TWENTY-THIRD JUDICIAL DISTRICT
LINN COUNTY
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RE: Aid and Assist

Dear Parties:

Through their attorneys, several youths have filed motions relating to their ability to "aid and assist" counsel in the preparation and conduct of their defense. Those individual cases will be addressed, as necessary, in a separate letter specific to that youth, but this letter opinion addresses the generic issue of whether such a defense exists at all in a juvenile delinquency proceeding. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths.

The parties agreed that the concept of "aid and assist" is not addressed anywhere in the juvenile code, even though it is addressed in the adult criminal code at ORS 161.360.[1] It has been a part of the adult criminal code since at least 1971. A major revision of the criminal code was done in 1973. Nearly 40 years have passed since that time and the legislature has not placed a provision similar to ORS 161.360 within the juvenile code in spite of revising it multiple times in that intervening time, including some major revisions. With that history, one can only conclude that the legislature's failure to include a similar provision in the juvenile code is not an oversight but a deliberate choice. If such a concept exists in Oregon's juvenile law, it would appear it must be found in constitutional law.

No party has indentified any relevant Oregon constitutional provision. The only potential provision advanced as relevant to this court is the Due Process Clause of the 14th Amendment to the U.S. Constitution.

In *Dusky v United States*, 362 US 402, 80 S Ct 788, 4 LEd2d 8241 (1960), the U.S. Supreme Court held a criminal defendant cannot be compelled to stand trial unless he is competent. The Court determined the test for competency was that the defendant must have:

> 1) A sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and
> 2) A rational as well as factual understanding of the proceedings against him.

Clearly, the test requires an ability of the party to have some reasonable understanding of the proceedings themselves and an ability to reasonably consult with their attorney. The *Dusky* ruling was expressed again by the Court in 1966 in *Pate v Robinson*, 383 US 375, 378, 86 S Ct 836, 838, 15 LEd2d 815 (1966), and reaffirmed again in 1975 in *Drope v Missouri*, 420 US 162, 171, 95 S Ct 896, 903, 43 LEd2d 103 (1975), when it said:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, **to consult with counsel, and to assist in preparing his defense** may not be subjected to trial. Thus, Blackstone wrote that one who became 'mad' after the

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[1] ORS 161.360 **Mental disease or defect excluding fitness to proceed**

(1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable:

a. To understand the nature of the proceedings against the defendant; or

b. *To assist and cooperate with the counsel of the defendant*; or

c. To participate in the defense of the defendant.

(Italic emphasis added by current court.)

> commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried,' for how can he make his defense?' 4 W Blackstone Commentaries, 24. *See Youtsey v United States*, 97 F 937, 940-946 (CA 6 1899). Some have viewed the common-law prohibition 'as a by-product of the law against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.' Foote, *A Comment on Pre-Trial Commitment of Criminal Defendant*, 108 U. Pa. L. Rev. 832, 834 (1960). *See Thomas v Cunningham*, 313 P2d 934, 938 (Ca 4 1963). **For our purposes it suffices to note that the prohibition is fundamental to an adversary system of justice.**
> (Bold emphasis added.)

In *Godingey v Moran*, 509 US 389, 402, 113 S Ct 2680, 125 LEd2d 321 (1993), the Court said:

> Requiring that a criminal defendant be competent has a modest aim: **It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.** While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while states are free to adapt competency standards that are more elaborate than the *Dusky* formation, the Due Process Clause does not impose these additional requirements.
> (Bold emphasis added.)

About three months after the *Drope* decision, the Court rendered its decision in *Breed v Jones*, 421 US 519, 529, 95 S.Ct. 1779, 44 LEd2d 346 (1975), where it held the double jeopardy prohibition is relevant to juvenile court proceedings and further affirmed its earlier statements that the distinction of juvenile proceedings being "civil" as opposed to "criminal" is to be disregarded as it relates to constitutional rights. As the Court said[2]:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 L.Ed.2d 647 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. *In re Gault*, 387 US 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *In re Winship*, 397 US 358. 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the process of finding a juvenile is entitled to the privilege against self-incrimination (5th Amendment, U.S. Constitution), the Court held in *Gault* that the Due Process Clause of the 14th Amendment to the U.S. Constitution was applicable to juvenile delinquency proceedings, and that " . . . the hearing must measure up to the essentials of due process and fair treatment."[3] It also required advance and adequate notice to the parents and the child of the pending issues[4] and

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[2] *Breed v. Jones*, p 528.
[3] *Gault*, page 30.
[4] *Gault*, pages 33-34.

the right to counsel, including court appointed counsel if the family qualified.[5] In holding the privilege of self-incrimination was applicable to a juvenile[6] it stated, "It would indeed be surprising if the privilege against self-incrimination was available to hardened criminals but not children.[7]"

In making its ruling, the court simply dismissed the concept that a juvenile court proceeding was classified as a "civil" proceeding as opposed to a "criminal" proceeding because such a classification simply overlooked the fact that the juvenile proceedings could result in deprivation of the juvenile's liberty (regardless of whether the juvenile was committed to an adult penal institution or a separate institution for juveniles).[8]

In *McKeiver v Pennsylvania*, 403 US 578, 91 S Ct 1976, 29 LEd2nd 647 (1971), the Court held juveniles had no federal constitutional right to a jury trial. In making its decision, the Court did not give a great deal of weight to consideration of whether juvenile court delinquency proceedings were either "criminal" or "civil" in nature. Rather, it expressed that, under the Due Process Clause, the issue was one of "fundamental fairness." It found a jury trial in juvenile court was not an essential ingredient to "fundamental fairness" and noted:

> . . . one cannot say that in our legal system the jury is a necessary component of accurate fact finding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials. *McKeiver*, page 543.

The Court also indicated[9] simply equating the adjudicative process of the juvenile proceeding with a criminal trial ignores aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile court system.

The Oregon Supreme Court in *State v Turner*, 253 Or 235, 453 P2d 910 (1969), also found no federal right to a jury trial in juvenile court nor a right to a jury trial under Oregon's constitution, *State v Reynolds*, 317 Or 560 (1993). Those decisions were reached even though the right to a jury trial in a criminal proceeding is clearly written into both the federal and state constitutions. In *State v McMaster*, 259 Or 291, 298, 486 P2d 567 (1970), the Oregon Supreme Court, in making reference to the U.S. Supreme Court, said the latter court ". . . has not held that all the substantive due process requirements of the criminal law were applicable to juvenile proceeding . . ."

From the foregoing, it is clear the Due Process Clause of the 14th Amendment to the U.S. Constitution is applicable to juvenile court and its procedures. There must be fundamental fairness. It is also abundantly clear that by the time of Blackstone it was well established in common law that a person whose mental condition was such that the person ". . . lacked capacity to understand the nature and object of the proceedings against him, to consult with counsel, and

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[5] *Gault*, page 41.
[6] *Gault*, page 55.
[7] *Gault*, page 47.
[8] *Gault*, page 49.
[9] *McKiever*, pgs. 529, 550.

to assist in preparing his defense may not be subjected to trial." (*See Drope* quoted earlier on page 2 of this document). That concept evolved as being basic to a person accused of a criminal act also being treated with basic fairness. That is the concept embodied in due process and expressed by the U.S. Supreme Court in *Dusky*. It is applicable in juvenile court proceedings. The Court concluded that Federal Constitutional law, by means of the 14th Amendment's Due Process Clause, requires a youth to meet the *Dusky* standards of competency (including the ability to aid and assist their attorney in their defense) before the youth can be compelled to go through an adjudication concerning conduct which, if the youth were an adult, would constitute a crime. If a youth is charged with a violation rather than conduct which, if the youth were an adult would constitute a crime, due process considerations would not necessarily mandate the same result. That is not the issue before this court now.

In the case of *State v L J*, 26 Or App 461, 522 P2d 1322 (1976), the Oregon Court of Appeals was presented with the issue of whether the defense of mental disease or defect[10], as then found in the criminal code at then ORS 161.795, could be raised as a defense in juvenile court in a delinquency proceeding.

At that time, ORS 161.295 (1) provided:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The court in *L J* noted that persons similarly situated except for a slight difference in their respective ages (for example: one being one day under 17 years of age and the other being 18 years old) could very well encounter dramatically different outcomes in their cases. The adult could potentially avail himself of an insanity defense, while the juvenile, if limited to the strict wording of the juvenile code, had no such recourse and therefore would be faced with commitment to a youth correctional facility. The court said:

> We cannot believe the legislature intended that one individual could go free while another in an identical situation could be sent to MacLaren School based on the fortuity that the former was over 18 while the latter was under 18. We hold the reference in ORS 419.476 (1)(a)[11] to matters that would be violations if

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[10] In footnote 2, the court said,: The defense in question, previously called 'insanity,' is now labeled 'mental disease or defect.' For brevity, we nevertheless continue to refer to the defense as 'insanity.'"

[11] The then current provision, in relevant part, of ORS 419.476 is as follows:

419.476 Children within jurisdiction of juvenile court.

(1) The Juvenile Court has exclusive jurisdiction in any case involving a person who is under 18 years of age and:

(a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of law or ordinance of the United States or a state, county or city; or

(b) Who is beyond the control of his parents, guardian or other person having his custody; or

(c) Whose behavior, or condition or circumstances are such as to endanger his own welfare or the welfare of others; or

> committed by adults includes a cross-reference to all of the affirmative defenses that would be available to adults.

Therefore, the defense was then made available to the juvenile as well as an adult.

The court did not otherwise identify any other legal authority for its decision. No participant has pointed out any case which overrules *L J,* and this court suggests it is rooted in the principal of "fundamental fairness" which is central to the federal due process clause. At the time of that decision, the statutory scheme for evaluation set out in ORS 161.360-161.370 was already a part of the statutory scheme. This court, therefore, interprets the ruling in *L J* to also include the references to those statutes as well. Case law, as well as ORS 161.360 and 161.365(1), make it a responsibility of the court to ascertain the capacity of the defendant (or youth, if in juvenile court) to aid and assist once that capacity is placed in doubt and to schedule a hearing to allow parties to present evidence on that issue. Any information on that topic would be relevant evidence which the court would anticipate would be placed into evidence. This court anticipates the Juvenile Department, as well as a youth's attorney, would likely be the first to learn of a potential issue of "aid and assist" and, therefore, bring the matter to the court's attention. In essence, that is what is occurring at the present time. The state, however, will have the benefit of the statutory procedure to follow, if it determines to do so.

In summary, this court concludes:

1. The due process clause of the 14th Amendment requires that the test enunciated in *Dusky* is applicable to delinquency proceedings. For a youth to be compelled to go through an adjudicative hearing to establish jurisdiction over that youth, the youth must have all of the following:
    a. A sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; and
    b. Have a rational as well as a factual understanding of the proceedings against him or her.

   This is stated in slightly different terms in *Drope v Missouri, supra,* page 171, when the Court stated "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel,

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(d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for his best interests; or
(e) Either his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, subjected him to cruelty or depravity or to unexplained physical injury or failed to provide him with the care, guidance and protection necessary for his physical, mental or emotional well-being; or
(f) Who has run away from home

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The last modifications made to this statute prior to the court's opinion in *State v L J,* 26 Or App 461, 522 P2d 1322 (1976) were made in 1971, See relevant Session Laws c 451, s 17.

Section 1(a) of that former statute is nearly identical to current ORS 419C.005 (1) which provides: "Except as otherwise provided in ORS 137.707, the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and who has committed an act that is a violation, or that if done by an adult would constitute a violation, of a law or ordinance of the United States or a State, county or city."

and to assist in preparing his defense may not be subjected to trial."

2. The provisions of ORS 161.360-161.370 are applicable to juvenile proceedings.
3. Any party who doubts a youth's competency to proceed must notify the court and provide the court with any documentation of that concern. That information is subject to disclosure to the other party. The appropriate procedure would be for defense counsel to obtain an independent opinion before bringing the matter to the court and the attention of the state and juvenile department.
4. If the matter is not resolved, the court will set an evidentiary hearing on the issue.

Sincerely,

Carl H. Brumund
Judge Pro Tem

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