involves a determination of whether the child needs the
7 court's protection because of his or her circumstances. As an example, see *GAC State*
8 *ex rel Juv. Dept.*, 219 Or App 1,9 (2008).
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10 Respectfully submitted,

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13 MARK A. TALEFF
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