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## Achieving Fundamental Fairness for Oklahoma's Juveniles: The Role for Competency in Juvenile Proceedings

Mary Sue Backus

*University of Oklahoma College of Law*, [msbackus@ou.edu](mailto:msbackus@ou.edu)

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# ACHIEVING FUNDAMENTAL FAIRNESS FOR OKLAHOMA'S JUVENILES: THE ROLE FOR COMPETENCY IN JUVENILE PROCEEDINGS

MARY SUE BACKUS\*

## *Introduction*

As a matter of due process under the Fourteenth Amendment, a criminal defendant has a constitutional right to be competent to stand trial.<sup>1</sup> In fact, at all stages of the criminal justice process a defendant must be able to understand the proceedings and be capable of consulting with and assisting his lawyer with his defense.<sup>2</sup> Although the United States Supreme Court has held that the Due Process Clause requires that criminal defendants must be competent, the Court has never addressed whether that competency requirement applies to juvenile proceedings. Left to their own devices on this issue, an overwhelming majority of states have established, either through statute or case law, a right to competence in juvenile proceedings.<sup>3</sup> In fact, experts in the field consider the question to be “settled” and often cite Oklahoma as the lone exception.<sup>4</sup>

In contrast to the overwhelming majority of states, the Oklahoma Court of Criminal Appeals has found that extending the right of adjudicative competence<sup>5</sup> to juveniles is neither appropriate nor necessary.<sup>6</sup> That conclusion was based on the rehabilitative nature of juvenile proceedings and the court's confidence in the juvenile system's capacity to consider and

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\* Professor of Law, University of Oklahoma College of Law. An earlier version of this article appeared in the Oklahoma Bar Journal, *Competency in Juvenile Delinquency Proceedings*, 82 OKLA. B.J. 20 (2011).

1. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

2. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

3. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 801 (2005).

4. *Id.* at 833-34; see also IVAN KRUH & THOMAS GRISSO, EVALUATION OF JUVENILES' COMPETENCE TO STAND TRIAL 20 (2009) (“It is now a ‘virtually inescapable conclusion’ that CST [competence to stand trial] is required in juvenile court.” (internal citation omitted)).

5. The terms “competence to stand trial” and “adjudicative competency” will be used interchangeably throughout this article. The term “competence to stand trial,” or CST, is the traditional term that has been in use for centuries. With the shift away from criminal trials to a system wherein plea bargains account for the vast majority of criminal cases, the term “adjudicative competence” more accurately reflects the broad array of criminal proceedings where competence is required to proceed. See PATRICIA A. ZAPF & RONALD ROESCH, EVALUATION OF COMPETENCE TO STAND TRIAL 5-6 (2009).

6. *G.J.I. v. State*, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

accommodate issues of mental health in adjudicating young Oklahomans as delinquent. Over two decades have passed since the court staked out what is now an atypical approach to juvenile competency. Dramatic changes in the juvenile system combined with new insights on adolescent brain development suggest that it is time for Oklahoma to reevaluate its outlier position and acknowledge that it is necessary to address issues of juvenile competency in order to ensure the fundamental fairness to which juveniles are entitled.

The appropriate role of juvenile competence is a complex question, however. To say that an overwhelming majority of states incorporates a right to competency in juvenile proceedings is *not* to say that there is any consistency or universal agreement on what that standard should be or precisely when it applies.<sup>7</sup> Because a juvenile may be treated in a number of different ways under the Oklahoma criminal code, —as a juvenile, as an adult, or as a hybrid youthful offender—questions of juvenile adjudicative competence can arise in different contexts and thus may require different approaches. Even if Oklahoma is able to maintain its *parens patriae* philosophy in juvenile adjudications, with a judge acting as a benevolent parent in the best interests of the child to meet individualized, rehabilitative goals, that philosophy is not the primary motivating construct when a juvenile is tried or sentenced as an adult or Youthful Offender. Where considerations of punishment trump rehabilitation, it is an illusion that the traditional juvenile court philosophy can adequately address a juvenile's right to competency and ensure fundamental fairness in juvenile proceedings as required by the Supreme Court.<sup>8</sup>

This article considers Oklahoma's outlier position on the right of juveniles to be competent before being adjudicated in juvenile court. More specifically, it raises questions about the applicability of the rejection of that right in *G.J.I. v. Oklahoma*<sup>9</sup> to juveniles tried or sentenced as adults or youthful offenders. Part I begins with a discussion of the fundamental due process right of competence, including its rationale and the legal criteria established for finding adult criminal defendants incompetent. Part II

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7. Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 369-74 (2001) (describing the variation among states in statutory provisions and case law relating to adjudicative competence in the juvenile court).

8. "[T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

9. 778 P.2d 485 (Okla. Crim. App. 1989).

explores the evolution of the modern juvenile justice system and the three trends prompting states to develop competency policies to ensure fundamental fairness in juvenile proceedings. Part III considers how the three trends in juvenile justice are reflected in Oklahoma's approach to juveniles and identifies two points in the system where the lack of a competence right raises significant due process concerns.

### *I. The Right to Competence*

The doctrine that a criminal defendant should not be tried while mentally incompetent is firmly entrenched in English and American legal history with roots dating at least to mid-seventeenth-century England. Blackstone, who recognized that a defendant should neither plead nor be tried if mentally defective, wrote that a defendant who became "mad" after the commission of an offense should not be arraigned "because he is not able to plead . . . with the advice and caution that he ought," and should not be tried, for "how can he make his defense?"<sup>10</sup> Another early and frequently cited English formulation for judging adjudicative competence required the jury first to consider whether a defendant was "mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial . . ." <sup>11</sup>

In the nineteenth century, United States federal courts adopted these British common law rules virtually intact. Federal courts cited common law authority, for example, to hold that "[i]t is not 'due process of law to subject an insane person to trial upon an indictment involving liberty or life.'" <sup>12</sup> Early American decisions also echoed Blackstone's concern about the inability of an incompetent defendant to mount a defense, framing the question as whether a defendant is able "to properly and intelligently aid his counsel in making a rational defense." <sup>13</sup> Other courts considered whether the defendant was "capable of properly appreciating his peril and of rationally assisting in his own defense." <sup>14</sup>

Mirroring this common law understanding, the U.S. Supreme Court crafted a test of incompetence in its landmark decision in *Dusky v. United*

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10. 4 WILLIAM BLACKSTONE, COMMENTARIES \*24.

11. *King v. Pritchard*, 173 Eng. Rep. 135, 135 (1836).

12. *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899) (internal citation omitted).

13. *United States v. Chisolm*, 149 F. 284, 286 (C.C.S.D. Ala. 1906).

14. *United States v. Boylen*, 41 F. Supp. 724, 725 (D. Or. 1941).

*States*.<sup>15</sup> The legal standard for competency focuses on a defendant's functional capabilities as they relate to participation in the trial process: "[T]he 'test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"<sup>16</sup> In *Drope v. Missouri* the Court further clarified that a competent defendant must be able to "assist in preparing his defense."<sup>17</sup> Through *Dusky* and *Drope*, the Supreme Court has articulated three separate factors required for competency. In order to be competent, defendants must be able to: (1) consult with defense counsel; (2) otherwise assist with their defense; and, (3) have a rational and factual understanding of the proceedings.<sup>18</sup>

In Oklahoma, as in every other state,<sup>19</sup> this fundamental constitutional right is embodied in a general competency statute which mirrors the *Dusky/Drope* standard. The Oklahoma statute states: "No person shall be subject to any criminal procedures after the person is determined to be incompetent . . ." <sup>20</sup> and defines incompetence as the "present inability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense."<sup>21</sup>

Since the standard established in *Dusky* and *Drope*, the Supreme Court has repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process, emphasizing that this basic requirement is the foundation for a host of other rights essential to a fair trial.<sup>22</sup> This functional focus of the standard recognizes that competence is required to exercise vital trial rights. Justice Kennedy described the fundamental nature of the right as follows:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the

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15. 362 U.S. 402 (1960).

16. *Id.* at 402 (internal citation omitted).

17. 420 U.S. 162, 171 (1975).

18. *Id.*; *Dusky*, 362 U.S. at 402.

19. Zapf & Roesch, *supra* note 5, at 8.

20. 22 OKLA. STAT. § 1175.2(A) (2011).

21. *Id.* § 1175.1(2).

22. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (internal citations omitted).

right to testify on one's own behalf or to remain silent without penalty for doing so.<sup>23</sup>

The accuracy and fairness of our criminal justice system depends upon the capability of the advocates to marshal the facts in support of their position and fully present their evidence. When each side is fully developed and zealously presented, the judge or jury is in the best position to ascertain the truth. Thus, proceeding against an incompetent defendant who is incapable of assisting his attorney to fully present the evidence is contrary to the adversary process itself and undermines the validity of the verdict as well as public confidence in the criminal justice system.<sup>24</sup>

Despite the fact that the Supreme Court has characterized the right to competence as "fundamental to an adversary system of justice,"<sup>25</sup> the practical application of this very general legal standard is challenging, both in its substance and in its frequency. Judges, juries, prosecutors, defense attorneys, and mental health professionals are all called upon to consider issues of competency. Although accurate statistics of incompetent criminal defendants are hard to come by, the prevalence of mental health problems in the prison population, which is well documented,<sup>26</sup> suggests that mental health issues are common among those who come into contact with the criminal justice system.<sup>27</sup> According to the American Bar Association

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23. *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (internal citations omitted).

24. The Supreme Court has repeatedly emphasized that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975); *see also* *United States v. Nobles*, 422 U.S. 225, 230-31 (1975) ("We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . .") (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

25. *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

26. The U.S. Department of Justice Bureau of Justice Statistics has found that more than half of the prison and jail inmates have mental health problems. *See* DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES at 1 (No. NCJ 213600, 2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789>.

27. Mental illness obviously may impact competency, but mental illness alone does not inevitably result in a finding of incompetence. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 175 (1989) [hereinafter ABA STANDARDS] ("If defendants are capable of meeting the articulated requirements for competence, the presence or absence of mental

(ABA), competency is, quantitatively speaking, “the single most important issue in the criminal mental health field.”<sup>28</sup> Estimates indicate that between two percent and eight percent of all criminal defendants are referred for competency evaluations, resulting in nearly 60,000 or more annual competency evaluations in the United States.<sup>29</sup>

In addition to its frequency, the substance of the competence determination remains challenging. Because the *Dusky/Drope* standard provides few specifics, practitioners have identified a number of competence-related abilities used to assess competence, including the ability to understand the charges, the current legal situation, relevant facts, legal issues and procedures, the roles of court personnel, and potential legal defenses and dispositions.<sup>30</sup> Nevertheless, professional evaluators have struggled with the application of the general competency standards to individual defendants. With a competency standard that speaks in terms of a reasonable degree of rational understanding, the inquiry is by its nature

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illness is irrelevant. Conversely, defendants may not be mentally ill yet may be incompetent to stand trial. Legal criteria, not medical or psychological diagnostic categories, govern competency. Hence, the presence or absence of mental illness, while certainly significant in evaluating defendant competence is by no means conclusive.”).

In contrast, the federal Insanity Defense Reform Act appears to require that incompetence be a result of a mental disease or defect. That statute states that in determining mental competency to stand trial or to undergo post-release proceedings, a court must find that the defendant is “presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” 18 U.S.C. § 4241(d) (2006).

28. ABA STANDARDS, *supra* note 27, at 168.

29. Zapf & Roesch, *supra* note 5, at 3; see also Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, J. AM. ACAD. PSYCHIATRY & LAW, 35, S3-S72 (2007), available at [http://www.jaapl.org/content/35/Supplement\\_4/S3.full](http://www.jaapl.org/content/35/Supplement_4/S3.full) (citing statistics showing a significant increase in the frequency of competence evaluations from 25,000-36,000 in 1973 to 50,000 in 1998 to 60,000 in 2000).

30. According to one source, the following relevant areas of inquiry are the best practice in forensic mental health assessment for competence: (1) capacity to understand the arrest process; (2) capacity to comprehend and appreciate the charges or allegations; (3) capacity to disclose to counsel pertinent facts, events, and states of mind; (4) capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed; (5) capacity to appreciate the likely outcome of the proceedings; (6) basic knowledge of legal strategies and options; (7) capacity to engage in reasoned choice of legal strategies and options (decision making); (8) capacity to understand the adversarial nature of the proceedings; (9) capacity to manifest appropriate courtroom behavior; (10) capacity to participate in trial; (11) capacity to testify relevantly; and (12) relationship with counsel. Zapf & Roesch, *supra* note 5, at 181-83.

flexible and context dependent.<sup>31</sup> But even though it would seem that there may be degrees of competency, where a defendant is capable of making some decisions but not others, the Supreme Court has nonetheless made it clear that competency is an either/or proposition. A defendant is either competent or he is not for all adjudicative proceedings, including the right to waive counsel or to plead guilty.<sup>32</sup> Whatever the inquiry, the central rationale underlying the right to competency remains: the fairness and accuracy of the criminal process require the lucid participation of the accused in his own defense.<sup>33</sup>

All of the U.S. Supreme Court's jurisprudence on the right to competency has been in the context of adult criminal defendants. Despite its unequivocal insistence that fairness dictates that incompetent defendants may not be tried, the Court has never addressed the question of whether juveniles are afforded that same due process right. Likewise, the Oklahoma general competency statute does not explicitly address whether it applies to juveniles. Oklahoma, however, flatly rejected the right to competency in juvenile proceedings in the 1989 case of *G.J.I. v. Oklahoma*.<sup>34</sup>

Thirteen-year-old G.J.I. claimed that he was incompetent to aid his defense attorney at his delinquency hearing for attempted second degree rape and that he was entitled to a competency hearing.<sup>35</sup> The Oklahoma Court of Criminal Appeals endorsed the trial court's view that the state's general competency statutes simply are not applicable to juvenile proceedings. Despite the fact that G.J.I. had a "demonstrable mental illness," a low I.Q., and suffered from major depression and conduct disorder of adolescence, the court held that it was neither appropriate nor

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31. ABA STANDARDS, *supra* note 27, at 175 ("A determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation, and should be viewed as such by both courts and mental health and mental retardation professionals.").

32. *Godinez v. Moran*, 509 U.S. 389, 398-401 (1993).

33. Of course, rationales other than fairness support the right to competency, such as maintaining the dignity and decorum of the criminal justice system by not having incompetent defendants disrupt the proceedings. In addition, several justifications for punishment of offenders are weakened if punishment is inflicted on those who cannot comprehend why they are being punished. There is little in the way of specific deterrence or retribution if a defendant does not understand what is happening to him and why. While these other valid justifications support a right to competency, the primary significance of competence is the key role it plays in ensuring a fair trial. See ABA STANDARDS, *supra* note 27, at 170.

34. 778 P.2d 485 (Okla. Crim. App. 1989).

35. *Id.* at 487.

necessary to extend the protections of the competency statutes to his jury trial, where he was found delinquent.<sup>36</sup> The court based its reasoning on the nature of the juvenile proceedings, which it characterized as “specifically not criminal” and “directed towards rehabilitation.”<sup>37</sup> Because G.J.I.’s mental disorders were considered by the court and presumably would be a factor in his disposition plan, the court found the juvenile procedures were “a comprehensive substitute for the competency statutes.”<sup>38</sup>

Oklahoma is the only state to reject explicitly the doctrine of adjudicative competence in juvenile court.<sup>39</sup> If the rationale of *G.J.I.* continues to hold true, that the nature of juvenile proceedings inherently considers issues of competence in adjudicating and treating juveniles, then Oklahoma’s outlier position is of no concern. But, as the only state to reject explicitly the right in juvenile adjudications, it is reasonable to reexamine the Oklahoma approach to juvenile competency in the face of the overwhelming consensus of virtually every other state, particularly in light of the three trends that have been shaping the evolution of the modern juvenile system and persuading most states to develop policies on juvenile competence. Those trends include the due process revolution in the juvenile court, the increasing punitive and adversarial nature of juvenile proceedings, and a growing scientific understanding of adolescent brain development.

## II. *The Evolving Juvenile Court*

The concept of the juvenile court as a separate legal institution is only a little over a century old.<sup>40</sup> First established in Chicago in 1899, the separate juvenile court concept spread rapidly across the United States so that by the early 1940s, all states had enacted legislation establishing separate courts for juvenile offenders.<sup>41</sup> Based on the notion that juveniles are developmentally different than adults and more amenable to treatment and

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36. *Id.* at 486.

37. *Id.* at 487.

38. *Id.*

39. Redding & Frost, *supra* note 7, at 372.

40. For a general description of the history of juvenile courts in the United States, see COAL. FOR JUVENILE JUSTICE, A CELEBRATION OR A WAKE? THE JUVENILE COURT AFTER 100 YEARS: 1998 ANNUAL REPORT (1998).

41. See H. Warren Dunham, *The Juvenile Court: Contradictory Orientations in Processing Offenders*, 23 LAW & CONTEMP. PROBS. 508, 508-09 (1958). Connecticut and Wyoming were the final two states to establish juvenile courts; all other states had followed Illinois’s lead by 1923. *Id.* at 509.

rehabilitation, juvenile courts embodied a *parens patriae* philosophy.<sup>42</sup> Juvenile courts were to act as a benevolent parent in the best interests of the child and the central tenets guiding the court were protection, treatment, and rehabilitation rather than punishment and retribution. The juvenile court judge was envisioned as a father figure, putting his arm around the child and “draw[ing] the lad to him” in order to intervene and save the child from a life of crime.<sup>43</sup> The jurisdiction of the juvenile court included all youth in need of intervention from the state, including abused or neglected children in need of protection and supervision.<sup>44</sup> As a result, young offenders were treated using the same informal, discretionary, and essentially diagnostic procedures used in those cases, where a child’s best interests, background, and welfare dictated the disposition. Thus, proceedings involving juvenile offenders were described as civil rather than criminal; constitutional requirements restricting state action when an individual’s liberty was at stake were considered irrelevant.<sup>45</sup>

Issues of juvenile competency had little relevancy in the traditional juvenile court system where informal proceedings were designed to take into account a juvenile’s immaturity and incompetence to reach a rehabilitative result. The need for a juvenile competency right, however, has emerged with the modern evolution of juvenile courts. Three significant changes have fueled this evolution and resulted in the increased salience of juvenile competence—the due process revolution, the increasing punitive nature of the system, and new scientific research on adolescent brain function and development. It is primarily these changes that have prompted a majority of states to establish a right to competency in juvenile proceedings.

#### A. *The Juvenile Due Process Revolution*

In the 1960s and 1970s, the U.S. Supreme Court addressed the concern that the actual performance of juvenile courts was failing to fulfill their

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42. The Latin phrase, *parens patriae*, means “parent of his or her country,” and is defined as “the state in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004). Justice Fortas explained in *In re Gault* that the Latin phrase “was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child.” 387 U.S. 1, 16 (1967) (internal citations omitted).

43. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107, 120 (1909).

44. See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

45. *Id.*

original laudable purposes and stepped in to curb perceived shortcomings and abuses of this informal system. Disturbed that “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children,”<sup>46</sup> the Court ushered in an era of due process requirements for juveniles. Through a series of decisions, the Court transformed the informal, highly discretionary juvenile justice system into a more adversarial, formalized structure.

The Court first addressed the serious deficiencies of the juvenile court in *Kent v. United States*:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.<sup>47</sup>

Sixteen year old Morris Kent, convicted of housebreaking and robbery in adult criminal court, raised a number of issues in his appeal to the U.S. Supreme Court.<sup>48</sup> The Court, however, addressed only the narrow issue of whether the waiver process, where the juvenile court waived jurisdiction and transferred Kent to adult criminal court, was fair. Interpreting the Washington, D.C. statute at issue, the Court found the waiver process

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46. *Kent v. United States*, 383 U.S. 541, 556 (1966).

47. *Id.* at 555-56.

48. *Id.* at 552. Kent raised a long list of grounds for reversal, including: his detention and interrogation were unlawful; his parents were not notified of his arrest; he was deprived of his liberty for about a week without a determination of probable cause; he was interrogated by the police in the absence of counsel or a parent and without warning of his right to remain silent or advice as to his right to counsel; he was fingerprinted while unlawfully detained; and that the fingerprints were unlawfully used. In addition, Kent cited a number of errors by the district court. *Id.*

defective and that Kent was entitled to a hearing, access to social records or reports available to the juvenile court, and to a statement of reasons for the waiver and transfer decision.<sup>49</sup> Although the Court declined to make a sweeping pronouncement on the constitutional reach of juvenile due process rights,<sup>50</sup> it did hold “that the hearing must measure up to the essentials of due process and fair treatment.”<sup>51</sup>

A year after *Kent*, the Court was more explicit on “the essentials of due process and fair treatment” in a watershed decision that has attained near iconic status in juvenile justice, *In re Gault*. In *Gault* the Court again questioned the legitimacy and efficacy of the *parens patriae* rationale and noted “that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”<sup>52</sup> Gerald Gault was a fifteen-year-old boy charged with making an obscene phone call to a female neighbor.<sup>53</sup> He was convicted by an Arizona juvenile court and committed to a juvenile facility for an indeterminate time not to extend beyond his twenty-first birthday.<sup>54</sup> An adult convicted of the same offense in criminal court would have faced a maximum of two months in jail or a fine of \$5 to \$50.<sup>55</sup> Gault’s parents were not notified that he was in custody, the delinquent petition filed against him did not contain any factual allegations, and the only testimony against him at the adjudicatory hearing was given by a probation officer who had investigated the case and prepared the petition.<sup>56</sup> The complaining witness did not testify, there was no record made of the proceeding, and Gault was not represented by an attorney at the hearing.<sup>57</sup>

In finding that young Gault’s due process rights had been violated, Justice Fortas, writing for the Court, proclaimed that “it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo

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49. *Id.* at 553-54.

50. “The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.” *Id.* at 556.

51. *Id.* at 562.

52. *In re Gault*, 387 U.S. 1, 18 (1967).

53. *Id.* at 4.

54. *Id.* at 7-8.

55. *Id.* at 8-9.

56. *Id.* at 33-34.

57. *Id.* at 56.

court.”<sup>58</sup> The Court reasoned that a proceeding alleging a violation of criminal law for which a juvenile may be committed to an institution is comparable in seriousness to a felony prosecution and, therefore, must be accompanied by similar due process guarantees.<sup>59</sup> The due process rights extended to juveniles as a result of the *Gault* decision included written notice of the charges, right to counsel, right against self-incrimination, and the right to confront and cross-examine witnesses. In subsequent cases, the Court also established that juveniles must be proven guilty beyond a reasonable doubt<sup>60</sup> and that juveniles enjoy the protections of the Double Jeopardy clause.<sup>61</sup>

Although the *Gault* decision heralded a due process revolution for juveniles, the U.S. Supreme Court stopped shy of extending the full panoply of criminal procedural rights to juveniles. The Court rejected, for instance, that the right to trial by jury in juvenile proceedings is constitutionally mandated<sup>62</sup> and has upheld pretrial detention of juveniles prior to a probable cause hearing.<sup>63</sup> Convinced that “the Constitution does not mandate elimination of all differences in the treatment of juveniles,”<sup>64</sup> the Court recognized that a juvenile proceeding is fundamentally different than an adult criminal trial. Although there is no question that juveniles are entitled to “the essentials of due process and fair treatment,” the Court sought to balance the informality and flexibility that characterize juvenile proceedings with the mandated constitutional standard that the proceedings be fundamentally fair.<sup>65</sup>

#### *B. A More Punitive and Adversarial Juvenile System?*

The second dramatic change in the juvenile justice system came as a response to the increase in the rate of violent juvenile crime in the late 1980s and early 1990s. A relatively constant rate for juvenile violent crime from the early 1970s to the late 1980s increased dramatically by 64% between 1988 and 1994. At the same time the number of juveniles arrested

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58. *Id.* at 27-28.

59. *Id.* at 36.

60. *In re Winship*, 397 U.S. 358 (1970).

61. *Breed v. Jones*, 421 U.S. 519 (1975).

62. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Interestingly, Oklahoma has extended the right to a jury trial in juvenile adjudications by statute. See 10A OKLA. STAT. § 2-2-401 (2011).

63. *Schall v. Martin*, 467 U.S. 253, 283 (1984).

64. *Id.* at 263.

65. *Id.* at 288.

for murder more than doubled between the mid-1980s and 1993.<sup>66</sup> Fueled by extensive media coverage of violent crimes by juveniles and mounting public concern over a perceived epidemic of violent juvenile crime,<sup>67</sup> all but a few states instituted reforms which tended to treat juveniles more like adults with a corresponding shift in philosophy away from rehabilitation and towards punishment.<sup>68</sup> This “get tough” on juvenile crime response from state legislatures sparked a period of intense legislative activity that began in the late 1980s and continued through the end of the 1990s. Despite a steady decline in juvenile crime and violence rates since the 1994 peak, states have not sought to roll back the shift in focus.<sup>69</sup>

Signaling a shift away from traditional notions of individualized dispositions based on the best interests of the juvenile, a significant number of states amended their juvenile code purpose statements during the 1990s. Typically, a traditional statement of legislative purpose attached to a juvenile code espouses an intent “to secure for each minor . . . such care and guidance . . . as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community.”<sup>70</sup> Amendments to juvenile code purpose statements, however, replaced the goal of rehabilitation with punishment or accountability as the primary goal for the juvenile justice system, emphasizing, for instance, public safety, the seriousness of the offense, children’s obligations to society, and rendering appropriate punishment.<sup>71</sup> By the end of the 1997 legislative session, a third of the states had redefined their juvenile court purpose clauses to emphasize public safety, certain sanctions, and/or offender accountability.<sup>72</sup>

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66. Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, JUVENILE JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), Nov. 1998, at 2.

67. Although there was a spike in violent juvenile crime in the early 1990s, the juvenile crime rate actually peaked in 1993 and declined during the second half of that decade. Public alarm, and the resulting legislative reaction, was stimulated at least in part by the excessive hype of the media. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807-08 (2003); see also COAL. FOR JUVENILE JUSTICE, FALSE IMAGES: THE NEWS MEDIA AND JUVENILE CRIME: 1997 ANNUAL REPORT (1997).

68. Patrick Griffin, Sean Addie, Benjamin Adams & Kathy Firestone, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, NAT’L REP. SERIES BULL., Sept. 2011, at 1.

69. *Id.* at 9.

70. Feld, *supra* note 44, at 709 (citations omitted).

71. *Id.*

72. Torbet & Szymanski, *supra* note 66, at 9.

In addition to the symbolic change in purpose statements, more substantive reforms included changes designed to make it easier to prosecute juveniles in adult criminal court. Legislatures in nearly every state revised their laws to lower the age at which a juvenile can be tried as an adult and broaden the range of felonies that can result in adult prosecution, shift decision-making authority from judges to prosecutors, and replace individualized discretion with automatic mechanisms.<sup>73</sup> Other common reforms included adding the existence of a prior record as a factor in waiver to adult court, increasing the maximum age beyond the normal age of majority for juvenile commitment, revising traditional confidentiality provisions in favor of more open proceedings and records, and including victims of juvenile crime as “active participants” in the juvenile justice process. The result of these changes to the traditional juvenile court jurisdiction has been an erosion of the boundary between the adult and juvenile systems.<sup>74</sup>

### *C. Juvenile Brains Are Different*

A third variable raising the salience of juvenile competency issues is the growing scientific understanding of the differences between adolescent and adult brain function. New research has disproven the long-held assumption that brain development is complete by puberty. Rather, neurologists have found that adolescence is a critical time for brain development, with dramatic changes to the brain’s structure and function.<sup>75</sup>

Utilizing relatively new imaging technology, magnetic resonance imaging (MRI), scientists have been able to track the changes in individual brains as they mature.<sup>76</sup> These longitudinal neuroimaging studies have given scientists new insights into the patterns of teenage brain development and revealed that remarkable changes occur in the brain during the teen

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73. Griffin et al., *supra* note 68, at 1, 9.

74. For a comprehensive analysis of the trends in the states’ responses to the escalating serious crimes by juveniles in the 1990s, see PATRICIA TORBET ET AL., U.S. DEP’T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (1996).

75. See generally NAT’L INST. OF MENTAL HEALTH, PUB. NO. 11-4929, THE TEEN BRAIN: STILL UNDER CONSTRUCTION (2011), available at <http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/complete-index.shtml>.

76. See, e.g., Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999), available at [http://www.math.tau.ac.il/~dms/Longitudinal/brain\\_MRI.pdf](http://www.math.tau.ac.il/~dms/Longitudinal/brain_MRI.pdf).

years.<sup>77</sup> These enormous changes impact the way adolescents process and react to information and, as a result, teenagers are more likely to be short-sighted, have poor impulse control, be driven by emotions, and be susceptible to peer pressure. These factors reduce adolescents' ability to make rational decisions about their actions and contribute to poor decision-making.<sup>78</sup>

In a series of recent cases, the U.S. Supreme Court relied upon, at least in part, this newly understood neuroscientific distinction between adult and adolescent brains in reminding us that "children cannot be viewed simply as miniature adults."<sup>79</sup> This distinction led the Court to abolish the juvenile death penalty,<sup>80</sup> both juvenile sentences of life without the possibility of parole for non-homicide crimes<sup>81</sup> and mandatory life without parole for homicide,<sup>82</sup> and to rule that the *Miranda* custody test must include a child's age in its analysis.<sup>83</sup>

The Court has repeatedly acknowledged the growing scientific evidence that young brains are simply not fully mature in their judgment, problem-solving, and decision-making capabilities. In finding that the death penalty is not appropriate for youth under age eighteen in *Roper v. Simmons*, Justice Anthony Kennedy noted that scientific and sociological studies have confirmed significant differences between adults and juveniles in maturity, responsibility, and other traits.<sup>84</sup> The Court was explicit in its reliance on developmental research, citing studies referenced in amicus briefs of both the American Medical Association and the American Psychological and Psychiatric Associations.

Writing again for the majority in *Graham v. Florida*, which struck down juvenile life without parole sentences, Justice Kennedy was even more explicit about scientific findings on adolescent brain development.

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77. NAT'L INST. OF MENTAL HEALTH, PUB. NO. 01-4929, *TEENAGE BRAIN: A WORK IN PROGRESS* (2008), available at <http://wwwapps.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml>.

78. For a summary of the scientific research on adolescent brain development and the possible implications for the juvenile justice system, see ACTION FOR CHILDREN OF N.C., *PUTTING THE JUVENILE BACK IN JUVENILE JUSTICE* (2007), available at [http://www.ncchild.org/sites/default/files/Juvenile\\_Justice\\_Raising\\_The\\_Age\\_Brief\\_final.pdf](http://www.ncchild.org/sites/default/files/Juvenile_Justice_Raising_The_Age_Brief_final.pdf).

79. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

80. *Roper v. Simmons*, 543 U.S. 551 (2005).

81. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

82. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (U.S. 2012).

83. *J.D.B.*, 131 S. Ct. at 2399.

84. *Roper*, 543 U.S. at 569.

Kennedy reiterated the developmental research cited in *Roper* and noted the recent neuroscientific research findings on the continuing development of adolescent brains: “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>85</sup>

Justice Sotomayor grounded the Court’s juvenile *Miranda* decision in the “commonsense” of the differences between children and adults and the Court’s longstanding recognition of those distinctions.<sup>86</sup> In concluding that age is both a relevant and an objective circumstance that must be included in the *Miranda* custody analysis, the Court noted that scientific research “confirms what experience bears out.”<sup>87</sup>

Writing for the Court in *Miller v. Alabama*, Justice Elena Kagan not only echoed the same scientific refrain, but asserted that “[t]he evidence . . . indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.”<sup>88</sup> Justice Kagan actually referred to the “incompetencies associated with youth” in explaining why chronological age must be a consideration in sentencing juveniles convicted of homicide offenses.<sup>89</sup> The Court’s holding that mandatory life without parole sentences for juveniles violates the Eight Amendment prohibition on cruel and unusual punishment rests in part, once again, on the neuroscientific distinction between adult and adolescent brains.

The Court’s refusal to ignore age in these four recent juvenile cases and its acknowledgement of and reliance upon the scientific evidence of adolescent brain research may have “opened the door to a broader examination of age in other contexts, with potentially far-reaching implications for children involved in the justice system.”<sup>90</sup> Based on these decisions, the Court may be open to considering the most recent scientific studies on how adolescent brain development impacts adjudicative competency. Indeed, Justice Kagan’s majority opinion in *Miller* explicitly

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85. *Graham*, 130 S. Ct. at 2026 (citing Brief for the American Medical Ass’n et al. as Amici Curiae at 16-24, *Graham* (No. 08-7412); Brief for American Psychological Ass’n et al. as Amici Curiae at 22-27, *Graham*)).

86. *J.D.B.*, 131 S. Ct. at 2403 n.5.

87. *Id.* at 2403 n.5.

88. *Miller v. Alabama*, 132 S. Ct. 2455, 2465, n.5 (U.S. 2012).

89. *Id.* at 2468.

90. Marsha Levick, *J.D.B. v. North Carolina: The U.S. Supreme Court Heralds the Emergence of the ‘Reasonable Juvenile’ in American Criminal Law*, 89 CRIM. L. RPT. 753 (2011).

references a juvenile's incapacity to assist his own attorneys as one of the "incompetencies associated with youth."<sup>91</sup>

Building on the new scientific understanding of brain development, the MacArthur Juvenile Competence Study<sup>92</sup> was the first large scale study to explore how these brain differences affect juvenile competency to stand trial. The study was designed to examine three basic questions: 1) whether adolescents differ from adults in their abilities to participate in the adjudicative process; 2) if so, in what types of youths are these differences most apparent; and, 3) what kinds of deficits have implications for law policy and practice?<sup>93</sup> The study included a diverse group of 1400 participants ages eleven to twenty-four, both males and females, half in jail or juvenile detention and half from the general population with a range of cultural, ethnic, and socioeconomic characteristics.<sup>94</sup> The study also tracked data on other variables such as "experience with the justice system, intelligence, and mental health problems."<sup>95</sup>

Using hypotheticals designed to evaluate a variety of abilities associated with competence, the study assessed "three key aspects of psychosocial maturity: the ability to evaluate risk, to think about future consequences, and to resist peer pressure".<sup>96</sup> Researchers used participant responses to a series of decisions "to assess how immaturity affects the choices defendants make".<sup>97</sup> In addition, study participants were evaluated with an established instrument widely "used with adults to assess their functional abilities related to competence," the MacArthur Competence Assessment Tool – Criminal Adjudication.<sup>98</sup> "Adults who score low [on this instrument] are generally impaired by mental illness or retardation."<sup>99</sup>

The findings of the study are startling. The results "strongly suggest that about one-third of 11-to 13-year-olds and one-fifth of 14- to 15-year-olds probably are not competent to stand trial."<sup>100</sup> The study found that many

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91. *Miller*, 132 S. Ct. at 2468.

92. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereinafter MacArthur Study].

93. *Id.* at 336.

94. *Id.* at 337.

95. Laurence Steinberg, *Juveniles on Trial MacArthur Foundation Study Calls Competency into Question*, 18 CRIM. JUST. 20, 22-23 (2003).

96. *Id.* at 22.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 23.

adolescents lack the capacities needed to be a competent defendant, exhibiting significant deficits in knowledge and understanding of the judicial process, an inability “to put facts together and draw logical conclusions, and less able than adults to think about the future consequences of their decisions.”<sup>101</sup> “In matters [related to trial understanding] and reasoning about important information, 30 percent of those 11 to 13 years old, and 19 percent of those ages 14 and 15, performed at the level of mentally ill adults who have been found not competent to stand trial.”<sup>102</sup> These findings were “robust” across gender, ethnicity, and socioeconomic status variables, as well as among both those currently in juvenile detention and those in the general community.<sup>103</sup> Thus, even setting aside the more traditional issues of juvenile mental illness and mental retardation, which current research also suggests are likely significant and undoubtedly affect competence,<sup>104</sup> policymakers and state legislators must grapple with developmental immaturity as a relevant factor for assessing juvenile competence.<sup>105</sup>

### *III. Where Does That Leave Oklahoma Juveniles?*

Oklahoma has not been immune to the trends sweeping the juvenile justice system and propelling the near universal move toward a right to juvenile competency across the nation. Questions remain, however, as to whether the impact of those trends on the juvenile justice system in Oklahoma reaffirms or undermines the state’s refusal to recognize a juvenile right of adjudicative competency. To answer those questions we must examine the different ways that the state of Oklahoma treats a juvenile under the juvenile code and the manner in which issues of juvenile competency are addressed under each approach. This section will examine each of those ways in order to assess whether Oklahoma’s approach to

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101. *Id.*

102. *See id.* at 22-23.

103. MacArthur Study, *supra* note 92, at 346.

104. *See* David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 508-19 (2006).

105. *But see* Joseph B. Sanborn, *Juveniles’ Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135 (2009) (arguing that studies of juvenile competence undertaken by developmental psychologists are flawed and that there is no categorical problem of juvenile incompetency to stand trial).

juvenile competency meets the U.S. Supreme Court's due process standard of "fundamental fairness" for juvenile proceedings.<sup>106</sup>

When a child under eighteen years old commits a crime in Oklahoma, the state can treat that individual in three different ways depending on the age of the child and the seriousness of the offense. Although the default standard for a child under the age of eighteen is juvenile adjudication,<sup>107</sup> Oklahoma's Juvenile Code also provides for prosecuting and sentencing children as adults<sup>108</sup> or as youthful offenders,<sup>109</sup> a status designed to avail the juvenile of the rehabilitative services of the juvenile system, but where an adult sentence is possible.

#### *A. Competency in Juvenile Adjudications*

Of the three trends shaping the modern juvenile justice system—a more punitive and adversarial system, expanded due process rights, and new understanding of the adolescent brain—at least one of those trends is consistent with Oklahoma's approach to competency in juvenile adjudications. The latest scientific research on adolescent brain development actually reconfirms the core rationale for a separate juvenile system, specifically that children and young adults are developmentally different than adults and should be treated so under the law. Hard science now reaffirms the historic justification for juvenile rehabilitation over punishment as the focus of juvenile dispositions. The highly elastic and malleable adolescent brain may leave young people more vulnerable to negative influences and compromise rational decision-making but it also provides a window of opportunity where appropriate guidance and support will help them become responsible members of society. The very nature of separate juvenile proceedings, just as the Oklahoma Court of Criminal Appeals held in *G.J.I.*, is designed to account for this developmental distinction from adults.

If the Oklahoma juvenile system has truly remained rehabilitative rather than become punitive like the adult criminal system, the MacArthur Study findings may be irrelevant to juveniles who remain in juvenile court. The MacArthur conclusion that a significant number of juveniles are likely incompetent to participate in their own trials because of developmental immaturity does not invalidate a system that takes into account a juvenile's immaturity and incompetence and constructs an individualized plan to

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106. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

107. 10A OKLA. STAT. § 2-5-203(A) (2011).

108. *Id.* § 2-5-205(B).

109. *Id.* § 2-5-205(A).

reach a rehabilitative result. The relevance of these findings on juvenile competence for juveniles who remain in the juvenile court, then, turns on how much those proceedings resemble a criminal trial and impose punishment in the form of adult-like consequences. Not surprisingly, the picture is mixed.

The purpose clause of the Oklahoma Juvenile Code is the first indication of this mixed picture. Unlike a number of states that amended their purpose clauses to embrace punishment and accountability over rehabilitation, Oklahoma's statute does not explicitly reference punishment as a goal. Although the purpose of the juvenile code is to "promote the public safety and reduce juvenile delinquency," the means listed to accomplish this goal focus on "the unique characteristics and needs of juveniles . . . rehabilitation and reintegration . . . [and providing] access to opportunities for personal and social growth."<sup>110</sup> There are, of course, multiple references to developing responsibility and protecting the public, but there is no wholesale abandonment of rehabilitation for punishment.

In addition, many of the traditional features of a rehabilitative focused juvenile system remain, with the state acting as *parens patriae*. The juvenile court is required to craft an individualized treatment plan that identifies the conditions leading to the adjudication, the specific services to remedy the conditions, and "the services to be provided to the parent . . ."<sup>111</sup> When a child is removed from the home, a treatment plan must detail the reason for the placement, the services to be provided, and the services necessary to transition a child back to the community.<sup>112</sup> A decision to leave a child in the home must be "consistent with the welfare of the child" and the court also has authority over a parent to require certain conduct.<sup>113</sup> Commitments to the custody of the Office of Juvenile Affairs are for an indeterminate period,<sup>114</sup> and any placement outside the home requires a court determination that "in accordance with the best interests of the child and protection of the public" reasonable efforts were made to provide for the return the child to the family.<sup>115</sup> All these dispositional orders are required to be reviewed periodically by the court "until such time as the conditions which caused the child to be adjudicated have been

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110. *Id.* § 2-1-102.

111. *Id.* § 2-2-502(A)(1)-(5).

112. *Id.* § 2-2-502(B)(1)-(4).

113. *Id.* § 2-2-503(A)(2).

114. *Id.* § 2-2-503(A)(5).

115. *Id.* § 2-2-503(A)(10).

corrected,”<sup>116</sup> with each review focusing on the services being provided to the child and directing additional services to be provided “to protect the child from further physical, mental or emotional harm or to correct the conditions that led to the adjudication.”<sup>117</sup> Presumably, the court considers elements of competency, such as maturity, mental illness, and functional ability to assist counsel in presenting the facts, in determining an appropriate individualized treatment plan for the juvenile.

While the Oklahoma juvenile system remains individualized and focused on rehabilitation at its heart, nevertheless, juvenile adjudications increasingly resemble criminal convictions because of their serious consequences, both direct and collateral. At the outset, a juvenile adjudication can result in a loss of liberty: the juvenile can be made a ward of the state, be placed on probation, be required to undergo counseling, be removed from home and placed in the custody of a private institution or group home, or placed in the custody of the Office of Juvenile Affairs for an indeterminate period of time.<sup>118</sup> As the U.S. Supreme Court recognized in *Gault*: “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.”<sup>119</sup> Even rehabilitation sanctions can involve a major loss of a child’s liberty.

A juvenile’s loss of liberty may be an incidental cost of a rehabilitative disposition, but other serious ramifications of a delinquency adjudication resemble a criminal conviction and may be motivated more by punishment (and perhaps public safety) than rehabilitation. For instance, juvenile adjudications are predicates for the filing of adult felony charges,<sup>120</sup> are used in certification determinations for youthful offender<sup>121</sup> and adult<sup>122</sup> status, may require registration as a juvenile sex offender,<sup>123</sup> or possible transfer from the juvenile sex offender registry to the adult sex offender registry.<sup>124</sup> Juvenile records are no longer as private as they once were<sup>125</sup> and may be used to enhance future adult sentences.<sup>126</sup> These serious

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116. *Id.* § 2-2-504(A)(1).

117. *Id.* § 2-2-504(C).

118. *Id.* § 2-2-503.

119. *In re Gault*, 387 U.S. 1, 36 (1967).

120. *See* 21 OKLA. STAT. § 1283(D) (2011).

121. 10A OKLA. STAT. § 2-5-101 (2011).

122. *Id.* § 2-2-403(A)(4).

123. *Id.* §§ 2-8-102 to 2-8-107.

124. *Id.* § 2-8-108.

125. *Id.* § 2-6-108.

126. 18 U.S.C.S. app. § 4A1.2 (2012).

consequences are generally unrelated to the rehabilitative function of the juvenile process and suggest a more punitive result, thus raising issues of competency.

In addition to the punitive consequences of juvenile adjudications, the state's decades-long struggle to provide appropriate treatment in its juvenile facilities raises questions about the punitive nature of those facilities. Oklahoma has been subject to two consent decrees as a result of lawsuits challenging its treatment of juveniles. The first consent decree was a result of a 1978 class action lawsuit, known as *Terry D.*,<sup>127</sup> which alleged that children were subjected to abusive use of restraints, solitary confinement, and the use of tranquilizing drugs to control juveniles, rather than treat them. In addition, children who had not committed any criminal act, such as status offenders and victims of neglect, were housed with those who had been adjudicated of crimes.<sup>128</sup> The lawsuit resulted in a detailed 1984 consent decree requiring the state to dramatically change its approach to confining juveniles, including a mandate to place children in state custody in the least restrictive alternative located near his/her home, limitations on the use of solitary confinement and a ban on confining any non-offender in an institution.<sup>129</sup>

In 2006, the state was sued again in federal court, this time by the Justice Department, for reported problems at the L.E. Rader Center, such as physical assaults, suicide attempts, and sexual assaults within the juvenile detention center.<sup>130</sup> Yet another consent decree was signed in September 2008 and contained nearly 100 requirements to address problems of juvenile safety, suicide prevention, inappropriate sexual behavior, inappropriate use of restraints, mental-health services, and special education.<sup>131</sup> Despite a last-minute emergency motion by the Justice Department to extend the decree due to "continued non-compliance" with the terms of the agreement, the consent decree expired in 2011.<sup>132</sup>

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127. *Terry D. v. Rader*, 93 F.R.D. 576 (W.D. Okla. 1982); Paul Sweeney, *Oklahoma Juvenile Officials Agree to Sweeping Changes*, 8 CORRECTIONS MAG. 39 (1982).

128. Sweeney, *supra* note 127, at 41.

129. *Id.*

130. *United States v. Oklahoma*, Case No. 06-CV-673-GKF-FHM (N.D. Okla. filed Dec. 15, 2006).

131. *Id.*

132. *United States v. Oklahoma*, Case No. 06-CV-673-GKF-FHM, 2011 U.S. Dist. LEXIS 107370 at \*12 (N.D. Okla. Sept. 21, 2011); *see also* David Harper, *DOJ Files for Extension of Rader Decree*, TULSA WORLD, Sept. 2, 2011, [http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110902\\_11\\_A1\\_TheUSD537089](http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110902_11_A1_TheUSD537089).

Although the era of consent decrees appears to be at an end, the state's long history in failing to meet the rehabilitative needs of juveniles in the system is troubling. There are also concerns that a number of new initiatives aimed at controlling a recent wave of violence in juvenile facilities, including the use of pepper spray, Tasers, restraints, and solitary confinement, reflect a move away from a rehabilitative model to a more punitive corrections model.<sup>133</sup> Despite the traditional *parens patriae* features of Oklahoma's juvenile code, where juvenile competency issues are accounted for through individualized dispositions and rehabilitation, it appears that children who remain in the juvenile system nevertheless are subject to an increasingly punitive system where competency may be a due process requirement.

The juvenile due process expansion transformed juvenile proceedings in Oklahoma just as it did across the nation. The rights flowing from *Gault* and its progeny are fundamental constitutional rights protected by both the federal Constitution and the Oklahoma state Constitution and recognized by our state and federal courts at all levels.<sup>134</sup> In fact, Oklahoma has not only upheld and endorsed the due process protections recognized by the U.S. Supreme Court, but has expanded those rights to include a right to trial by jury.<sup>135</sup>

Although due process is a flexible concept which "calls for such procedural protections as the particular situation demands,"<sup>136</sup> the U.S. Supreme Court has endorsed "fundamental fairness" as the applicable due process standard for juvenile proceedings.<sup>137</sup> The due process rights accorded juveniles from *Gault*—notice, right to counsel, right against self-

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133. Barbara Hoberock, *Reforms on Juvenile Justice Centers Losing Ground*, TULSA WORLD, Oct. 8, 2011, [http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20111008\\_16\\_A1\\_CUTLIN247397](http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20111008_16_A1_CUTLIN247397).

134. For Oklahoma state cases and statutes recognizing the rights established in *Gault*, see for example, *Crandell v. State*, 539 P.2d 398,401 (Okla. Crim. App. 1975) and 10A OKLA. STAT. § 2-2-107 (2011) (notice of charges); *J.T.P. v. Oklahoma*, 544 P.2d 1270, 1276-77 (Okla. Crim. App. 1975) and 10A OKLA. STAT. § 2-2-301(A), (C) (right to counsel); *J.T.P.*, 544 P.2d at 1277-78 and 10A OKLA. STAT. §2-2-402(B) (right against self-incrimination); *D.M.H. v Oklahoma*, 136 P.3d 1054, 1055 (Okla. Crim. App. 2006) and 10A OKLA. STAT. § 2-2-402(C) (right to confrontation and cross examination); *In re J.E.S.*, 585 P.2d 382, 383 (Okla. Crim. App. 1978) (right to beyond a reasonable doubt standard); and *D.M.H.*, 136 P3d at 1056 and 10A OKLA. STAT. § 2-2-401 (right to a trial).

135. See 10A OKLA. STAT. § 2-2-401.

136. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

137. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

incrimination, right to confront witnesses—are thus fundamental to a fair proceeding. In the context of adult criminal trials, the U.S. Supreme Court has made clear that competence is required to exercise the very rights that are fundamental to a fair juvenile proceeding:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.<sup>138</sup>

If competence is a prerequisite to exercising essential adult trial rights, is competence also a prerequisite to exercising those same rights in a juvenile adjudication? In other words, are the juvenile due process rights from *Gault* meaningless without competency? Like the relevance of the scientific findings on juvenile brain development to a need for juvenile adjudicative competency, the answer to that question may also depend on how much a juvenile proceeding resembles an adult criminal trial and imposes adult-like consequences. As we have seen, that picture is mixed, with a traditional *parens patriae* rehabilitative statutory scheme somewhat eroded by increasingly severe consequences and the state's struggle to provide consistent rehabilitative services.

As discussed above, whether juvenile brain science discoveries and expanded due process rights mandate a right to competency for juveniles in Oklahoma is dependent in part upon the extent to which the third trend in the evolution of juvenile justice, a more punitive model of juvenile justice, has impacted the nature of juvenile proceedings in the state and overshadowed the rehabilitative model. For youth who remain subject to traditional juvenile adjudication, where dispositions still result in an individualized treatment plan geared to the best interest of the child,<sup>139</sup> competency issues arise less from the proceeding and disposition itself and more from the consequences of being adjudicated delinquent. That results in a somewhat mixed picture for juveniles who remain in juvenile court for adjudication. Consistent with the more punitive trend, however, Oklahoma has crafted policies that subject more juveniles to adult proceedings and sanctions, where competency issues are undeniably relevant and only partially addressed. For those children prosecuted or sentenced as adults or

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138. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citing *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring)).

139. 10A OKLA. STAT. §§ 2-2-501 to 2-2-504.

youthful offenders, punishment replaces individualized rehabilitative dispositions and transforms a juvenile proceeding into a criminal one requiring all the due process protections to which a criminal defendant is entitled, including competency to stand trial. In short, the rationale that the Oklahoma Court of Criminal Appeals relied upon in refusing to recognize a juvenile competency right in *G.J.I.*—that the proceedings were “specifically not criminal” and “directed towards rehabilitation”—simply does not apply when children are prosecuted and sentenced in adult criminal court.

### *B. Children Prosecuted and Sentenced as Adults*

In Oklahoma, a child of any age who is charged with an act which would be a felony if committed by an adult may be certified as an adult and treated as an adult in every way by the criminal justice system,<sup>140</sup> including being incarcerated with adults upon conviction.<sup>141</sup> More specific provisions of the Juvenile Code require that a child as young as thirteen charged with first degree murder “shall be held accountable for the act as if the person were an adult,”<sup>142</sup> unless the court “reverse” certifies the child as a youthful offender or a juvenile. These certification decisions, either to prosecute a child of any age on a felony charge in adult court or, conversely, to return a thirteen- or fourteen-year-old accused of first degree murder from adult to juvenile court, require the court to conduct a hearing and make findings based on a list of statutory factors supported by clear and convincing evidence.<sup>143</sup> However, youths who are fifteen to seventeen years old and charged with first degree murder *must* be treated as adults, with no option to convince a judge to certify the child as a youthful offender or juvenile.<sup>144</sup> In addition, Oklahoma has a once-an-adult-always-an-adult provision such that once a child has been certified to stand trial as an adult or for the imposition of an adult sentence, that child will always be treated as an adult and will not be subject to juvenile court jurisdiction for any future proceedings.<sup>145</sup>

Under the Youthful Offender Act, juveniles as young as fifteen may be subject to adult sentences through another certification process or if the juvenile fails to comply with the treatment plan ordered by the court or

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140. *Id.* § 2-2-403.

141. *Id.* § 2-5-204(F).

142. *Id.* § 2-5-205(A).

143. *Id.* §§ 2-2-403, 2-2-205.

144. *Id.* § 2-5-205(B).

145. *Id.* § 2-5-204(G).

engages in other prohibited behavior.<sup>146</sup> Oklahoma's Youthful Offender Act has provided a blended sentencing option between the criminal and juvenile courts since 1998.<sup>147</sup> The Act, which elevates public safety and accountability over rehabilitation in dealing with juveniles who commit more serious crimes,<sup>148</sup> is applicable to juveniles fifteen to seventeen years old who are charged with a statutory list of serious felonies.<sup>149</sup> Oklahoma criminal courts have jurisdiction over children charged as youthful offenders and the prosecution proceeds exactly the same as it would in adult criminal court.<sup>150</sup> Convicted youthful offenders are subject to the same type of sentencing procedures and duration of sentence as an adult convicted of a felony offense. The distinction is that unless the child has been certified for an adult sentence, a youthful offender sentence is served in the custody or under the supervision of the Office of Juvenile Affairs, where the youth may still receive appropriate rehabilitation services.<sup>151</sup> The Office of Juvenile Affairs prepares a rehabilitation plan for the child, identifying the goals along with the programs and services to be provided to meet those objectives.<sup>152</sup> The court periodically reviews the progress of the youthful offender and may, based on additional offenses, bad behavior, or failure to follow the rehabilitative plan, transfer him to the custody of the Department

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146. *Id.* § 2-5-208.

147. *Id.* § 2-5-201.

148. *Id.* § 2-5-202(B).

149. Fifteen to seventeen year olds are held accountable as youthful offenders for: 1) Murder in the second degree; 2) Kidnapping; 3) Manslaughter in the first degree; 4) Robbery with a dangerous weapon or a firearm or attempt thereof; 5) Robbery in the first degree or attempt thereof; 6) Rape in the first degree or attempt thereof; 7) Rape by instrumentation or attempt thereof; 8) Forcible sodomy; 9) Lewd molestation; 10) Arson in the first degree or attempt thereof; or 11) Any offense in violation of Section 652 of Title 21 of the Oklahoma Statutes. *Id.* § 2-5-206(A).

Sixteen and seventeen year-olds are held accountable as youthful offenders for: 1) Burglary in the first degree or attempted burglary in the first degree; 2) Battery or assault and battery on a state employee or contractor while in the custody or supervision of the Office of Juvenile Affairs; 3) Aggravated assault and battery of a police officer; 4) Intimidating a witness; 5) Trafficking in or manufacturing illegal drugs; 6) Assault or assault and battery with a deadly weapon; 7) Maiming; 8) Residential burglary in the second degree after certain prior offenses; 9) Rape in the second degree; or 10) Use of a firearm while in commission of a felony. *Id.* § 2-5-206(B).

150. *Id.* § 2-5-204.

151. *Id.* § 2-5-209.

152. *Id.* § 2-5-210.

of Corrections to complete his sentence in adult prison.<sup>153</sup> In essence, a youthful offender is tried as an adult and given an adult criminal sentence that is deferred as long as he takes advantage of the rehabilitative services provided in the juvenile system. A court order transferring a youthful offender to the custody of the Department of Corrections is deemed an adult conviction with all the ramifications of such.

These provisions reflect the national trend of a more punitive juvenile system and raise questions of juvenile competency to stand trial for those Oklahoma youths prosecuted or sentenced in adult criminal court. Even if you accept *G.J.I.*'s contention that issues of competency are adequately accounted for in the juvenile system, despite the fact that consequences have become markedly more punitive and rehabilitation harder to come by, juveniles remain vulnerable to due process competency violations in the context of adult treatment and in the certification process itself.

### *C. Competency for Juveniles in Adult Criminal Court*

Of course, once a juvenile is certified to stand trial as an adult or as a youthful offender, the child has all the statutory and constitutional rights and protections of an adult accused of a crime,<sup>154</sup> including the right to competency. What remains uncertain in Oklahoma is whether a juvenile's developmental immaturity and resulting lack of capacity to assist effectively in her defense would render her incompetent to stand trial under either the *Dusky/Drope* standard or the state competency statute. Given the conclusions of the MacArthur Study regarding the significant numbers of juveniles whose adjudicative capabilities mirror mentally ill adults who have been found incompetent to stand trial,<sup>155</sup> this question is worthy of an answer.

While a majority of states have extended the right of adjudicative competency to juveniles, states are split on whether developmental immaturity alone is a legitimate source of incompetence.<sup>156</sup> Most states use the *Dusky/Drope* functional standard to assess juvenile competency, but some states require that the incompetence come from mental illness or

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153. The court must also decide whether to transfer a youthful offender to adult prison once he or she reaches the age of 18, when the Office of Juvenile Affairs no longer has jurisdiction over the individual. *See id.* § 2-5-209.

154. *Id.* § 2-5-204(C).

155. *See* MacArthur Study, *supra* note 92, at 346.

156. Twila A. Wingrove, *Is Immaturity a Legitimate Source of Incompetence to Avoid Standing Trial in Juvenile Court?*, 86 NEB. L. REV. 488, 506 (2007).

mental retardation rather than immaturity alone.<sup>157</sup> Only a few states explicitly allow for developmental immaturity to serve as a component in juvenile competency determinations. For example, the Iowa Court of Appeals stated:

Limiting incompetency in delinquency proceedings to cases in which the child is incompetent by reason of a “mental disorder” would fail to recognize that a juveniles’ inability to appreciate the charge, understand the proceedings, or assist effectively in the defense may be the result of immaturity, lack of intellectual capacity, or both. We conclude that limiting determinations of incompetency in juvenile cases to those cases in which the inability to appreciate, understand, and assist is based on a “mental disorder” would offend rights to due process.<sup>158</sup>

Similarly, at least three other states have identified immaturity as a legitimate source of incompetence for juveniles either through statute or case law.<sup>159</sup>

Oklahoma’s competency standard, like the ABA Criminal Justice Mental Health Standards, does not tie incompetence to mental illness but rather, “[t]he test . . . is whether the accused has sufficient ability to consult with his lawyer and has a rational as well as actual understanding of the proceedings against him.”<sup>160</sup> Under that standard, competency assessments for juveniles facing criminal court in Oklahoma should factor in the developmental features and unique maturity issues that can adversely affect a child’s ability to assist in her defense. The *Dusky/Drope* competence standard established by the Supreme Court and embraced by Oklahoma’s competency statute and case law is a functional test; therefore, it should make no difference whether the source of the defendant’s inability to function is mental illness or immaturity. In short, in order to ensure due process for children prosecuted or sentenced in adult criminal court,

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157. Douglass Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S52 (Supp. 2005); see, e.g., *Washington v. Swenson-Tucker*, No. 32944-7-II, 2006 Wash. App. LEXIS 242 at \*13 (Wash. Ct. App. Feb. 22, 2006) (upholding a finding of competence for an eight-year-old because his “limitations are the result of developmental deficits, not mental disease or defect”).

158. *In re A.B.*, No. 05-0868, 715 N.W.2d 767 (Table), 2006 WL 469945 at \*3 (Iowa App., Mar. 1, 2006).

159. See Wingrove, *supra* note 156, at 508 (identifying Florida, Michigan and Ohio as recognizing that immaturity may impact competency).

160. *Bryson v. State*, 876 P.2d 240, 249 (Okla. Crim. App. 1994) (citation omitted).

Oklahoma courts should apply a competency standard to juveniles that takes into consideration their unique development and maturity issues.

The loudest criticism of this approach is that children who commit serious crimes simply would not be held accountable for their criminal actions. If a sizeable proportion of younger adolescents are unfit to stand trial, what would the state do with them after certifying them to adult criminal court but declaring them incompetent to proceed? Adult defendants who are found incompetent to stand trial may not be held indefinitely for treatment to restore competency.<sup>161</sup> There must be a prospect for the defendant's successful restoration within a reasonable time and "his continued commitment must be justified by progress toward that goal."<sup>162</sup> The same would be true for children, but courts would certainly be reluctant to detain immature adolescents long enough for them to grow up and gain competency. The simple answer is to send incompetent youths back to juvenile court where their immaturity is better accounted for and rehabilitative services are more likely available.

Advocates for harsher youth sentences, who have argued that "adult time for adult crime" serves as a strong deterrent and is an effective response to more serious and often violent juvenile crime, would balk at sending serious young offenders back to juvenile court based on maturity-based incompetence. But recent research shows that prosecuting youths in the adult system is ineffective and actually may lead to more crime, not less. According to both the Centers for Disease Control and Prevention and the Office of Juvenile Justice and Delinquency Prevention, youths who are transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youths retained in the juvenile court system to be rearrested for violent or other crime.<sup>163</sup> Researchers with the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice reported similar findings from a study of more than 2000 New York and New Jersey juveniles, drawn from two jurisdictions with dramatically different approaches to handling juvenile offenders. The study

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161. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

162. *Id.*

163. Robert Hanh et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventative Services*, MORBIDITY & MORTALITY WEEKLY REP., Nov. 30, 2007, at 6; Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), June 2010, available at <http://nicic.gov/Library/023262>.

concluded that “results suggest that harsher sentences and adult punishment are ineffective deterrents to crime among the juveniles in this sample.”<sup>164</sup> In addition, a recent Baltimore, Maryland study found that, among other things, the adult justice system teaches teens to become violent criminals, subjects them to sexual and physical abuse, wastes taxpayer money, and unfairly targets African Americans.<sup>165</sup>

These findings are not particularly surprising. There are limited services in the adult system and youth often become socialized into a violent institutional culture where adult criminals are the role models.<sup>166</sup> Returning incompetent youths to juvenile court would save money in the long run by decreasing reoffending and increasing the odds that youth offenders will be rehabilitated in the juvenile system and become productive members of society.<sup>167</sup> Implementing a competency standard for juveniles in adult court that considers developmental immaturity as a factor is the first step to correcting these unintended consequences of juvenile transfer and protecting the due process rights of juveniles in adult court. The second area requiring action on juvenile competency is in the certification process itself.

#### *D. Competency in the Certification Process*

The certification process itself—where a court determines whether a child will be tried as an adult or a youthful offender or subject to an adult sentence—raises a more troubling competency concern. The consequences of being certified as an adult or a youthful offender and subject to an adult sentence are obviously significant and potentially severe. Nevertheless, a child has no right to be competent to participate in the certification process that may ultimately result in an adult criminal trial or sentence. The decisions that juveniles have to make with their attorney in a certification hearing are no less complex than in a criminal trial and certainly require that the juvenile be able to effectively and rationally assist their attorney. If the central rationale that animates the right to competency is fairness, is it

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164. MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 1* (Issue Brief 5, n.d.).

165. See Tricia Bishop, *Report Says Trying Juveniles as Adults is Counterproductive*, BALTIMORE SUN, Oct. 4, 2010, [http://articles.baltimoresun.com/2010-10-04/news/bs-md-just-kids-partnership-20101004\\_1\\_juvenile-system-baltimore-jail-juvenile-court](http://articles.baltimoresun.com/2010-10-04/news/bs-md-just-kids-partnership-20101004_1_juvenile-system-baltimore-jail-juvenile-court).

166. CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES 7-8* (2007).

167. MICHELLE DEITCH ET AL., *FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 64* (2009).

fair to certify a juvenile to the adult court if she is incompetent to provide assistance to her attorney in the hearing that makes that determination?

It is true that the court is bound to consider something akin to competency in making some certification decisions, even though the juvenile need not be competent to participate in the certification hearing itself. Among the statutory factors that the court is required to consider in order to certify a juvenile as an adult<sup>168</sup> or youthful offender<sup>169</sup> or impose an adult sentence<sup>170</sup> is an assessment of the sophistication and maturity of the accused and their capability of distinguishing right from wrong. Typically, the court has the benefit of a psychological evaluation as part of the investigation that accompanies such a motion, but that does not address the problem of a juvenile being competent enough to assist counsel in the hearing itself, which could lead to a significant deprivation of liberty.

Competence is not always a factor in the decision to prosecute a child in adult court, however. Where there is a statutory mandate that a youth who commits certain serious crimes will be treated as an adult, the factors the court may consider in a “reverse certification” back to the juvenile court or to youthful offender status do not include developmental immaturity or other aspects of adjudicative competency.<sup>171</sup> The only factors the court may weigh in deciding to remove the youth from adult court include the manner in which the alleged offense was committed, whether the offense was against persons or property, the record and past history of the child, and the prospects for adequate protection of the public.<sup>172</sup> For instance, a thirteen-year-old charged with first degree murder must be tried in adult court. Although he could petition the court to certify him as a child and return the matter to juvenile court jurisdiction, there is no provision for the court to consider his competency to assist his lawyer in his defense or to understand the proceedings against him in making that determination. In fact, the statutory language seems to suggest the court is precluded from considering competency at all in that situation.<sup>173</sup>

The Supreme Court has held that a proceeding that results in waiver to adult court is a “critically important” stage in the juvenile court process and must be accompanied by minimum requirements of due process and fair

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168. 10A OKLA. STAT. § 2-2-403(A)(3) (2011).

169. *Id.* § 2-5-205(E)(4).

170. *Id.* § 2-5-208(C)(2)(d).

171. *Id.* § 2-5-101(E).

172. *Id.*

173. “When ruling on the certification motion of the accused person, the court shall give consideration to the following guidelines, listed in order of importance.” *Id.* § 2-5-101(E).

treatment.<sup>174</sup> Given the grave consequences of adult criminal court, those minimum due process protections should include an assessment of competency prior to proceeding with a certification hearing of any kind. Even though Oklahoma's competency statute does not explicitly mention juveniles, it does apply to every stage of a criminal proceeding after arrest and before judgment including *but not limited to*, interrogation, lineup, preliminary hearing, motion dockets, discovery, pretrial hearings, and trial.<sup>175</sup> A certification hearing certainly is implied in that list.

#### IV. Conclusion

The U.S. Supreme Court has held that the right to be competent to stand trial is a fundamental right essential to fairness and due process about which there is no question.<sup>176</sup> The significance of the right is the key role it plays in ensuring a fair and accurate trial. The trends shaping the modern juvenile justice system—the expansion of juvenile due process rights, the punitive juvenile justice reforms, and the growing understanding of the unique features of the adolescent brain—have propelled other states to acknowledge a right of competency in juvenile proceedings. In the twenty-two years since the Oklahoma Court of Criminal Appeals rejected that right as unnecessary, those trends have changed the landscape of juvenile justice in Oklahoma enough to warrant a second look at our outlier position on juvenile competency.

Even if we accept the assertion that Oklahoma's juvenile system remains true to its *parens patriae* foundations, with a judge acting as a benevolent parent in the best interests of the child to meet individualized, rehabilitative goals, it is reasonable to reexamine the Oklahoma approach to juvenile competency in the face of the overwhelming consensus of virtually every other state. An examination of the shifting landscape of Oklahoma's juvenile justice system and the different ways juveniles are treated under the law reveals at least two circumstances where due process demands that youths are competent to proceed. First, where juveniles are prosecuted or sentenced in adult court they should be entitled to a competency standard that takes into consideration their unique development and maturity issues.

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174. *Kent v. United States*, 383 U.S. 541, 556 (1966) (“It is clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.”); *id.* at 562 (“[W]e do hold that the hearing must measure up to the essentials of due process and fair treatment.”).

175. 22 OKLA. STAT. § 1175.1(4) (2011) (emphasis added).

176. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996).

And second, any certification process that makes that determination about whether a child will be prosecuted or sentenced in an adult criminal court should be preceded by a finding of adjudicative competence. Making these adjustments to account for the changes in the juvenile system since *G.J.I* was decided twenty-two years ago is consistent with Oklahoma's commitment to both a rehabilitative *parens patriae* philosophy and due process of law.