

Waiver of the Right to Counsel

The Sixth Amendment's guarantee of assistance of counsel in criminal proceedings has, since the United States Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), applied to defendants in state courts, and through the Court's decision in *In re Gault*, 387 U.S. 1 (1967), extended to minors in state juvenile delinquency proceedings. The Court has recognized, implied in the right to assistance, the correlative right to refuse counsel and proceed *pro se* provided that the accused is aware of the dangers and disadvantages of dispensing with a lawyer's help and that self-representation is voluntary, knowing and intelligent. See *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); see also *In re Gault*, 387 U.S. 1, 42 (1967) (concluding that Gault and his mother had "a right . . . to be confronted with the specific consideration of whether they did or did not choose to waive the right").

A minor's right to waive the assistance of counsel in juvenile proceedings varies widely by jurisdiction.

Generally speaking (and recognizing significant nuance based on age and offense) states' approaches to permitting a juvenile's waiver of the assistance of counsel can be grouped into five categories:

- **Judicial colloquy:** The least restrictive approach to waiver requires a colloquy in which the judge advises the juvenile of his right to counsel and of the potential consequences of waiving the right such that any waiver made satisfies constitutional due process minimums.
- **Parental presence, concurrence or consultation:** A slightly more restrictive approach requires parental presence at the colloquy to lend validity to the waiver. Many states add the requirement of a meaningful consultation with a parental figure (i.e. a parent, guardian, custodian or guardian ad litem) prior to waiver.
- **Attorney consultation:** Requires juveniles to meaningfully consult with an attorney before waiving assistance of counsel.
- **A presumption against waiver that can only be rebutted by formal hearing:** New York and Kentucky presume incompetence to waive and require a full hearing, at which the juvenile is represented by counsel, to determine whether a juvenile's decision to proceed *pro se* is voluntary, knowing, and intelligent.
- **Unequivocally prohibits the possibility of waiver for certain offenders or at certain stages of the proceedings (which has not been fully adopted by any one state):** The most restrictive approach to the issue flatly prohibits juveniles from waiving their Sixth Amendment right to assistance of counsel. Although no state currently prohibits waiver for all offenders at all stages of juvenile proceedings, a few states make waiver unavailable based on age, offense or other circumstances.

States are divided below by approach to waiver of counsel in juvenile proceedings. The categories range from least restrictive, judicial colloquy, to most restrictive, prohibition of waiver. Applicable statutes and rules are included where available. Some states fall

under several categories owing to gradations based on age, offense, and other circumstances.

WAIVER OF COUNSEL ALLOWED AFTER JUDICIAL COLLOQUY:

Fifteen States Inform Juveniles through Colloquy Without a Codified Requirement:

1. Alabama
2. California
3. Connecticut
4. District of Columbia
5. Georgia
6. Hawaii
7. Illinois
8. Maine
9. Massachusetts
10. Mississippi
11. North Carolina
12. Oregon
13. Rhode Island
14. South Carolina
15. South Dakota

Fourteen States Have Codified the Judicial Colloquy Requirement:

1. Delaware (Del. Fam. Ct. R. Crim. P. 44(a))
2. Idaho (Id. Code § 20-514; Juv. Ct. R. 9)
3. Kansas (Op. Kan. Att’y Gen. No. 94-53)
4. Minnesota (Minn. R. Juv. Del. P. 3.04)
5. Missouri (Mo. Rev. Stat. § 211.211(8))
6. Nebraska (R.R.S. Neb. §§ 43-272, 279)
7. Nevada (Nev. Rev. Stat. § 62D.030(4))
8. New Mexico (N.M. Stat. Ann. § 32A-2-14(E))
9. Ohio (Ohio Juv. P. R. 3)
10. Oklahoma (10A Okl. St. § 2-2-301)
11. Utah (Utah Juv. P. R. 26(d))
12. Washington (Wash. Rev. Stat. §§ 13.40.140(9)(10))
13. Wisconsin (Wis. Stat. § 938.23(1m)(a))
14. Wyoming (Wyo. Stat. Ann. §§ 7-6-105, 107)

WAIVER OF COUNSEL ALLOWED WITH “PARENTAL” PRESENCE, CONCURRENCE OR CONSULTATION:

Two States Have Codified a Parental Presence Requirement in Certain Cases:

1. Colorado (absolute) (Colo. R. Juv. P. 3)

2. Utah (absolute if under 14) (Utah Juv. P. R. 26(d))

Ten States Have Codified or Recognized a Parental Concurrence Requirement:

1. Alaska (Alaska Stat. § 47.12.090)
2. Arizona (Ariz. R. Juv. P. 10(D))
3. Arkansas (Ark. Code Ann. § 9-27-317(a)(3))
4. Michigan (Michigan Comp. Laws § 712A.17c(3))
5. Montana (Mont. Code Ann. § 41-5-1413)
6. New Hampshire (N.H. Rev. Stat. § 62D.030(4))
7. North Dakota (*In Interest of D.S.*, 263 N.W. 2d 114 (N.D. 1978))
8. Pennsylvania (237 Pa. Code § 152; 42 Pa. Cons. Stat. Ann. § 6337)
9. Vermont (attorney consultation also required) (V.R.F.P. 6(d))
10. Virginia (Va. Code Ann. § 16.1-266(c)(3))

Four States Have Codified a Parental Consultation Requirement:

1. Indiana (unless married or emancipated) (Ind. Code Ann. § 31-32-5-1(1)-(3))
2. Louisiana (La. Child. Code art. 810(A)(1)-(3), 810(D)(1)-(3))
3. New Jersey (N.J. Stat. § 2A:4A-39(b)(1), (2))
4. Tennessee (Tenn. R. Juv. P. 30)

One State Has Granted Parents the Exclusive Right to Waive Counsel:

1. Washington (if child is under 12) (Wash. Rev. Stat. §§ 13.40.140(9), (10))

WAIVER OF COUNSEL ALLOWED AFTER ATTORNEY CONSULTATION:

Nine States Have Codified a Consultation Requirement in Certain Circumstances:

1. Alaska (if accused of felony-grade offense) (Alaska Stat. § 47.12.090)
2. Florida (Fla. R. Juv. P. 8.165(b))
3. Indiana (or parent, guardian, custodian GAL) (Ind. Code Ann. § 31-32-5-1(1)-(3))
4. Maryland (Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(2)-(4); Md. R. 11-106(b))
5. South Carolina (in detention hearings) (S.C. Code Ann. § 20-7-7215)
6. Texas (Tex. Fam. Code § 51.09)
7. Vermont (with consent of GAL also) (Vt. Fam. Pro. R. 6(d)(3), (4))
8. Virginia (if subject to detention) (Va. Code Ann. § 16.1-266(c)(3))
9. West Virginia (W. Va. Code § 49-5-9(a)(2))

WAIVER OF COUNSEL ALLOWED AFTER A HEARING:

Two States Have Codified a Hearing Requirement:

1. Kentucky (Ky. Rev. Stat. Ann. § 610.060(b))
2. New York (N.Y. Fam. Ct. Act § 249-a)

PROHIBITION AGAINST WAIVER OF COUNSEL:

Thirteen States Have Codified or Recognize Certain Prohibitions Against Waiver:

1. Arizona (if parents' interests are adverse or conflicting) (Ariz. R. Juv. P. 10(D))
2. Arkansas (if parent has filed petition against juvenile or requested removal from home; if institutional commitment is likely; if in EJJ proceedings; if in youth services custody) (Ark. Code Ann. § 9-27-317(d)-(g))
3. Illinois (if under 18 and pleading guilty, guilty but mentally ill or waiving the right to trial by jury) (725 Ill. comp. Stat. 5/113-5)
4. Iowa (if under 16; if 16 or older and in detention or shelter care hearing, waiver hearing, or dispositional hearing) (Iowa Code Ann. § 232.11(2))
5. Kentucky (if felony-grade offense, sex offense, or if there is a possibility of detention or commitment) (Ky. Rev. Stat. Ann. § 610.060(2)(a))
6. Minnesota (if subject to competency proceedings; stand-by counsel always appointed in all detention hearings and if any out-of-home placement is proposed) (Minn. R. Juv. Del. P. 3.02, 3.04))
7. Montana (if possibility of more than six months detention) (Mont. Code Ann. § 41-5-1413)
8. New Jersey (if incompetent) (N.J. Stat. § 2A:4A-39(b)(3))
9. Ohio (if possibility of transfer) (Ohio Juv. P. R. 3)
10. Oklahoma (if petition filed pursuant to § 2-2-104) (10A Okl. St. § 2-2-301)
11. Texas (if in transfer hearings, adjudications, dispositions, modifications or if juvenile if mentally ill) (Tex. Fam. Code Ann. § 51.10(b))
12. Vermont (if under 13) (V.R.F.P. 6(d)(4))
13. Wisconsin (if under 15; if 15 or older and waiver is granted, court may not transfer to serious juvenile offender program or criminal court or order secure detention) (Wis. Stat. § 938.23(1m)(a))

NEAR ABSOLUTE PROHIBITION ON WAIVER OF COUNSEL:

One state has a near absolute prohibition against Waiver:
Pennsylvania (PA R. Juv. Ct. P. 152)