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

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

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Abstract.—The present work is oriented to readers unfamiliar with the American criminal justice system. Legal issues are examined vis-à-vis an empirical case study of a juvenile defendant tried in adult criminal court due to curious elements of American law. 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 particular juvenile defendant was “competent” to stand trial in adult court. The work sets out 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 then presents the evidence and controversies that transpired in the course of the competency litigation.

Introduction

In 2000 the California voters approved Proposition 21, a state constitutional initiative which, among other provisions, gave prosecution agencies discretion to file statutorily enumerated criminal charges against juvenile defendants who are 14 years or older in adult court. (Welfare & Institutions Code section 707(b), Welfare & Institutions Code section 707(d)(1).) In September 2009, the District Attorney in the County of Santa Barbara filed a second-degree robbery charge¹ against a 16 year-old Hispanic male who shall be referred to as RJ.² This charge was accompanied by an allegation that the minor committed the robbery for the benefit of, or in association with, a “criminal street gang” in violation of a provision of the Street Terrorism Enforcement Act (Penal Code section 186.22(b)).³ The property allegedly stolen by use of force or fear was a skateboard. While

¹ 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.

² RJ has provided written permission to disclose and utilize material, which may otherwise be confidential.

³ 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

the maximum sentence for second-degree robbery is 6 years in the California State Prison, the maximum exposure would be enhanced to 16 years 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 per cent or 13.6 years of actual incarceration.

The following is a brief description of the law and facts pertaining to the case, and an account of the litigation concerning RJ's competency to stand trial for the alleged crime in adult criminal court, as opposed to juvenile criminal court where there are greater procedural safeguards. The definition of competency as a legal term of art is set forth in the United State Supreme Court case, *United States v. Dusky* (1960) 362 U.S. 402⁴ and the California statutory provisions of Penal Code section 1367.⁵

In United States law, the range of terminology is vast and at times abstruse. The judicial meaning of terms like relevance, prejudice, character, insanity, criminal gang activity, competency, and other terms are often defined by statute, but refined by judicial interpretation and the adherence to *stare decisis*, the common law doctrine that the lower courts are bound to follow the legal precedents of statutory and constitutional interpretations rendered by the higher appellate courts and ultimately the state and federal supreme courts. Two statutory and judicial terms important to the present inquiry are the meaning of "legal competency" and "criminal street gang."

In RJ's case, the substantive facts of the criminal offense were not litigated on the merits of their claim. What transpired, rather, was a comprehensive litigation on the issue of RJ's legal competency to even have a trial on the merits of the criminal claim. The following is a selective but succinct account of the procedural and substantive constitutional and statutory rules attributed to legal competency and how they were recognized and applied in the government's case against RJ.

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.

⁴ The constitutional test of a defendant's competency is whether he has sufficient present ability to reasonably and rationally consult with his attorney with a degree of rational understanding and whether he has a rational as well as a factual understanding of the proceeding against him.

⁵ Penal Code section 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 assist counsel in the conduct of a defense in a rational manner.

Constitutional Test for Competency to Stand Trial in Criminal Court

When a state or the federal government seeks to curtail the liberty of a subject by way of criminal sanctions, the 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 due process or procedural fairness legally 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 that it is not enough that a criminal defendant is oriented to time and place. Rather, a 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.).

In California, the state legislature enacted statutory rules to conform to the *Dusky* standard. These rules are enumerated in California Penal Code section 1367(a).⁶ The statute's basic rule is that in order to be deemed 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 *rationaly* assist his lawyer to aid in his own defense.

The California statute not only mandates the nature of legal incompetence by explicit definition, but also requires that such legal incompetency be on account of a "mental disorder" or "developmental disability." 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. Although Penal Code

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 assist counsel in the conduct of a defense in a rational manner.

section 1367(a) requires that a finding of mental incompetence be on account of a mental disorder or developmental disability, the California Court of Appeal has found that such a limitation cannot be sanctioned by the federal constitution. Instead, a trial court may find a criminal defendant to be legally incompetent if that defendant is limited in his or her rational understanding 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 set forth the following precedential rule:

[W]e construe rule 1498(d) [7] 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.

(*Timothy J. v. Superior Court* (*supra*) 150 Cal. App. 4th 847, 852.) 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, 58 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 judicial determination of competency on account of insufficient cognitive development, a phenomenon subject to clinical and empirical study.

⁷ 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.

Right to Jury Trial on the Issue of Competency

Given that a defendant has a constitutional right to a fair trial in criminal court, the trial court has a duty to determine whether there is substantial evidence of incompetence to require a full competency hearing whenever the issue of competency is brought to the court's attention. (*People v. Campbell* (1987) 193 Cal. App. 3d 1653, 1661-62.) Evidence is considered substantial if it raises a reasonable doubt as to the defendant's competency to stand trial. (*People v. Jones* (1991) 53 Cal. 3d 1515, 1552-1553.) 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. (*People v. Pennington* (1967) 66 Cal. 2d 508, 518-519.)

A competency hearing is considered a special proceeding. A defendant is entitled to a jury trial of the competency issue only if he demands one. (*People v. Hill* (1967) 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 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, defense counsel may make the decisions regarding the choice between a jury trial or a court trial. (*People v. Masterson* (1994) 8 Cal. 4th 965, 974.) Defense counsel may make these decisions over the defendant's objection. (*People v. Masterson* (1994) 8 Cal. 4th at p. 971; *People v. Smith* (2001) 94 Cal. App. 4th 510.) In selecting the 12 member jury, attorneys for the defendant and the government may peremptorily disqualify six potential jurors without cause as in civil trials. (*People v. Stanley* (1995) 10 Cal. 4th 764; see Code Civ. Proc. section 231(c).) The defendant is presumed to be mentally competent and the defendant has the burden of proof to demonstrate at trial that he is incompetent by a preponderance of the evidence. (*People v. Medina* (1990) 51 Cal.3d 870, 875.)

The Competency Litigation of RJ

The legal procedures for competency adjudication in California are set forth in Penal Code section 1369.⁸ An attorney representing a criminal defendant has a duty to investigate the competency issue when he is presented with evidence of the defendant's inability to rationally understand the nature of the proceedings or rationally assist counsel in his own defense. Defendant's mental competency may be called into question by such factors as the nature of the crimes, the defendant's mental history or current psychiatric evaluations. (*People v. Corona* (1978) 80 Cal. App. 3d 684, 709.) If the judge or the criminal defendant's attorney has a doubt as to the legal competency of the defendant to stand trial, he has an obligation to raise this doubt in open court. A conflict may arise when an attorney represents a client who appears incompetent to participate in the 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 potentially incompetent defendant may thus present evidence to the court of the defendant's incompetency despite the defendant's desire that he be found competent by the court. In fact, failure to present such evidence could result in prejudicial error and require that

⁸ 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 medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence.

(b) (1) The counsel for the defendant shall offer evidence in support of the allegation of mental incompetence.

(2) If the defense declines to offer any evidence in support of the allegation of mental incompetence, the prosecution may do so.

(c) The prosecution shall present its case regarding the issue of the defendant's present mental competence.

(d) Each party may offer rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention.

(e) When the evidence is concluded, unless the case is submitted without final argument, the prosecution shall make its final argument and the defense shall conclude with its final argument to the court or jury.

(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

the criminal trial or 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.) Once the doubt has been declared, the court must appoint one or two licensed psychologists or psychiatrists to evaluate the defendant and provide a written report to the court and legal counsel for use as evidence in the competency proceedings.

As noted above, RJ was charged with second-degree robbery enhanced by a formal allegation that he committed the robbery with the specific intent that the robbery benefited a criminal street gang in violation of the Street Terrorism Enforcement and Prevention Act. (Penal Code sections 211, 186.22(b).)⁹ When counsel (this writer) met RJ, it was apparent, in counsel's practiced opinion, that RJ had a basic understanding of the nature of the adult felony criminal proceedings against him. However, RJ's lawyer was troubled by RJ's apparent inability to meet the second prong of the *Dusky* standard, i.e., the ability to rationally cooperate with counsel in his own defense. Although RJ consistently maintained that he did not participate in the assault or the original taking of the skateboard – a point confirmed by the victim himself – he expressed an 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 and probationary sentence, but with likely disastrous consequences, including a potential 13.6 years of physical incarceration upon a violation of probation. Despite his lawyer's strong advisements, RJ seemed to only focus on the promise of immediate release from jail and could not rationally appreciate or rationally discuss the potentially harmful probationary terms. It appeared to counsel that this process of decision-making by RJ reflected an inability to appreciate the consequences of pleading guilty to a crime that was not well supported by the evidence and consistently denied by RJ.¹⁰ In counsel's opinion, a decision to litigate the substantive offense of robbery for the benefit of a criminal street gang had a high likelihood of success for RJ at jury trial where twelve members of the community would listen to the evidence brought forth by the government. At such a trial on the merits of the criminal charges (as opposed to a trial on the issue of competency) the jury would have

⁹ Along with the three other suspects, RJ was also charged with having committed the crime of battery with serious bodily injury and assault with force likely to cause great bodily injury in accordance with Penal Code sections 243(d) and 245(a). These crimes were filed in the alternative to the robbery/street gang allegations and would not have added additional punishment upon conviction of all three charges.

¹⁰ RJ repeatedly denied engaging in the legal elements of robbery and street gang participation when interviewed by two sheriff's detectives, his own lawyer, and three court-appointed psychologists.

to unanimously conclude that the elements of each offense were proven beyond a reasonable doubt.¹¹

If RJ's version of events were true, he would be factually innocent of the charged crimes. By taking the case to trial on the merits of the charges, or at least proceeding in the direction of a trial, RJ would most likely avoid severe future punishment. Continued litigation (even short of trial) would, in counsel's estimation, have considerably mitigated the criminal consequences of an early plea-bargain. This is because judges routinely pressure prosecuting attorneys to soften initial plea-bargain offers when a case appears weak on the merits. The court has an interest to settle cases by stipulated dispositions, rather than engage in protracted litigation requiring evidentiary hearings or lengthy jury trials. RJ appeared to not rationally appreciate his counsel's repeated advise that by engaging in the preliminary phases of litigation – preliminary hearing,¹² *in limine* motions,¹³ and further settlement negotiations with urging by the court – the prosecution would likely soften its initial plea-bargain offer to the extent that RJ would not be subject to a potential lengthy prison commitment.¹⁴ RJ's only focus, however, was to "get out" of the juvenile detention facility 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 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 declared this doubt in open court.

Once the doubt was formally declared, and pursuant to statute, the judge appointed two psychologists to evaluate 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 opinions. One psychologist, Psychologist A,

¹¹ 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)

¹² 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.

¹³ In limine motions are hearings that occur before trial and outside the presence of the jury. Their objective is to limit the scope of evidence to matters relevant to the trial and not otherwise excludable by the statutory rules of evidentiary procedure.

¹⁴ RJ, moreover, did not pause to consider his history while on juvenile probation, which included 15 probation violations for minor crimes between November 2006 and September 2009.

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. In short, 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 – is not listed in Penal Code section 1367, but as noted above, is given legal authority by the Timothy J. judicial opinion concerning the inadequacy of section 1367 under the United States Supreme Court’s mandate in Dusky. Given the split of opinion by the court appointed psychologists A and B, the judge issued an order for a third psychological examination and report to assist in the legal determination of RJ’s competency to stand trial. The third court-appointed psychologist, Psychologist C, expressed 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.

Sheriff’s Deputies Reported Facts

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 detectives¹⁵, 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 followed him into the residence while in possession of the victim's skateboard. According to RJ's initial account, Miguel Z hid the skateboard under the bed in RJ's girlfriend's bedroom. RJ initially reported that occupants of 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 Oscar 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.

¹⁵ 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 Competency Trial

At the competency trial a jury of 12 community members 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,¹⁶ 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.

A. Court Appointed Expert Evidence

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 and meaningfully cooperate with his counsel. Psychologist B wrote that although RJ was “substantially informed of his charges... it is

¹⁶ “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)

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’ [17] 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 infor-

¹⁷ 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.

mation which requires complex cognitive processing skills.” Psychologist C’s final analysis was that based on her psychological consultation and a “careful review of the 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.”

B. Defense Expert Witnesses

Counsel for RJ received the court’s clearance to submit additional scientific and expert evidence of (1) RJ’s psychological disorders, (2) the nature 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.¹⁸

Counsel called a neuropsychologist (Dr. G) 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 tasked by the school district to evaluate the mental and cognitive status of RJ for use in the school district’s determination of whether RJ was eligible for an Individualized Education Program (IEP) to assist with his special learning needs. Dr. G testified that he had subjected RJ to a battery of neuropsychological examinations to determine cognition and intelligence levels. These standardized neuropsychiatric examinations¹⁹ tested the various operative brain regions for potential deficits. Dr. G testified that while RJ’s communication skills were within normal range, RJ’s cognitive functioning was deficient. According to Dr. G, 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,

¹⁸ “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.)

¹⁹ 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, visuo-perceptual ability and sensory ability.

one area of developmental cognition – non-verbal intellectual ability – fell within the borderline range, almost at the level of mental retardation. While the rules of evidence would not permit Dr. G 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.²⁰

In addition to Dr. G’s testimony, counsel for RJ presented another witness, research psychologist Elizabeth Cauffman,²¹ who studies adolescent cognitive development and its implications in adolescent adjudicative competency evaluations. Dr. Cauffman offered evidence (testimony) of the history and the state of research concerning adolescent adjudicative competency. In her view, evaluators frequently use insufficient and inappropriate methods to measure adolescent adjudicative competency and often fail to measure or consider adolescent cognitive development as a factor in adolescent competency evaluations. Dr. Cauffman did not conduct a collateral interview and evaluation of RJ himself, but provided to the jury a partial account of the peer-reviewed literature on the subject of adolescent adjudicative competency evaluations. Dr. Cauffman also addressed the quality of the competency evaluations prepared by Psychologists A, B and C.

As discussed above, in *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847 an expert witness with similar qualifications as Dr. Cauffman was permitted to testify that minors are different from adults because their brains are still developing and that 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. Like *Timothy J.*’s case, RJ’s attorney sought to present evidence – through Dr. Cauffman’s testimony – concerning the development of the brain’s frontal lobe and why, cognitively, the ability of adolescents to think logically and abstractly, and to make decisions in their long-term best interest, is distinguished from adult cognitive functioning. Dr. Cauffman was permitted to present evidence of the developmental impediments to competence as it relates to the generally accepted scientific literature based on empirical and clinical research. Dr. Cauffman presented 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 for adolescent defendants to think abstractly and make decisions by

²⁰ It should be noted that both psychologists B and C had access to the previous reports of Dr. G, and that these reports were considered as part of their evaluations of RJ.

²¹ Professor of Psychology & Social Behavior and Education, University of California, Irvine.

rationally comparing and weighing short-term and long-term consequences represents emotional maturity levels. Dr. Cauffman’s testimony inferred that the current state of empirical and clinical research is compatible with the reasoning and conclusions drawn by Psychologists B and C. Dr. Cauffman also testified that in her view, had Psychologist A properly considered scientific literature and judicially established forensic tools to evaluate adolescent adjudicative competency under the *Dusky* standard, Psychologist A may have asked additional questions in relation to the defendant’s ability to think abstractly and appreciate the nature and consequences of his thought processes and decision-making. 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.

C. 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 content of the interview favored RJ in his assertion of innocence – he consistently and convincingly 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,²² but to show the quality of the interaction between sheriff’s detectives and RJ.²³ The quality of this interaction, the prosecution argued, was probative of RJ’s competency to stand trial, even in adult court.

²² 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.

²³ 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

As is typical of police/detective interviews, RJ was directed to sit in a chair, in front of a hidden camera.²⁴ 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,²⁵ 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 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 Oscar 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.²⁶

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.

²⁴ 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.

²⁵ 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.

²⁶ 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.

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 down²⁷ – 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 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 ob-

²⁷ The statement “they have me down” in this context is a reference 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.

jective 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 Interviews with Jurors

Following the presentation of all permissible evidence at trial, the jury was ordered to determine whether RJ had sufficient competence to stand trial for the assaultive robbery and the gang allegation. After several hours of deliberation, the jury rendered a verdict of “competent.” In a short interview with several jurors immediately following the trial, jurors told this writer and his investigator that the interview between detectives and RJ largely 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 despite his adamant denial of criminal liability or the apparent weaknesses of the substantive 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, was enough for the jury to determine that the defense had not provided sufficient evidence of RJ’s incompetence.

RJ reported to counsel and the court that he was pleased with the verdict. Following the jury verdict, RJ presented a beaming smile and exclaimed, “I’m competent!” He then immediately asked his attorney if he could plead guilty and accept the initial prosecution’s offer so he could get out of jail. This, of course, would be his right as a “competent” defendant.

Adjudicative Disposition of the Case

After the verdict, the judge reinstated the criminal proceedings. RJ was then free to accept the prosecution’s initial proposal for a plea bargain over his attorney’s advice to the contrary. Prior to the plea of guilty, however, the prosecutor made a proposal to RJ’s

lawyer that RJ plead to two different crimes which would result in RJ's release from jail on felony probation and would significantly diminish his prison exposure upon a violation of probation. 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 certain statutorily enumerated crimes as a primary activity of the gang. (Penal Code sections 487(a) and 186.22(a).) This would result in an exposure of just 3 years and 8 months 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. RJ accepted this 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.

Conclusion

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 defendant's cognitive maturity. One might infer that the prosecutor radically reduced the criminal charges in RJ's case on account of the apparent weakness of evidence revealed in the course of the competency litigation. The empirical and clinical evidence demonstrates that adolescents think differently than adults. While adolescents may at times adequately understand the nature of adult criminal proceedings, their ability to appreciate the consequences of their decisions may still be impeded by a lack of cognitive development. Given the duty imposed upon defense counsel to investigate the competency issue when presented with evidence of a defendant's inability to rationally understand the nature of the proceedings or rationally assist counsel in his or her own defense, it appears that criminal defense lawyers in the United States should consider, as a matter of course, the implementation of a competency hearing prior to the substantive criminal litigation of juveniles in adult court.

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