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Juvenile Competency Adjudication in California Criminal Court

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Juvenile Competency Adjudication in California Criminal Court: A Defense Attorney’s Participation and Observations of a Criminal Competency Trial

Legal issues are examined vis-à-vis an empirical case study of a criminal judicial proceeding where an alleged juvenile offender was charged with serious crimes in an adult court venue. The issue litigated before a 12-member jury was not the substantive merits of guilt or innocence of the alleged criminal conduct, but whether the juvenile offender was statutorily and constitutionally competent to stand trial. The following is a succinct account of the procedural and substantive constitutional and statutory rules attributed to legal competency to stand trial and how they were recognized and applied in the government’s case against an alleged juvenile offender. The work presents the basic substantive and procedural rules of competency litigation in California state court and the extent to which these rules are shaped by federal constitutional mandates. The work gives an account of the testimonial evidence presented to the jury by three court-appointed psychologists and by a neuropsychologist who conducted quantitative testing upon the alleged offender prior to, and without knowledge of, the present litigation. At the trial, the defense presented the expert testimony of a Professor of Psychology & Social Behavior at the University of California, Irvine, who was permitted to give an account of the empirical and clinical literature on juvenile adjudicative competency in the United States. The research psychologist demonstrated that the cognitive development of adolescents could adversely affect the ability of juveniles to understand and appreciate the nature of the criminal proceedings and rationally assist their lawyer in their own defense. The research psychologist was also permitted to present an “expert opinion” concerning the quality of the evaluations and findings of the three court-appointed psychologists charged with determining the adjudicative competency of the juvenile defendant. The work also considers evidence of a surreptitious interview between two sheriff’s detectives and the alleged juvenile offender. This evidence was used by the prosecution to demonstrate the cognitive functioning of the alleged juvenile offender as it related to his legal competency to stand trial. Finally the work presents the jury’s verdict and some views expressed by jurors after the competency trial.

Keywords: juvenile competency adjudication, competency litigation, criminal proceeding, participant observation

1 Disclosure: I was appointed to represent the juvenile defendant, RJ, in my capacity as an attorney at the Santa Barbara County Office of the Public Defender.
Introduction

In 2000 the California voters approved Proposition 21, a state constitutional referendum which, among other provisions, gives prosecutors discretion to file certain statutorily enumerated criminal charges against juvenile defendants who are 14 years or older in adult court. (Welfare & Institutions Code section 707(b), Welfare & Inst. Code section 707(d)(1).) In September 2009, the District Attorney in the County of Santa Barbara filed, in adult court, a second-degree robbery charge against a 16-year-old Hispanic male here referred to as RJ. This charge of robbery was accompanied by a specially charged allegation that the alleged minor-offender (the defendant) committed the robbery “for the benefit of, at the direction of, or in association with [a] criminal street gang” in violation of the Street Terrorism Enforcement Act (Cal. Penal Code § 186.22(b)). The property allegedly stolen by use of force or fear was a skateboard. While the maximum sentence for second-degree robbery is 6 years confinement in the California State Prison, exposure would be enhanced by 10 years, for a maximum of 16 years in the state prison, if a jury were to unanimously find that the Street Terrorism Enforcement Act allegation was true. This sentence would be served at a rate of 85% or 13.6 years of actual incarceration. In RJ’s case, the substantive facts of the criminal offense were not litigated to determine guilt or innocence of the criminal conduct. What transpired, rather, was a comprehensive litigation and jury trial on the issue of RJ’s legal competency to even have a trial, in adult court, on the merits of the criminal charges. The venue of adult court, rather than juvenile court, requires a higher level of competency of the juvenile offender.

2 Juvenile court generally provides considerable advantages to an accused over adult court, including a broader range of dispositions that emphasize rehabilitation, education, and training. Juvenile court dispositions also include considerably less incarceration than dispositions reached in adult court. CEB Practice and Procedure (20014) §56.6
3 Penal Code section 211: Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.
4 RJ has provided written permission to disclose and utilize material, which may otherwise be confidential.
5 Penal Code section 186.22(b)(1): “Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court’s discretion. (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.
Federal Constitutional Test for Competency to Stand Trial and California Rules of Competency Litigation

When a state or the federal government seeks to curtail the liberty of a subject by way of criminal sanctions, the overriding federal constitutional law requires that the subject be competent to meaningfully participate in the adjudicative process. Although an accused is constitutionally entitled to effective legal representation in the criminal proceedings, his own participation is necessary to the adequate and constitutionally mandated level of procedural fairness or due process afforded to criminal defendants in the United States. The Supreme Court set forth the fundamental requirements of procedural fairness, as it relates to competency to stand trial in criminal proceedings, in the case of *Dusky v. United States* (1960) 362 U.S. 402. The high court ruled it is not enough that a criminal defendant is oriented to time and place. Rather, a criminal defendant’s competency to stand trial depends upon a determination of his present ability to consult with an attorney and have a reasonable degree of rational and factual understanding of the proceedings against him. (*Dusky*, *supra*, 362 U.S. 402.)

Many states have enacted statutory rules to conform to the constitutionally mandated *Dusky* standard. In California, these rules are enumerated in California Penal Code section 1367(a). The statute’s basic rule is that in order to be judged competent to stand trial, a criminal defendant must understand the nature of the criminal proceedings and be meaningfully able to participate in those proceedings. The criminal defendant must (1) have a rational understanding of the roles and objectives of the judge, the prosecutor, the defense attorney, the jury, and (2) the defendant must be able to rationally assist his lawyer to aid in his own defense. Given that a criminal defendant has a constitutional right to a fair trial, the judge has a duty to consider whether any given criminal defendant is competent. If the trial court judge believes there is substantial evidence that a criminal defendant is incompetent, the judge must conduct a full competency hearing. (*People v. Campbell* (1987) 193 Cal. App. 3d 1653, 1661-62.) The California Supreme Court has ruled that evidence is considered “substantial” if it raises a “reasonable doubt” in the judge’s mind concerning the defendant’s competency to stand trial. (*People v. Jones* (1991) 53 Cal. 3d 1515, 1552-1553.)

A competency hearing is considered a special proceeding and considered quasi-civil litigation. If the defense chooses, it may insist upon a 12-member jury trial to determine the issue of the defendant’s competency. (*People v. Hill* (1967)

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6 Pen. Code, § 1367(a): A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to rationally assist counsel in the conduct of a defense.

7 See also, *People v. Pennington* (1967) 66 Cal. 2d 508, 518-519 [If the defendant’s showing of incompetence is substantial the trial judge must order a full hearing to resolve any conflict in the evidence bearing on the defendant’s competency and determine the defendant’s ability to stand trial.]
67 Cal.2d 105, 114 cert. denied, 389 U.S. 1009.) The government also has a right to have the question of the defendant’s competency be determined by a 12-member jury. (People v. Superior Court (McPeters) (1985) 169 C.A.3d 796, 798.) Because the defendant’s right to a jury trial in this regard is statutory, and because his competence is in question, the defendant’s lawyer may make the decisions regarding the choice between a jury trial or a trial where the factual determination of competency would be rendered by the trial judge alone. (People v. Masterson (1994) 8 Cal. 4th 965, 974.) Defense counsel may make this decision over the defendant’s objection. (People v. Masterson (1994) 8 Cal. 4th at 971; People v. Smith (2001) 94 Cal. App. 4th 510.) The selection of a jury is referred to as the voir dire process. Here the judge and lawyers may ask questions of potential jurors regarding their ability to follow the judge’s instruction on the law and assess the evidence in a fair and impartial manner. The questions of court and counsel are limited to an inquiry of each juror’s ability to follow the legal rules and conduct their duty fairly according to the rule of law. In selecting the 12-member jury, attorneys for the defendant and the state government may peremptorily disqualify six potential jurors without stating cause or prejudice, as in civil trials. (People v. Stanley (1995) 10 Cal. 4th 764.) The court may also disqualify potential jurors if they demonstrate a degree of prejudice that would make the proceedings unfair. The defendant is presumed to be mentally competent. Accordingly, the defendant has the burden of proof to demonstrate at trial that there is a preponderance of evidence that the defendant is incompetent. (People v. Medina (1990) 51 Cal.3d 870, 875.)

The statutory procedures for competency adjudication in California are set forth in Penal Code section 1369. An attorney representing a criminal defendant has a duty to investigate the competency issue when presented with evidence of the defendant’s inability to rationally understand the nature of the proceedings or rationally assist his lawyer in his own defense. The defendant’s men-

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8 Cal. Code Civil Procedure § 223
9 Code Civ. Proc. § 231(c)
10 “The phrase ‘preponderance of evidence’ is usually defined in terms of probability of truth, e.g., ‘evidence that has more convincing force than that opposed to it.’ (BAJI, No. 2.60.) CACI, No. 200 uses the phrase ‘more likely to be true than not true.’” 1 Witkin, Cal. Evid. 5th (2012) Burden, § 36, p. 207
11 Penal Code 1369: A trial by court or jury of the question of mental competence shall proceed in the following order:
(a) The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant’s counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. The examining psychiatrists or licensed psychologists shall evaluate the nature of the defendant’s mental disorder, if any, the defendant’s ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder and, if within the scope of their licenses and appropriate to their opinions, whether or not treatment with antipsychotic medication is med-
tal competency may be called into question by such factors as the nature of the alleged crimes, the defendant’s mental history or current psychiatric evaluations. (*People v. Corona* (1978) 80 Cal. App. 3d 684, 709.) If the defendant’s lawyer has a doubt as to the defendant’s legal competency to stand trial, he has a legal duty to raise this doubt on the record in open court. A conflict may arise when an attorney represents a defendant who appears to be incompetent to participate in the legal proceedings, but who wishes to be found competent. An attorney in this position may legally assume that the potentially incompetent client is not capable of acting in his best interest. (*See, People v. Hill* (1967) 67 Cal. 2d 105, 115 n.4.) The attorney for the defendant may present evidence at trial that tends to prove the defendant’s incompetency, despite the defendant’s desire that he be found competent. The failure to present such evidence could result in prejudicial legal error, and require that the criminal trial or competency proceedings be re-litigated. (*People v. Harris* (1993) 14 Cal. App. 4th 984, 994; *People v. Bolden* (1979) 99 Cal. App. 3d 375, 379-380.)

**Sheriff’s Detectives’ Initial Field-Investigation and Reported Findings**

As noted above, RJ was charged with second-degree robbery enhanced by a formal allegation that he committed the robbery with the specific intent to benefit a criminal street gang in violation of the Street Terrorism Enforcement and Prevention Act. (Penal Code sections 211, 186.22(b).)12 According to Santa Barbara County Sheriff’s Department reports, in September 2009, sheriff’s...
deputies responded to a “gang fight” in progress with three subjects assaulting one victim. A witness to the fight alerted sheriff’s deputies to a departing vehicle that was subsequently stopped for investigation. Sheriff’s deputies detained three young adults, Carlos O, Miguel Z, and Raul M. Sheriff’s deputies contacted the 16 year-old male victim, who reported that he had been skateboarding home when a young Hispanic male, later identified as Carlos O, asked him “what’s up” and punched him in the face, knocking him off his skateboard. The victim stated that two other Hispanic males, Miguel Z and Raul M, also attacked him while he was on the ground. The victim stated he tried to fight back, but was overwhelmed. After the initial attack, he asked his assailants if he could have his skateboard back. The victim reported to sheriff’s deputies that his initial attacker, Carlos O responded, “No. This is my fucking skateboard. What you going to do about it?” The victim reported that the three men then beat him and stomped on his head. After the assailants fled, the victim made a positive identification of a fourth subject, RJ, whom the victim said was also involved in the encounter, but did not assault or batter him.

When later questioned by detectives, RJ told sheriff’s deputies he had been outside his girlfriend’s residence when Carlos O, Miguel Z, and Raul M drove near his location and stopped their vehicle. RJ admitted to detectives that he knew the three young men, and that they were either members or affiliates of the Locotes gang. RJ said that Carlos O approached RJ and said, “Hey fool, come over here.” RJ reported that Carlos O was trying to “check [him],” meaning check his willingness to do something on behalf of the Locotes gang to which Carlos O, Miguel Z and Raul M were affiliated. According to RJ, the three young men wanted RJ to participate with them, to “bust a mission,” meaning to commit a crime in the name of the gang. RJ stated, “I don’t bang,” meaning he does not participate in crimes on behalf of the gang or criminally associate with gang members or affiliates. RJ told investigating deputies that he had been “jumped out” of the Locotes gang, meaning that he had been granted ostensive permission to leave the Locotes gang following a ritual beating by a group of Locotes gang members. RJ told sheriff’s investigators that he witnessed Carlos O punch the victim as he was riding his skateboard and that Miguel Z also joined the physical attack upon the victim. He stated that Raul M, however, had not been involved in the physical assault. RJ told deputies that all parties fled the scene of the assault, fearing the police would soon arrive on the scene. RJ said he then entered his girlfriend’s residence and that Miguel Z hid the skateboard under the bed in RJ’s girlfriend’s bedroom. RJ initially reported that occupants of

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13 RJ was first briefly interviewed by police in the field shortly after the alleged criminal conduct. At a later point, RJ was interviewed by two sheriff’s detectives at the sheriff’s station. The latter interview was captured and recorded on video, and will be addressed more thoroughly infra.
the residence told Miguel Z that he (Miguel Z) was not welcome, and that Miguel Z then left the residence to get a ride from Carlos O and Raul M.

When Raul M was questioned he told deputies that RJ, Carlos O and Miguel Z had attacked the victim. Raul M also reported that RJ had taken the skateboard and hidden it inside the residence. Raul M also stated that he was not a gang member, but that RJ, Carlos O and Miguel Z were members of the Locotes street gang.

**Attorney-Client Interview Raised Doubt as to RJ’s Competency and Required Formal Declaration of Doubt in Open Court**

When RJ’s attorney (this writer)\(^\text{14}\) met RJ, it was apparent, in counsel’s practiced opinion, that RJ had a basic understanding of the nature of the charges and the adult felony criminal proceedings against him sufficient to meet the first criterion of the *Dusky* test for competency. However, RJ’s lawyer was troubled by RJ’s apparent inability to meet the second prong of the *Dusky* standard, the ability to rationally cooperate with counsel in his own defense. In the course of five separate interviews, RJ consistently maintained that he did not participate in the assault or the original taking of the skateboard.\(^\text{15}\) During the initial investigation, the victim of the assault and robbery told Sheriff’s deputies that it was not RJ, but two other gang-affiliated youths who conducted the assault and took his skateboard. Despite his adamant and consistent denial of criminal liability to Sheriff’s detectives, his attorney, the judge, and three court-appointed psychologists, RJ nonetheless expressed his intention to plead guilty to this serious felony in exchange for a quick release from physical incarceration. As part of this disposition proposed by the prosecution, RJ’s admission of criminal liability would have resulted in an early release from jail and a five-year probationary sentence. Some of RJ’s probationary terms would require that he obey all laws, be subject to search and seizure by state officials without cause or warrant, make restitution to the victim of the assault and robbery, have no association with gang members and follow all orders of his probation officer including taking any recommended therapies or classes or oth-

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\(^{14}\) At the time of the litigation the author had no thought of writing an article about the RJ case and was later asked to do so. As a Deputy Public Defender and attorney for RJ my duty was to ethically and zealously represent RJ’s legal interests and ultimately compel the prosecution to prove its case unless an acceptable compromise or plea bargain could be negotiated and consummated by the court. All private conversations between attorney and client are privileged and confidential. RJ has provided written permission to disclose such communications.

\(^{15}\) RJ consistently denied principle participation in the assault and the taking of the skateboard despite being interrogated by two sheriff’s detectives and being interviewed by his attorney and three court appointed psychologists. The interrogation by detectives was video recorded, transcribed and presented to the jury and will be further discussed *infra*. 
er programs at RJ’s expense. If RJ were to violate these or any other probationary terms, he would be subject to a potential punishment of 13.6 years of physical incarceration in the California State Prison System. Despite his lawyer’s strong advice to the contrary, RJ insisted on pleading guilty to a crime which he adamantly professed he did not commit. In his attorney’s view and that of one of the court ordered psychologists, RJ seemed only able to focus on the promise of imminent release from incarceration and seemingly could not rationally appreciate or even rationally discuss the potentially harmful probationary terms or the likelihood that he would violate his probation\textsuperscript{16} and face the disastrous consequence of a lengthy prison term. It appeared to RJ’s lawyer that the process of RJ’s decision-making demonstrated an inability to appreciate the consequences of entering a guilty plea to a crime that was not well supported by the evidence and was repeatedly and consistently denied by RJ. In counsel’s opinion, a decision to litigate the substantive offense of robbery for the benefit of a criminal street gang had a reasonable likelihood of success for RJ at a jury trial, where twelve members of the community would listen to the evidence brought forth by the government on the merits of the criminal charges. At such a trial on the merits of the charges (as opposed to an initial trial on the issue of competency) the jury would have to unanimously conclude that the elements of each criminal offense were proven beyond a reasonable doubt by legally admissible evidence.\textsuperscript{17} If RJ’s version of events were true, he would be factually innocent of the charged crimes. In counsel’s practiced opinion,\textsuperscript{18} advancing the litigation on the merits of the charges – continuing litigation even short of trial – would have considerably mitigated the potential punitive consequences of an ultimate plea-bargain. This is because judges routinely pressure prosecuting attorneys to soften initial plea-bargain offers when a case appears weak on the merits or is sympathetic in other respects. The court has an interest in finding a fair resolution of cases on an individual basis and an interest to settle cases by stipulated dispositions, rather than engage in protracted litigation requiring evidentiary hearings or lengthy jury trial proceedings. RJ appeared to not rationally appreciate his counsel’s advise that by engaging in the preliminary phases of litigation – preliminary hearing,\textsuperscript{19} in

\textsuperscript{16} RJ’s history on a separate juvenile probation included 15 probation violations for minor transgressions between November 2006 and September 2009.

\textsuperscript{17} The following instruction would be read by the judge to the jury defining “reasonable doubt”: Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true … Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty. Judicial Council Of California Criminal Jury Instruction 220

\textsuperscript{18} Counsel for RJ had 17 years of litigation experience at the time of the litigation, 14 of which were spent conducting criminal practice and trials in the jurisdiction of the Santa Barbara Superior Courts, the venue of RJ’s proceedings.

\textsuperscript{19} A preliminary hearing or preliminary examination is an evidentiary proceeding where the prosecution must present witnesses and/or other evidence to a judge to establish a “strong suspicion” in the judge’s mind that a crime was in fact committed and the defendant is the one who committed the crime. Any witnesses presented at the preliminary hearing would be subject to cross-examination by the defense attorney.
limine motions, and further settlement negotiations with assistance by the judge – the prosecution would likely soften its initial plea-bargain offer to the extent that RJ would not be subject to a lengthy prison commitment. RJ’s only focus, however, was to “get out” of incarceration at any cost, even that of pleading guilty to a serious and violent felony that would potentially result in a long-term prison commitment upon a violation of a strictly supervised probation. These factors, as well as knowledge that RJ had been diagnosed with learning disabilities during his elementary school years, raised a doubt in counsel’s mind as to RJ’s capacity to rationally assist his lawyer in his own defense, the second prong of the test in Dusky. As such, counsel was legally obliged to declare this doubt in open court and on the judicial record.

Appointment of Psychologists, Expert Evaluations and Findings Concerning RJ’s Competency to Stand Trial in Adult Criminal Court

Once the doubt was formally declared, and pursuant to the statutes discussed, the judge appointed two psychologists to conduct psychological evaluations and file written reports stating their opinions as to RJ’s competence to stand trial under the provisions of Penal Code section 1367. Weeks later, the two psychologists issued reports with differing findings and opinions. One psychologist, Psychologist A, opined that RJ was competent. Psychologist A determined that RJ did not suffer from a psychiatric disorder or developmental disability to the extent that it impeded his ability to understand the nature of the judicial proceedings or rationally aid his counsel in his own defense. Psychologist A opined that RJ met both prongs of the Dusky standard for competency. The second psychologist, Psychologist B, determined that RJ was not competent to stand trial on account of psychiatric disorders in combination with his insufficient adolescent maturation.

The latter basis for incompetency – insufficient adolescent maturity or insufficient cognitive development – is not listed in Penal Code section 1367 as a criterion for adjudicative competency in California. Despite the broader and overriding federal constitutional mandate set forth in Dusky, the text of the California statute requires that legal incompetency be on account of a “men-
tal disorder” or “developmental disability.” However, the California Court of Appeal has ruled – thus creating a legal mandate – that such a limitation cannot be sanctioned by the overriding federal constitution. Instead, and despite the California statute, a trial court may find a criminal defendant to be legally incompetent on account of an insufficient but normal level of adolescent cognitive development. The case of *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847, 852, set forth the following precedential observation and rule:

> [W]e construe rule 1498(d) consistent with the constitutional test of competency stated in *Dusky v. United States* (1960) 362 U.S. 402 [4 L.Ed.2d 824, 80 S. Ct. 788] (*Dusky*) and hold that the rule does not require that a minor have a mental disorder or developmental disability before the juvenile court may hold a hearing to determine whether, or find after holding a hearing that, the minor is incompetent to stand trial.

The court further stated that although section 1367(a) of the Penal Code “defines mental incompetency as a ‘mental disorder or developmental disability’ the test stated in *Dusky* does not.” (*Timothy J.* at p. 859.) This standard was reaffirmed in the appellate case of *In re Alejandro G.* (2012) 205 Cal. App. 4th 472, 474-75.

> [T]he correct test of competency of a minor is set forth in *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847, 858 Cal. Rptr. 3d 746 (*Timothy J.*). The court must determine whether the minor “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.” (*Id.* at p. 857, 58 Cal.Rptr.3d 746.)

In both cases, the Court of Appeal gave lawyers and judges the ability to make a legal determination of competency not only on account of a mental disorder or developmental disability, but also due to insufficient cognitive development, a phenomenon subject to clinical and empirical study.

In RJ’s case, the split of opinion by the court appointed psychologists A and B caused the judge to issue an order for a third psychologist to examine RJ and issue a report to assist in the legal determination of RJ’s competency to stand trial. This third court appointed psychologist, Psychologist C, expressed

22 A mental disorder generally refers to a psychological disorder typically listed and defined in the Diagnostic and Statistical Manual of Psychiatric Disorders IV (DSM-IV), e.g., psychosis, Bi-Polar disorder, or other psychological disorders. A developmental disability is generally an early manifested mental or physical cognitive impairment, e.g., mental retardation, autism.

23 Former Cal. Rules of Court, Rule 1498(d) required a juvenile court to stay the proceedings and conduct a hearing into a child’s competency if the court found a reason to doubt the child’s ability to understand the proceedings or cooperate with counsel.
a written opinion similar to Psychologist B, that RJ was not competent to stand trial on account of a psychiatric disorder and insufficient adolescent cognitive development.

The Competency Trial: Presentation of Expert and Sheriff’s Detectives’ Testimony on the Issue of RJ’s Competency to Stand Trial in Adult Criminal Court

At the competency trial, a jury of 12 community citizens was selected to listen to and observe the evidence presented by opposing counsel on the issue of RJ’s competency to stand trial in adult criminal court. The defense attorney in such a proceeding bears the burden to prove to the jury, by a preponderance of evidence,\textsuperscript{24} that the defendant is not competent. Both the defendant and the government may present judicially approved witnesses and other evidence to the jury to assist in the jury’s determination of the defendant’s competency to stand trial.

Court Appointed Psychologists

At the jury trial concerning the competency of RJ, the prosecution called Psychologist A to testify as to her findings and opinion that RJ was competent to stand trial. Psychologist A noted that during her interview, RJ was alert and oriented and that no mental illness symptoms were reported or noted, except what appeared to be managed symptoms of hyperactivity. Psychologist A reported that RJ was (1) verbally competent, (2) had good memory for recalling various events, (3) was verbally coherent and well-organized, (4) was able to disagree with the examiner in a firm, reasonable, and polite way, and (5) could explain his reason for accepting a guilty plea – that “he is pleading guilty to a crime he did not commit because he fears going to CYA [incarceration at the California Youth Authority] and wants the close supervision which felony probation will give him.” Psychologist A reported that RJ believed that if he were sent to CYA, he would be killed. Psychologist A also testified in conformity with her report that RJ had a rational understanding of the criminal justice system, could “correctly describe the names and roles of the judge, Deputy Public Defender Attorney, Deputy District Attorney, and the jury.”

The defense presented Psychologists B and C as witnesses. Both psychologists testified to the substance of their reports and conclusions. Psychologist B determined that RJ was not able to sufficiently understand abstract concepts, which could impede his ability to understand the nature of the proceedings.

\textsuperscript{24} Preponderance of evidence defined as that which has more convincing force of truth than the probability that such proposition is untrue.

\textsuperscript{1} Witkin, Cal. Evid. 5th (2012) Burden, § 36, p. 207
and meaningfully cooperate with his counsel. Psychologist B wrote that although RJ was “substantially informed of his charges... it is not clear that he understands the meaning of the enhancement. RJ knows that he may be tried as an adult, but he does not appreciate the implications in trial procedure or outcome for his being tried as an adult.” Psychologist B reminded RJ that his attorney had told RJ that a conviction of the charges would be considered a violent felony and would have serious detrimental consequences if RJ were to commit another criminal offense or otherwise violate a term or condition of his probation. According to Psychologist B, RJ failed to recall this discussion with his attorney and, in the course of Psychologist B’s interview, failed to understand the importance of this information. Psychologist B stated in court and in her report that she was concerned about RJ’s ability to work cooperatively with his attorney. She wrote, “RJ’s attitude toward his legal matter appears fixed and unmovable. He wants to be released from custody, and this desire appears to be constraining his ability to think rationally and clearly about his situation.” She further wrote, “He views his attorneys’ attempts to advise him as self-serving unless their opinions support what he wants to do. [RJ] does not experience his attorneys as advocates. This causes him to oppose his attorneys’ views and turn the attorney/client relationship into a tug of war [a conflict] in which the attorney is either ‘with’ RJ or ‘against’ him if they disagree.” Psychologist B also opined that RJ was limited in his ability to think rationally and objectively about himself and his case. Psychologist B noted, “this is not due to a mental disorder, although he has a history of Attention Deficit/Hyperactivity Disorder.” Rather, it was on account of emotional immaturity. “He is 16 years old and emotionally immature. He relates to his attorneys in an oppositional way. He is unable to make adult judgments in his best interest.” In her final analysis, Psychologist B opined that in his current state of functioning, RJ was “incapable of thinking clearly and rationally about his case, and therefore he is likely not capable of cooperating with his attorney in his own defense.”

At trial, the jury heard from Psychologist C, who also gave an opinion that RJ was not competent to stand trial in adult criminal court. Psychologist C’s testimony at trial conformed to the following passage in her written report, “What is evident is that RJ’s cognitive abilities are dramatically impacted by the following: chronological age, developmental limitations, immature manner of processing information, cognitive abilities which are limited due to Attention Deficit Disorder and possible Bipolar Disorder, present stressful environment, which appears to be exacerbating RJ’s psychological symptoms ... all of which impact RJ’s ability to appropriately and adequately process information which requires complex cognitive processing skills.” Psychologist C’s final analysis was that based on her psychological consultation and a “careful review of the

25 RJ was initially appointed two attorneys from the Public Defender’s Office, one for his adult proceedings (this writer) and one for an alleged violation of an existing juvenile probation.
police reports and medical records,” RJ was not competent to stand trial. “[H]is psychiatric condition combined with his emotional immaturity related to his chronological age of 16 and a developmental age which appears to be much younger (1) impairs his ability to aid and assist his attorney with his defense [and] (2) impedes his ability to cooperate with his attorney in a rational manner.”

**Defense Presentation of Neuropsychological Evidence**

Counsel for RJ received the court’s permission to submit additional scientific and expert evidence of (1) RJ’s psychological disorders, (2) the process of cognitive development in adolescents and (3) the quality of the psychological juvenile competency evaluations presented by Psychologists A, B and C. The court ruled that such evidence would assist the trier of fact (the jury) in its determination of the evidence.26

Prior to the litigation, Counsel obtained all of RJ’s school records, which contained abundant documentation of psychological testing. At trial, counsel called a neuropsychologist (Dr. D) as a witness to testify about his interactions with RJ over the course of RJ’s middle school and early high school years. The neuropsychologist explained to the jury that he had been previously tasked by the school district to evaluate the mental and cognitive status of RJ to assist the school district in its determination of whether RJ was eligible for an Individualized Education Program (IEP) to assist with his special learning needs. Dr. D testified that he had subjected RJ to a battery of neuropsychological examinations to determine cognition and intelligence levels. These standardized neuropsychiatric examinations27 tested the various operative brain regions for potential deficits. Dr. D testified that while RJ’s communication skills were within normal range, RJ’s cognitive functioning was deficient. According to Dr. D, the tests indicated that RJ had difficulty understanding abstract concepts and that RJ tended to think in literal terms. Although many areas of intellectual ability were within normal range, one area of developmental cognition – non-

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26 “Except as otherwise provided by statute, all relevant evidence is admissible.” (Evidence Code section 351.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evidence Code section 210.) A person is qualified to testify as an expert if she has “special knowledge, skill, training, or education sufficient to qualify [her] as an expert on the subject to which [her] testimony relates.” (Evidence Code section 720.) In addition, expert testimony should be related to a subject that is sufficiently beyond common experience to require an expert to assist the trier of fact, in this case the jury. (*People v. Chapple* (2006) 138 Cal. App. 4th 540, 546.)

27 These neuropsychological tests included the Wechsler Intelligence Scale for Children (WISC IV), Executive Wisconsin Card Sorting Test (WCST), Working Memory Index (WMI), California Verbal Learning Test, Children’s Ed. (CVLT-C), among other tests for psychomotor speed, visuoperceptual ability and sensory ability.
verbal intellectual ability – fell within the borderline range, almost at the level of mental retardation. While the rules of evidence would not permit Dr. D to present an opinion to the jury as to RJ’s competency to stand trial, his testimony did support the reasoning and conclusions of Psychologists B and C.28

**Defense Presentation of Professor of Psychology & Social Behavior**

In addition to Dr. D’s testimony, counsel for RJ presented another witness, Professor of Psychology & Social Behaviour Elizabeth Cauffman.29 In a hearing outside the jury’s presence, the court ruled that Dr. Cauffman could give expert testimony concerning adolescent cognitive development in general, adolescent cognitive development as it relates to adjudicative competency, and her opinion of the quality of the evaluations and reports submitted by court appointed Psychologists A, B, and C.

As discussed above, the case of *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847 provided the legal rule that an expert witness with qualifications similar to Dr. Cauffman’s must be permitted to testify that minors are different from adults because their brains are still developing, and due to biological factors, a given stage of normal brain development distinguishes a minor’s ability to think logically and abstractly. The court in *Timothy J.* said that such conclusions were supported by the scientific literature. As in Timothy J’s case, RJ’s attorney presented evidence – through Cauffman’s expert-testimony – concerning the development of the adolescent brain, and why, cognitively, the ability of adolescents to think logically and abstractly, and to make legal decisions in their long-term interest, is distinguished from adult cognitive functioning. Cauffman introduced the results of empirical research that showed adolescent intellectual ability in sharp contrast to diminished maturity levels in adolescents when scored at adult mean levels (Steinberg, Cauffman, Woolard, Graham, & Banich 2009). Developmental factors, such as the difficulty of adolescent defendants to think abstractly and make decisions by rationally comparing and weighing short-term and long-term consequences represent emotional diminished maturity levels.

In Cauffman’s view, evaluators frequently use insufficient and inappropriate methods to measure adolescent adjudicative competency and often fail to consider the various capacities necessary to make valid assessments of competency to stand trial under the *Dusky* standard. In particular, evaluators often fail to use the Juvenile Adjudicative Competence Interview (JACI, Grisso 2005), which is recognized as the gold standard for the evaluation of juvenile adju-

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28 It should be noted that Psychologists A, B and C had access to the prior existing reports of Dr. D, and that these reports were considered as part of their evaluations of RJ.
29 Professor of Psychology & Social Behavior, Education and Law, University of California, Irvine.
dicative competency. The JACI is a semi-structured interview developed to assist clinicians in their evaluation of adjudicative competence in a juvenile court setting (Lexcen, Heavin, Redick 2010). This assessment tool utilizes developmentally sensitive questioning of the youth directly, and considers the “Four Capacities Model” (Kruh, Grisso 2009).30 Prior to her testimony before the jury, Dr. Cauffman reviewed the three competency reports of Psychologists A, B and C and was permitted to point out their strengths and weaknesses. Cauffman testified that none of the evaluations utilized sufficient developmentally sensitive methods to determine adjudicative competency, but rather were largely based upon typical psychological assessment methods. Despite this shortcoming, Dr. Cauffman testified that some of the reasoning set forth in the evaluations submitted by Psychologists B and C made reference to perceived deficiency of RJ’s cognitive development. As such, Cauffman’s testimony did not contradict the conclusions of Psychologists B and C, who found RJ not competent to stand trial on account of psychological impairment and lack of cognitive development. Dr. Cauffman also testified that in her view, had Psychologist A properly considered the scientific literature and judicially established forensic tools used to evaluate adolescent adjudicative competency under the Dusky standard, Psychologist A may have asked additional questions regarding the defendant’s ability to think abstractly, appreciate the nature of the legal proceedings and their consequences, and make rational decisions about the litigation. Had Psychologist A asked such questions in her evaluation, she may have come to a different conclusion about RJ’s ability to rationally assist his counsel in his own defense, the second prong of the Dusky standard.

Prosecution’s Submission of Investigatory Interview between Detectives and RJ

In rebuttal to RJ’s presentation of evidence, the prosecution was permitted to present evidence of a clandestine video recording of RJ being interviewed by two sheriff’s detectives (Officers G and H). In this interview, RJ appeared oriented and rational in his discussion with detectives. His demeanor and apparent knowledge of the investigatory process and potential criminal prosecution tended to demonstrate a satisfactory understanding of the nature of the judicial process. However, the interview provided no evidence of RJ’s appreciation of the consequences of entering an early plea of guilty.

The interview occurred shortly after RJ’s arrest and a few days before his appointment of counsel. The observer may conclude that the substantive con-

30 Kruh and Grisso note that four primary capacities emerge across the various models of adjudicative competency evaluation. These are (1) factual understanding of the proceedings, (2) rational appreciation of the proceedings, (3) ability to consult and assist defense counsel, and (4) ability to make rational decisions during the course of the litigation processes.
tent of the interview favored RJ in his assertion of innocence – he consistently and convincing denied the elements of robbery (force and/or violence, theft of the skateboard) and the criminal street gang allegation (he doesn’t “bang no more” and was “jumped out” of the gang). The prosecution’s purpose in presenting the video recorded interview to the jury, however, was not to establish guilt of the substantive charges, but to show the quality of the interaction between sheriff’s detectives and RJ. The quality of this interaction, the prosecution argued, was probative of RJ’s competency to stand trial, even in adult court.

As is typical of police/detective interviews, RJ was directed to sit in a chair, in front of a hidden camera. During the interview, RJ made several inquiries as to the nature of his charges. He attempted to convince officers G and H that he was not involved in criminal activity, and gave a fairly comprehensive account of the unfolding criminal transaction. He consistently denied using force or violence or assisting others in their use of force or violence against the victim and repeatedly explained why he was no longer affiliated with the Locotes gang. In an attempt to exonerate himself, RJ urged the detectives to have the victim and witnesses make an identification of the assailants in the attack.

In the interview, Officer G accused RJ of assault (the “ass beatin’ on that kid” and robbery (“[y]ou beat him and took his … skateboard.”). Officer G said that RJ was also being charged with the crime of conspiracy to commit assault, and a “gang enhancement.” RJ explained to the detectives that at the time of the crime he was with his girlfriend at her family’s house when Carlos O, Miguel Z and Raul M drove up in their vehicle, “they just showed up.” He and his girlfriend greeted them and had just planned to “kick it” [visit] with them. RJ described how the assault occurred. He stated to sheriff’s detectives that once the young man on the skateboard rolled up, the assault and robbery was conducted by Carlos O and Miguel Z, that the victim tried to get his skateboard

31 If there were to be a jury trial on the merits of the substantive charges, a different jury would be selected and would be governed by different rules, including a higher burden of proof upon the prosecutor to establish each element of the charged crimes beyond a reasonable doubt.

32 The fact that the interview itself may detract from the prosecution’s substantive position that RJ is guilty of robbery and criminal street gang activity would not prejudice the prosecution’s case. The exonerating nature of the interview would be subject to exclusion from a second jury because the rules of evidence generally preclude self-serving non-sworn statements made by the criminal defendant when such statements are offered as evidence for the truth of their assertions. (Cal. Evidence Code section 1220.) Although the prosecution (as opposed to the defense) could submit the statements on her own motion, she would do so at her peril.

33 While there is always uncertainty that the interviewee may suspect a surreptitious recording, there is no indication that RJ had such suspicion. On the contrary, he repeatedly noted concern about a potential memorialization of the interview, given his fear of reprisal by members of his former gang.

34 The crime of conspiracy to commit an assault or robbery was not charged in the criminal complaint and was thus not a subject of judicial litigation.
back, but was again assaulted by Carlos O. As noted above, RJ told the two detectives that after the assault, Miguel Z wanted to flee with RJ and his girlfriend back to the girlfriend’s home. However, according to RJ, Miguel Z was not permitted entry to the house, and was told to get a ride and leave the scene with Carlos O and Raul M. Before leaving the property, however, Raul M left the skateboard with RJ and his girlfriend. One of those parties – [presumably RJ] – took the skateboard into the girlfriend’s house.35

In an apparent display of “understanding,” RJ asked the interviewing Officer G to explain the meaning of the criminal charge of conspiracy. Officer G told RJ that he was suspected of “conspiracy to ... assault him [the victim] with a deadly weapon, feet stompin’ on [and] kicking him.” Detective H told RJ that he was being charged with a gang enhancement as he was suspected of having committed the crime “in furtherance of the gang.” RJ responded to Officer H, “One thing is, I don’t bang no more – they even have me down36 – so I don’t know why they tried to hit [charge] me with that.” RJ continued, “I stopped banging...[s]econd of all, I was not in the fight.”

In a further display of “understanding” the criminal process – as opposed to “appreciation” of the consequences of pleading guilty – RJ inquired of the charges lodged against him. He also commented on the detectives’ apparent coercive tactics of getting him to make self-incriminating statements. RJ asked Officers G and H whether his participation in the interview could result in a dismissal of charges. He also invoked his right to have an attorney present during police interrogation, and then later waived his right to have an attorney present during his interrogation. At one point in the interview RJ urged the detectives to have the victim of the robbery and percipient witnesses make a visual identification of the suspects, “so he [the victim] can like point ‘em out so you can see who did it ... he knows that I wasn’t the one of the ones [sic] that beat him up.” In the course of the interview, RJ denied engaging in assaultive behavior on five separate occasions, denied the element of initially taking the property (skateboard) from the victim seven times, and denied affiliation and criminal association with the Locotes gang on nine occasions.

The evidence from the interview was a strong indication that RJ met the first element of competency as set forth in section 1367(a) of the Penal Code and

35 The reader may note that this version of events varies from RJ’s initial statement to police, that Miguel Z hid the skateboard under the bed in RJ’s girlfriend’s room. If the latter version of events as recorded by the surreptitious interview were factual, RJ would be guilty of aiding in a criminal offense after the fact of its commission, Penal Code section 32. This offense could have been charged as a misdemeanor or a felony, with a maximum prison exposure of 3 years to be served at 50 percent actual incarceration.

36 The statement “they have me down” in this context is a references to the fact that the Department of Probation had documented their opinion and belief that RJ was expelled from the gang by being “jumped out,” a ritual whereby a gang member is assaulted and beaten by multiple gang-members prior to being given permission to sever his gang-membership ties.
as required by the Supreme Court’s opinion in *Dusky*, that of understanding the nature of the charges and the criminal proceedings. However, the second element of the Dusky standard is arguably not established by the interview. The interview itself did not show that RJ understood the consequences of his actions during the process of adjudication of guilt, as opposed to the consequences of his decision-making during the sheriff’s deputies’ investigation. In the police investigation, RJ was focused on asserting his factual innocence and a desire to be released from police custody and jail. In the communication with his attorney and the three psychologists, RJ maintained the same objective, but sought to attain this objective by pleading guilty to a crime he adamantly maintained he did not commit and without regard or appreciation of the potentially disastrous consequences of lengthy future incarceration. The recorded interview demonstrated a reasonable “understanding” of investigatory and judicial procedure, but showed little evidence of “appreciation” or judgment capacity in consideration of the probable consequences of pleading guilty to a crime that RJ adamantly denied committing and that was noticeably unsupported by the prosecution’s proffered evidence.

**The Verdict and Subsequent Interview with Jurors**

Following the presentation of all permissible evidence at trial, the jury was given instruction on the law by the judge. The jury was told to choose a foreperson to conduct the deliberations of all twelve members. They were instructed that their task was to determine whether RJ had proven, by a preponderance of evidence, that he was not competent to stand trial on the criminal charges at the present time. After several hours of deliberation, the jury rendered a verdict in favor of the prosecution’s position that RJ was competent to stand trial for the criminal charges. In a short interview with several jurors immediately following the trial, jurors told defense counsel and his Public Defender Investigator that the interview between detectives G and H and RJ significantly contributed to their belief that RJ was competent. Jurors reported that they gave little weight to RJ’s failure to articulate a rational basis for a plea of guilty in light of his adamant denial of criminal liability or the apparent weaknesses of the substantive criminal case. The general consensus among jurors interviewed was that RJ’s ability to cogently interact with police investigators, and his knowledge of the judicial process as shown in the clandestine interview with detectives G and H, was enough for the jury to determine that the defense had not provided sufficient evidence of RJ’s incompetence.

37 The jury instructions represent the work of the Task Force on Jury Instructions, appointed by Chief Justice Ronald M. George in 1997. Their charge was to write instructions that are both legally accurate and understandable to the average juror. *Judicial Council Of California Criminal Jury Instruction Preface, Judicial Council Of California Criminal Jury Instruction Preface*
After the verdict, the judge reinstated the criminal proceedings. RJ was then free to accept the prosecution’s initial proposal, that he plead guilty, over his attorney’s advice and objection,38 to all criminal charges and accept a plea bargain offer from the prosecution. After the jury was discharged, counsel informed the court that RJ wanted to plead guilty to all counts over his lawyer’s objection. At this point, however, the prosecutor made a new proposal to RJ, that he plead guilty to only two crimes, none of which were charged in the initial complaint or charging documents. The prosecutor amended the charges so that RJ could plead guilty to the crimes of grand theft and active participation in a criminal street gang with knowledge that gang members engage in criminal conduct. (Penal Code sections 487(a) and 186.22(a).) The exposure to incarceration under the new charges would be significantly diminished should RJ violate his probation. The exposure would be just 4 years incarceration to be served at a rate of 50% upon a violation of probation as opposed to the possibility of 16 years imprisonment to be served at a rate of 85% upon a violation of probation.39 RJ accepted the newly proposed plea bargain and was released from custody shortly after his plea of guilty to the two reduced counts. As of the date of this writing, RJ has been charged with, and has admitted to, two separate probation violations, both of which resulted in short jail terms and a reinstatement of his felony probation.40

Although a 12-member jury found RJ competent to stand trial in adult court, the results may have been different under different factual circumstances. For example, had the juvenile been 14 years old instead of 16, the jury may have given greater weight to the accused’s cognitive maturity. The empirical and clinical evidence demonstrates that adolescents think differently than adults. While California and other states such as Washington41 have enacted statutory rules to comport with the standard of competency dictated by the Supreme Court’s ruling in *Dusky v. United States*, those statutes may be unconstitutionally narrow given their language that findings of incompetency be on account of

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38 It was counsel’s believe and advise to RJ that he proceed to the preliminary hearing stage of the litigation and to a jury trial on the merits of the criminal charges unless the prosecution would agree to a stipulated disposition – a plea bargain – that would further benefit RJ. As noted above, in counsel’s opinion, RJ had a considerable advantage to proceed with the litigation because he may have prevailed on some or all of the criminal charges and allegations, and even if he were to lose on all counts, the judge, the ultimate decision-maker as to sentencing, would in all likelihood, have given RJ a probationary sentence similar to the prosecution’s pre-trial offer.

39 One might infer that the prosecutor radically reduced the criminal charges in RJ’s case on account of the apparent weakness of evidence of guilt on the criminal charges of robbery, revealed in the course of the competency trial.

40 Although the court could have imposed the four-year suspended sentence, it also had the authority to impose a lesser jail term and reinstate RJ’s probation.

41 Washington’s statutory rule that seeks to comport with the *Dusky* standard defines “incompetency” as lacking “the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect” (Lexcen, F., Heavin, S., & Redick, C. 2010).
psychological or developmental disabilities. While adolescents may at times adequately understand the nature of adult criminal proceedings, their ability to appreciate the consequences of their decisions – especially in an adult court venue – may still be impeded by a lack of cognitive development. Under California law, cognitive development may be considered despite the limiting statutory language of Penal Code section 1367. Lack of cognitive development in juveniles may of course act in conjunction with other psychological factors. One may anticipate future litigation on issues of juvenile adjudicative competency when prosecutors seek to convict youths of crimes in a complex adult court venue that places additional demands on the capacities of suspected juvenile offenders.

Literature


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