IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re R.V., A Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent,	S212346
v.	Ct. App. 4/3 No. G046961
R.V., Defendant and Appellant.	Orange County Super. Ct. No. DL034139

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE DEBORAH CHUANG, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF ON THE MERITS

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

ISSUES PRESENTED IN PETITION FOR REVIEW

(California Rules of Court, rule 8.520 (b)(2)(B))

1. Whether a minor is presumed competent and bears the burden to prove incompetency in a juvenile delinquency proceeding.

2. Whether there was sufficient evidence to prove beyond a

reasonable doubt that Rosario was competent given that defense counsel told the court Rosario was not able to consult with her with a reasonable degree of rational understanding, the appointed doctor opined that Rosario was not competent, and the prosecution presented no evidence of competency.

INTRODUCTION

Just before the turn of the new century, the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice formed and began to investigate whether treating juveniles and adults similarly was appropriate for both the delinquency and criminal law systems. Results of the seminal study, published in 2003, concluded equal treatment was inappropriate given the significant developmental processes on-going during a juvenile's formative years. (Thomas Grisso et.al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (2003) 27 Law & Hum. Behav. 333]; See also Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question* (2003) 18 Crim. Just. 20.)

In 2008, the Administrative Office of the Courts (AOC) published the Juvenile Delinquency Court Assessment. (Juvenile Delinquency Court Assessment (April 2008) <http://www.courts.ca.gov/documents/JDCA2008CombinedV1V2.pdf> [as of March 3, 2014].) Prepared to help improve both the administration of justice and the lives of youth, victims, and other community members affected by the delinquency system, this new report set a significant agenda

for systemic improvements over the coming years. (*Id.* at p. 1.) Specifically, study participants suggested that the AOC collaborate with other justice partners to sponsor legislation and Rules of Court to clarify the delinquency court incompetency procedures. (*Id.* at pp. 49, 52.) To this end, the Family and Juvenile Law Advisory Committee in turn recommended that the AOC support legislation to more adequately and effectively deal with competency issues that come before the delinquency courts. (*Id.* at pp. 6, 55.)

It was not until 2010 that the California Legislature acted, recognized the specific needs of juveniles within the delinquency system, and created a separate competency scheme for minors. That year, it enacted Welfare and Institutions Code[1] section 709. The new statute was designed to handle competency considerations in the juvenile context. No longer would juvenile courts need to look to the scheme which applies in the adult criminal context – Penal Code section 1367 et seq.

Section 709 sets forth a separate competency structure for minors. The plain language of the statute shows that section 709: (1) did not specify a presumption of competency for minors, and (2) did not either explicitly or by implication allocate the burden of proof to either party. Rather, section 709 provides for a judicial determination of juvenile competency based on the findings of a neutral expert and record evidence without requiring either party to bear the burden of proof. The statute takes this path to best protect

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

a minor's right not to be adjudicated while incompetent and to recognize the unique characteristics of a developing adolescent brain.

In this case, the juvenile court inappropriately applied the statutory scheme for adult competency. Thus, even after delinquency proceedings had been suspended under section 709, subdivision (a), and a hearing was conducted under subdivision (b), the court presumed appellant was competent and allocated the burden to prove incompetence to appellant. But the specific language of section 709 sets forth no such procedures. Improperly disregarding the applicable statutory language and instead following the adult scheme, the juvenile court held that the defense did not meet its burden and found appellant competent.

The Court of Appeal also incorrectly applied the adult competency scheme, holding that appellant was presumed to be competent and bore the burden of proving his incompetency. The Court of Appeal compounded these errors by finding substantial evidence supported the juvenile court's competency finding. While the substantial evidence lens is the specific, appropriate one through which to assess the threshold competency determination under section 709, subdivision (a), it is not appropriate for the ultimate determination. Based upon the principles set forth in *People v. Ault* (2004) 33 Cal.4th 1250, and *People v. Cromer* (2001) 24 Cal.4th 889, de novo review is the appropriate standard of review to assess a juvenile court's competency determination made at a competency hearing. However, under either standard of review, the evidence in this case demonstrated that appellant was incompetent.

STATEMENT OF THE CASE

A. Trial Court Proceedings

A section 602 petition filed on March 12, 2012, alleged that appellant, R. V., committed two counts of brandishing a deadly weapon, in violation of Penal Code section 417, subdivision (a)(1), and one count of vandalism under $400, in violation of Penal Code section 594, subdivision (a)/(b)(2)(A). (CT 1.)

On April 2, 2012, the court suspended proceedings after defense counsel expressed a doubt as to appellant's competency to stand trial pursuant to section 709. (CT 24, 25.) The court appointed Dr. Kojian, a forensic psychologist, to perform a section 709 evaluation. (CT 25.)

On April 20, 2012, the court granted a continuance of the competency hearing so the prosecution could subpoena Dr. Kojian. (CT 46.)

On April 27, 2012, the court held a competency hearing. The court granted a defense request to take judicial notice of its own files. (RT 29-30.) Dr. Kojian testified and explained why he concluded appellant was incompetent. (RT 30-67.) After reviewing the court file and Dr. Kojian's report and testimony, the court found appellant did not sustain his burden to prove he was incompetent by a preponderance of the evidence; therefore the court found appellant competent and reinstated proceedings. (RT 73.) Appellant's counsel disagreed with the ruling. When appellant waived his rights and entered a slow plea, counsel did not join but submitted to a factual basis for his plea based on the police report. (CT 81.)

The juvenile court found true all counts. (CT 82.) Appellant was granted probation with a term of probation being commitment to Juvenile Hall or appropriate facility for 43 days. He received 43 days of credit for time served. (CT 82.) A timely notice of appeal was filed. (§ 800; CT 86.)

B. Appellate Court Proceedings

On appeal, appellant argued that the juvenile court erred in presuming he was competent and allocating the burden of proof to the defense. In addition, appellant argued that regardless of which side had the burden, the evidence did not support the court's finding that he was competent. In a published opinion filed June 19, 2013, the Court of Appeal affirmed the judgment, holding that appellant was presumed to be competent and bore the burden of proving his incompetency. The court found substantial evidence supported the trial court's finding appellant was competent. (G046961, Slip opinion at pp. 6-13.)

Appellant also filed a petition for writ of habeas corpus concurrent with his appeal in support of his claim he was incompetent because less than three months after he was found competent the same juvenile court found appellant incompetent. (Court of Appeal No. G047716.) The appellate court summarily denied that petition; after receiving the government's Answer, this Court denied review. (Supreme Court No. S212345.)

This Court granted review of appellant's appeal on September 25, 2013.

STATEMENT OF FACTS[2]

On March 9, 2012, officers responded to a call that a juvenile was threatening his family with a knife. (CT 68.) Appellant's mother reported that she left home a little after 7:00 a.m. to attend a class, but as she was walking away she heard Jose Cruz, her husband, yelling for her to return. When she returned to the house she saw appellant, her 16-year-old son, throw a small television to the ground. She followed appellant to his bedroom where he yelled to her, "Don't come close to me I have a knife." (CT 68, 69.)

Cruz reported that when he woke up appellant, his stepson, at about 7:00 a.m. for school, appellant was angry, complained he was sick, and said he did not want to go to school. (CT 4, 69.) Appellant then began throwing things around. Cruz explained that appellant needed to get up or he would miss the bus. Appellant clenched his fists and told Cruz, "I'm going to fuck you up." Cruz tried to get appellant to calm down, but appellant pulled out a small silver knife and told Cruz that he would kill him if he called the police. Appellant never made any movement toward Cruz who walked out of the room and called the police. (CT 69.)

Javier Naranjo, the homeowner, reported that about 7:20 a.m. he had been working on the roof of the house when he heard something break inside the house. (CT 4, 74.) When Naranjo entered the house he saw appellant and Cruz arguing and saw appellant kicking a small DVD player.

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[2] This statement of facts is based on the police report, which was the basis for the trial court's true findings. (RT 78, 79.)

(CT 74.) Appellant then went into the bedroom and pulled out a knife. (CT 74.) Appellant threatened to stab Cruz, and kill Naranjo before stabbing the bed three times. (CT 70, 74.) Appellant was taken into custody. (CT 69.)

ARGUMENT

I.

WELFARE AND INSTITUTIONS CODE SECTION 709 REQUIRES A JUDICIAL DETERMINATION OF JUVENILE COMPETENCY BASED ON THE FINDINGS OF A NEUTRAL EXPERT AND RECORD EVIDENCE WITHOUT REQUIRING EITHER PARTY TO BEAR THE BURDEN OF PROOF

The issue of which party bears the burden of proof in a juvenile competency hearing is an open question. The appellate decision in this case was the first and only published case that directly addressed this issue. (*In re R.V.* (2013) 217 Cal.App.4th 296, review granted September 25, 2013, S212346.) Other courts have noted that which party bears the burden of proof is an open question, but declined to answer the question as it would not have impacted their analysis. (*In re Alejandro G.* (2012) 205 Cal.App.4th 472, 482; *In re Christopher F.* (2011) 194 Cal.App.4th 462, 472.) As will be shown, the Court of Appeal in this case inappropriately applied the statutory system governing adult cases when it held that appellant, a juvenile, was presumed to be competent and bore the burden to prove his own incompetency. (G046961, Slip opinion at pp. 10-11.)

The criminal trial of an incompetent defendant violates the due process clause of the state and federal Constitutions. (*Medina v. California* (1992) 505 U.S. 437, 453 [112 S.Ct. 2572, 120 L.Ed.2d 353]; *In re Ricky S.* (2008) 166 Cal.App.4th 232, 234.) Because this principle is fundamental to

our adversary system of justice (*Drope v. Missouri* (1975) 420 U.S. 162, 172 [95 S.Ct. 896, 43 L.Ed.2d 103]), the United States Supreme Court has held that failure to employ procedures to protect against the trial of an incompetent defendant is a deprivation of due process. (*Pate v. Robinson* (1966) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815]; *Drope v. Missouri, supra*, 420 U.S. at p. 172.) The United States Supreme Court has also held that minors in juvenile delinquency proceedings are entitled to due process rights. (*In re Gault* (1967) 387 U.S. 1, 31–57 [87 S.Ct. 1428, 18 L.Ed.2d 527].)

Like an adult defendant, a minor has a right to a competency hearing in juvenile delinquency proceedings. (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 174-175.) A competency hearing, whether in adult court or juvenile court, must determine whether the accused "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." (*Dusky v. United States* (1960) 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824]; § 709.)

A. Section 709 Sets Forth A Separate Competency Structure For Minors Recognizing The Specific Needs Of Juveniles

In 2010, the California Legislature enacted section 709.[3] (Stats.

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[3] Section 709, states, in relevant part:

(a) During the pendency of any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency. A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable (continued...)

2010, ch. 671, § 1.) That section established and clarified protocols to be followed in juvenile competency proceedings. By enacting section 709, the Legislature recognized that juvenile competency issues differ from adult competency issues and demonstrated a legislative intent to have a separate statutory scheme for juvenile competency determinations.

Before reviewing the language of section 709, it is instructive to look at the context in which this new statute was enacted: a recognition of the fundamental differences between adult and juvenile minds.

1. Minors and Adults Differ In The Cognitive Abilities Implicated Under The *Dusky* Standard

Society's understanding of how children think, perceive situations,

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[3](...continued)
degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her.If the court finds substantial evidence raises a doubt as to the minor's competency, the proceedings shall be suspended.

(b) Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence. The Judicial Council shall develop and adopt rules for the implementation of these requirements.

(c) If the minor is found to be incompetent by a preponderance of the evidence, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. During this time, the court may make orders that it deems appropriate for services, subject to subdivision (h), that may assist the minor in attaining competency....

and process information has grown dramatically over the past 30 years. During this time, the psychological, psychiatric, and social science literature in the area of child development, child psychology and child psychiatry has vastly increased.

Recognizing the need for a comprehensive study comparing youth and adult cognitive and psychosocial abilities as trial defendants, the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice conducted the MacArthur Juvenile Adjudicative Competence Study in 2000-2003. (Thomas Grisso et.al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (2003) 27 Law & Hum. Behav. 333, [hereinafter "MacArthur Study"].) The purpose of the study was to determine: (1) whether adolescents and adults differ in abilities implicated under the *Dusky* standard; (2) if so, in what ways and to what extent; and (3) whether abilities are related to age, gender, justice system involvement, and intellectual and psychosocial development. (*Id.* at p. 336.)

The MacArthur Study looked at how individuals understood their charges, penalties, pleas, and the roles of trial participants, and whether they were able to communicate relevant facts to counsel and to reason about a plea offer through a standardized interview process. The study also assessed psychosocial influences on decisionmaking related to trial participation. (MacArthur Study, at pp. 336, 339-341.) The study confirmed that competence-related abilities improve with age during adolescence. On average, 11-13-year-old youths demonstrated significantly

poorer understanding of trial matters as well as poorer reasoning and recognition of the relevance of information for a legal defense, than did 14-15-year-old youths, who in turn performed significantly more poorly on average than did 16-17-year-olds and young adults in matters of adjudicative competency. (*Id.* at pp. 343-344.) This study provided powerful and tangible evidence that many youths facing criminal charges function less capably and competently in the role of a criminal defendant than do their adult counterparts. (*Id.* at p. 356.)

Several other studies have also produced results consistent with the MacArthur study findings. For example, a study of youth and adult capacities to understand *Miranda* rights found that, as compared to adults in the criminal justice system, 14-year-old youths in juvenile detention manifested significantly inferior comprehension of the meaning and importance of *Miranda* warnings. (MacArthur Study, at p. 356.) Other studies using smaller samples also found differences across the adolescent age range regarding knowledge of legal terms and the legal process in delinquency/criminal adjudication. (*Id.* at p. 357.)

The Court of Appeal in *Timothy J.*, recognized the developmental differences between juveniles and adults finding that a minor's competency to stand trial may manifest itself in ways not typically found in adult cases. (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860.) For adults, their incompetency to stand trial must arise from a mental disorder or developmental disability that limits their ability to understand the nature of the proceedings and to assist counsel. (Pen. Code, § 1367, subd. (a).)

The same cannot be said of a child whose developmental immaturity alone may render him incompetent to stand trial without any underlying mental or developmental abnormality. (*Timothy J., supra,* 150 Cal.App.4th at p. 860.) The court in *Timothy J.* explained:

> ...While many factors affect a minor's competency to stand trial, "the younger the juvenile defendant, the less likely he or she will be able to manifest the type of cognitive understanding sufficient to satisfy the requirements of the *Dusky vs. United States* standard."

(*Timothy J., supra,* 150 Cal.App.4th at pp. 860-861 citing Baerger et al., *Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants* (2003) 3 Journal of American Academy of Psychiatry and Law 314, 318.) The court concluded that developmental immaturity is grounds for a finding of incompetency in juveniles. (*Timothy J., supra,*150 Cal.App.4th at pp. 856-857.)

The increase in understanding about child and adolescent cognitive development has had a significant impact on the way the criminal justice system deals with juveniles.

2. The Courts Have Recognized That There Is A Difference Between Juveniles and Adults

In the last decade, the United States Supreme Court has repeatedly recognized that juveniles, in certain circumstances, must be treated differently than adults for sentencing purposes. For example, in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1], the Court invalidated the death penalty for all juvenile offenders under the age of 18 recognizing that because juveniles have lessened culpability they are less

deserving of the most severe punishment. (*Id.* at p. 569.) The Court cited the scientific and sociological studies that confirmed the "lack of maturity and an underdeveloped sense of responsibility" distinguish youth from adults. (*Ibid.*)

Similarly, in *Graham v. Florida*, the Court held that a sentence of life without parole violates the Eighth Amendment when it is imposed on juvenile nonhomicide offenders. To reach this conclusion, the Court relied on findings that minors have both diminished capacity and a greater opportunity for rehabilitation than do adults. (*Graham v. Florida* (2010) 560 U.S. 48, 74 [130 S.Ct. 2011, 176 L.Ed.2d 825].) The Court again recognized the scientific research and how "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." (*Id.* at p. 68.)

Finally, in *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455, 2469, 183 L.Ed.2d 407], the Court expanded its finding in *Graham* by holding that mandatory sentences of life imprisonment without the opportunity for parole are cruel and unusual when applied to all juvenile offenders. (*Miller, supra,* 132 S.Ct. at p. 2465.) The Court explained:

> [M]andatory life without parole for a juvenile precludes consideration of [a juvenile's] chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him-and from which he cannot usually extricate himself-no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures

> may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth-for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

(*Id.* at p. 2468.)

This Court has also recognized that sentencing a juvenile offender for a nonhomicide offense to life imprisonment without the opportunity for parole constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*People v. Caballero* (2012) 55 Cal.4th 262, 268.) In making this finding, this Court acknowledged the high court's reliance on studies showing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" in determining that a juvenile nonhomicide offender has a "twice diminished moral culpability" as opposed to an adult convicted of murder. (*Id.* at p. 266.)

3. Section 709 and Penal Code Section 1367 et seq.

By enacting section 709, the Legislature recognized the fundamental differences between adults and juveniles and the need to create a separate statutory scheme for juvenile competency determinations apart from the adult context.

In construing section 709, a court should first look at the language of the statute. If the language is clear and unambiguous there is no need for construction. However, if the language permits more then one reasonable interpretation, it is necessary to look to a variety of aids, such as legislative

intent, public policy, statutory scheme of which the statute is a part, and objectives to be achieved. (Code Civ.Proc., § 1859; *People v. Zambia* (2011) 51 Cal.4th 965, 972.) The policy of this Court "has long been to favor the construction that leads to the more reasonable result," and comports most closely with the Legislature's apparent intent. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389, quoting *Webster v. Superior Court* (1988) 46 Cal.3d 338, 343.)

The express language used in section 709, does not specify a presumption of competency for juveniles or establish which party bears the burden of proof for competency hearings. Nothing in the statute discusses or even mentions either concept. Nevertheless, if this Court finds in looking at this statute as a whole that the lack of explicit language is susceptible to more than one reasonable interpretation, resolving the question requires further inquiry.

Section 709 includes procedures that are unique to juvenile competency determinations while adding specific selected sections from the adult competency statutes that appropriately apply to juveniles. This indicates that the drafters of section 709 deliberately chose which procedures from Penal Code section 1367 et seq. to include and which procedures to leave out.

The Legislature included in section 709 similar wording of the *Dusky* standard, set forth in Penal Code section 1367, subdivision (a); a defendant is mentally incompetent if he is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a

rational manner. Additionally, in both the adult and juvenile statute, the Legislature included the language that once the court declares a doubt as to the defendant's competency, the court must suspend proceedings and hold a hearing to determine whether the defendant is competent to stand trial. (§ 709, subd. (a); Pen. Code, § 1368, subd. (c).) Both the adult and juvenile statute also state that all proceedings are to remain suspended if the defendant is found incompetent and to resume the proceedings if the defendant is found competent. (§ 709, subd. (c); Pen. Code, § 1370.)

These procedures were taken from the adult statutes because they appropriately applied in both competency schemes. From this it can be inferred that the Legislature did not intend to borrow Penal Code section 1367 et seq. procedures that did not apply to juvenile competency proceedings. (*In re Christopher F., supra,* 194 Cal.App.4th at pp. 468-469 [holding Penal Code section 1369 did not apply to juvenile proceedings and that juvenile proceedings look to general principles of due process and the requirements of California Rules of Court, rule 5.645(d) for competency determinations].)

Other procedures established in section 709 reflect that the Legislature understood the unique differences between juveniles and adults and intended to create a statutory scheme that would be appropriate for juvenile competency proceedings. Penal Code section 1369, subdivision (a), states, "The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant." In contrast, section 709, subdivision (b), requires that the

appointed expert "shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence." The Legislature recognized the need for the evaluation of children to be done by a professional with expertise in child development.

The Legislature also acknowledged a key fundamental difference between adults and juveniles by including that a juvenile may be incompetent due to developmental immaturity. (§ 709, subd. (b); (*Timothy J., supra,* 150 Cal.App.4th 847.) This procedure recognizes the variability of the development of minors.

4. There Is No Presumption Of Competency For Juveniles Once The Prima Facie Burden Has Been Met

The absence of a presumption of competency in section 709 strongly suggests that the Legislature did not intend to presume all juveniles are competent as in the adult context. Given the possibility that a juvenile may not have achieved competency yet, a presumption of competency would not be proper. "Certainly no one would dispute that a three-year-old would be incompetent to stand trial because of his or her cognitive inability to understand the proceedings or to assist his or her attorney in preparing a defense." (*Timothy J., supra,* 150 Cal.App.4th at p. 861.) Indeed, the Legislator's specific use of the word "attain" competency in section 709, subdivision (c), once the prima threshold has ben met, instead of "restore" competency as used in the adult context (Pen. Code, § 1369, subdivision (a)), reflects an understanding that a minor may not have yet gained

competency thus making a presumption of competency inappropriate.

Had the Legislature intended to create a presumption of competency it easily could have done so. In the adult competency statutes the Legislature specifically stated that the defendant shall be presumed mentally competent. (Pen. Code, § 1369, subd. (f).) Because the Legislature is deemed to be aware of existing laws when it enacts a statute (*People v. Overstreet* (1986) 42 Cal.3d 891, 897), it can be assumed that the Legislature was aware of Penal Code section 1369 when it enacted section 709 and chose not to include a presumption of competence for juveniles.

Section 709, subdivision (a), gives both defense counsel and the court the authority to declare a doubt as to a minor's competency. The statutory trigger of expressing a doubt over a juvenile's competency does not, however, imply a presumption of competency. Declaring a doubt is a way for defense counsel or the court to express that the minor might not be able to meet the *Dusky* standard. Where no doubt is raised, the parties and the court proceed because the juvenile's competency is sufficiently clear that no expert is required and no special proceeding must be held to make the competency determination.

Although policymakers draw boundaries between childhood and adulthood, it is difficult to pinpoint a particular age at which youths attain adult-like psychological capacities given that there is a great deal of individual variability in the level of development among youths at any given age. (*Timothy J., supra*, 150 Cal.App.4th at p. 861.) The best practice, as section 709 establishes, is simply to have each case dealt with individually

in those cases where defense counsel or the court express a doubt as to the minor's competency rather than presuming competency for all.

A presumption of competency ignores the developments in psychology and the research on adolescent brain development as well as the MacArthur Study which confirm that many youth, especially young adolescents, do not have the capacity to adequately understand the legal process and assist their attorney in their own defense. Moreover, a presumption of competency for a juvenile in a delinquency proceeding cannot be reconciled with the Legislature and the courts' recent treatment of juveniles.

5. Section 709 Does Not Allocate The Burden Of Proof To Either Party

As the courts have recognized, section 709 also does not establish which party bears the burden of proof in a juvenile competency hearing. (*In re Alejandro G.*, *supra*, 205 Cal.App.4th at p. 482, *In re Christopher F.*, *supra*, 194 Cal.App.4th at p. 472.) The absence of a statutory allocation of a burden of proof in section 709 is indicative of a legislative intent not to adopt the burden of proof from the adult competency scheme. Because the Legislature is deemed to be aware of existing law when it enacts a statute (*Overstreet*, *supra*, 42 Cal.3d at p. 897), it can be assumed that the Legislature was aware of Penal Code section 1369, subdivision (f), when it enacted section 709 and chose not to allocate the burden of proof to the minor. (Pen. Code, § 1369, subd. (f).) It can also be assumed that the Legislature was aware that this Court held that it was constitutional for the defendant in an adult competency hearing to have the burden of proof and

chose not to include that burden. (*People v. Medina* (1990) 51 Cal.3d 870, 884-885 (*Medina I*), affd. *sub nom. Medina v. California* (1992) 505 U.S. 437 [112 S.Ct. 2572, 120 L.Ed.2d 353] (*Medina II*).)

The Court of Appeal in this case cited *Medina I* to support that the burden to prove incompetency should be on the defendant. (G046961, Slip Opinion p. 11.) In *Medina I*, this Court held that it was constitutional for the defendant in an adult competency hearing to have the burden of proof because criminal defendants and their counsel have better access to relevant information. Although having the burden fall on the defendant in an adult case might be constitutional, such a holding does not mandate that the burden fall on a juvenile defendant or signify that such a burden allocation would be the best practice for juvenile court.

In a juvenile proceeding, defense counsel may often be in the best position to initially raise a doubt as to the minor's competency, but once the court finds substantial evidence of incompetency and appoints an expert in juvenile development to examine the minor, the expert becomes the person having the best access to relevant information and the skill to assess it. For example, in the Orange County Juvenile Court, the protocol established by the Judicial Council states that the probation department is responsible for obtaining all records to provide to the expert in juvenile competency proceedings. (Orange County Juvenile Court Competency Protocol (WIC § 709) (July 11, 2011) pp. 3-4, at <www.courts.ca.gov/documents/Orange_Protocol.pdf> [as of Jan. 6, 2014].) Defense counsel and the prosecution are responsible for providing

identifying information to probation. This protocol affirms that this Court's rationale in *Medina I* about the defense having the best access to information does not apply in juvenile court competency hearings. It is the expert who has better access to relevant information, the expertise to evaluate it, and whose opinion is integral in making a competency determination.

Section 709 specifically states that the court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition/s impair the minor's competency. (§ 709, subd. (b).) This emphasis on the expert's responsibilities and qualifications suggests that the Legislature intended the expert's opinion to be key to the court's competency determination. Recently, in *People v. John Z.* (Feb. 10, 2014, A138728) __ Cal.App.4th __ [2014 WL 505344], the Court of Appeal acknowledged that section 709 clearly intended the report and/or testimony of experts who have evaluated the defendant for legal competency to be the center of a competency determination.

Additionally, just because defense counsel may be the one to express a doubt initially it does not necessarily follow that the burden of proof at a subsequent competency hearing should automatically be allocated to the defense. In the juvenile context, under section 709 both the court and defense counsel can express a doubt as to a minor's competency. Certainly, no one would expect the court to bear the burden of proof. Thus, it is irrational to place the burden on minor just because his counsel may express

a doubt as to his competency.

The plain language of section 709 show the statute did not allocate the burden of proof to either party in juvenile competency proceedings either explicitly or by implication.

Although the idea of neither party having the burden of proof in a juvenile competency hearing may seem unprecedented, this situation has been recognized in the adult context when neither party seeks a finding of incompetence and instead the trial court must take the initiative of producing evidence of incompetence. (*People v. Maxwell* (1981) 115 Cal.App.3d 807, 812-813; see also *People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460 [on occasions when neither party seeks a finding of incompetence and instead the trial court assumes the burden of producing evidence of incompetence, neither party has the burden of proof]; *People v. Redman* (1971) 16 Cal.App.3d 931, 939, fn. 7 [there may be competency hearing situations wherein the trial court is compelled to take the initiative in having proof on the issue of present sanity introduced, despite the fact that such a role is not to be recommended in an adversary hearing].)

In *Maxwell,* defense counsel expressed a doubt as to the defendant's competency. (*Maxwell, supra,* 115 Cal.App.3d at p. 811.) The court appointed two psychiatrists to examine defendant, but defendant refused to see either of them. (*Ibid.*) At the competency hearing neither defendant, his counsel, nor the prosecution presented any evidence of incompetency. (*Ibid.*) The court found defendant competent based on the two letters from the doctors reciting defendant's refusal to see them, its own observations of

defendant and the presumption of mental competence. (*Id.* at pp. 812-813.) On appeal, the defendant questioned whether a proper competency hearing was held. (*Id.* at p. 812.) The Court of Appeal held that the fact that neither party chose to present evidence on the issue did not point to the absence of a hearing. (*Ibid.*) The court found that the judge declared that he no longer had a doubt in his mind concerning defendant's competence to stand trial on the state of the record. (*Ibid.*) This very situation is contemplated in Penal Code section 1369.

Although the prosecution is not required to present evidence of competency, (Pen. Code, § 1369, subd. (c)), Penal Code section 1369, subdivision (b)(2) allows the prosecution to do so if the defense declines to offer any evidence in support of the allegation of mental incompetence. Penal Code section 1369, subdivision (d), permits the court to offer evidence in support of the original contention. In this situation, neither party has the burden of proof.

The bench notes to CALCRIM No. 3451 instruct the court to chose the appropriate language regarding which party bears the burden of proof: "The party that seeks a finding of incompetence bears the burden of proof. If the court raises the issue, neither party bears that burden." Similarly, CALJIC No. 4.10 instructs: "If neither the defendant nor the prosecution, but only the court, seeks to establish incompetence, neither party has the burden of proof."

The Legislature did not establish a presumption of competency for juveniles and did not allocate the burden of proof at the competency hearing

to the minor in section 709. Accordingly, this Court must not add those requirements. (*People v. Guzman* (2005) 35 Cal.4th 577, 587; *People v. White* (1954) 122 Cal.App.2d 551, 554 ["It is ... against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute."].)

B. All Parties Involved In The Juvenile Proceeding Have A Responsibility To Make Sure The Minor Is Competent To Be Adjudicated

The Due Process Clause demands adequate anticipatory and protective procedures to minimize the risk that an incompetent person will be convicted. (*Medina II, supra,* 505 U.S. at p. 458.) If the procedures to be followed are not specified by statute or by rules adopted by the Judicial Council,[4] this Court has the inherent power to create new forms of procedure. (*Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813.) Section 709 does not specify the procedures to follow between appointing an expert and a finding by the court of incompetency or competency. To best protect a minor's rights and in recognition of the unique characteristics of a developing adolescent brain, the statute provides that upon suspension of the proceedings, the court shall appoint an expert in child and adolescent development, with training in the forensic evaluation

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[4] Various counties in California have established competency protocols developed by the Judicial Council pursuant to Section 709, subdivision (b), but these protocols differ regarding the procedures to be implemented once an expert has been appointed (Local Court Activities and Documents - Competent to Stand Trial: Local Protocols (January 1, 2012) <http://www.courts.ca.gov/cfcc-delinquency.htm> (as of Jan. 6, 2014).

of juveniles to evaluate the minor for competency. The defense and prosecution may submit evidence to support or oppose the findings by the expert. No single party has the burden to prove the minor incompetent. Rather, after the court has heard all of the evidence, specifically the report and testimony of the expert, and any additional evidence presented by the defense or prosecution, the court must make a finding as to competence. By utilizing these procedures, all parties are tasked with the important obligation to make sure that the minor is not adjudicated while incompetent. Allocating the responsibilities to all parties is in line with the objectives of section 709 and furthers the goal of making sure the minor is competent to be adjudicated.

Thus, to best protect a minor's right to be competent in juvenile delinquency proceedings, no specific party should bear the burden to prove incompetency or competency. Accordingly, appellant urges this Court to find that there is not a presumption of juvenile competency and to find that all parties involved in the juvenile delinquency proceedings share the responsibility to make sure that the minor is competent before being adjudicated.

C. In The Alternative, The Prosecution Should Bear The Burden of Proof In A Juvenile Competency Hearing

If this court rejects appellant's suggestion that no party bear the burden of proof in juvenile competency proceedings, then appellant believes the prosecution should bear the burden of proving competency. Appellant acknowledges that this Court held in *Medina I* that the Legislature's choice to place the burden of proof on the defendant to prove

incompetency in the adult context did not violate due process, but the situation is starkly different in the juvenile context where the Legislature has specifically not allocated the burden of proof. Given the unique differences between juveniles and adults, having the burden fall on the prosecution would ensure fairness and accuracy of the adjudication.

A critical factor in determining which party should bear the burden of proof is the extent to which either party has access to the relevant information. (*Medina I., supra,* 51 Cal.3d at p. 885.) Juvenile competency determinations are primarily based on the court appointed expert's report and testimony. This report, as well as the other reports and information upon which the expert relied, are available to both the prosecution and the defense. Other than expressing that initial doubt, the defense does not have superior access to information regarding the minor's competency.

When defense counsel or the court express a doubt as to the minor's competency and the court finds substantial evidence as to the minor's incompetency, a prima facie case has been established that the minor is incompetent. Once that occurs the burden should shift to the prosecution to present evidence of competency because of the unique and important role that the juvenile justice system has in rehabilitating juveniles to prevent continued criminality into adulthood. Those goals can only be achieved if the system is dealing with a competent juvenile with the cognitive abilities to understand what is happening and to participate in the proceedings. Given the importance of this initial determination, the burden of proving competency once a doubt has been raised should properly be on the

prosecutor, the party that has brought the charges in need of adjudication.

A competency determination involves a constitutional right not to be adjudicated while incompetent. Just like a competency determination, there are other matters that involve a constitutional right where the defense makes the initial motion and then the burden shifts to the prosecution. For example, the defense makes a motion to suppress evidence and the burden then shifts to the prosecution to prove the voluntariness of a confession, the legality of a warrantless search, or the reasonableness of a detention. (See *People v. Markham* (1989) 49 Cal.3d 63, 69; *People v. Cantor* (2007) 149 Cal.App.4th 961, 965; *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1086.)

In response to this argument, in *Medina II.*, the Court reasoned that these decisions do not control the result in the adult competency context because they involved situations where the government sought to introduce inculpatory evidence obtained by virtue of a waiver of, or in violation of, a defendant's constitutional rights. The court stated in such circumstances, allocating the burden of proof to the government was proper because it furthered the objective of "deterring lawless conduct by police and prosecution." (*Medina II., supra,* 505 U.S. at pp. 451-452, quoting *Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 30 L.Ed.2d 618].)

Juvenile competency determinations present a similar situation. Allocating the burden of proof to the prosecution furthers the objective of deterring erroneous competency determinations by the court appointed experts and prosecution. Since a true finding of an incompetent minor

violates the right to a fair trial guaranteed by the due process clause of the Fourteenth Amendment, it is imperative that the minor is competent to be adjudicated. (*Medina II, supra,* 505 U.S. at p. 453; *In re Ricky S., supra,* 166 Cal.App.4th at p. 234.) Given the complex nature of a juvenile's mental development, placing the burden on the prosecution to prove competency will ensure that the right to a fair trial is not violated. Allocating the burden to the prosecution is necessary to enforce the right to be adjudicated while competent.

In the present case, the court's presumption that appellant was competent and imposition of the burden of proof on him to prove he was incompetent was fundamentally unfair and deprived appellant of his due process rights.

ARGUMENT

II.

BASED UPON THE PRINCIPLES DISCUSSED IN *PEOPLE V. AULT* AND *PEOPLE V. CROMER*, DE NOVO REVIEW IS APPROPRIATE TO ASSESS A JUVENILE COURT'S FINDING OF COMPETENCY

Traditionally, on appellate review, questions of fact are reviewed under the substantial evidence test, questions of law are reviewed independently, and mixed questions of law and fact utilize both standards of review. (*Cromer, supra,* 24 Cal.4th at pp. 893-894.) Mixed questions are those in which the "historic facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard. . . ." (*Id.* at p. 894, quoting *Ornelas v. United States* (1996) 517 U.S. 690, 696-697 [116 S.Ct. 1657, 134 L.Ed.2d 911], quoting *Pullman Standard v. Swint* (1982) 456 U.S.273, 289, fn. 19 [102 S.Ct. 1781, 72 L.Ed.2d 66].)

This Court in *Cromer, supra,* 24 Cal.4th 889, held that a trial court's determination of due diligence was a mixed question of law and fact requiring independent appellate review, disapproving its previous holding that due diligence presented a question of fact reviewed on appeal for abuse of discretion. *(Cromer, supra,* 24 Cal.4th at p. 898.) In concluding due diligence was a mixed question, this Court explained that the first inquiry was to establish a detailed account of the prosecution's failed efforts to

locate the absent witness. The second inquiry was whether those efforts amounted to due diligence. (*Id.* at p. 900.)

Similarly in *People v. Leyba* (1981) 29 Cal.3d 591, 596-598, this Court held that the reasonableness of a detention is a question of law and fact requiring independent review. (*Leyba, supra*, 29 Cal.3d at p. 597.) In *Leyba*, this Court discussed the two-step process by which a superior court rules on a motion to suppress evidence under Penal Code section 1538.5, based on the reasonableness of a detention and the different standard by which an appellate court reviews that finding. The trial court must first decide what the officer actually perceived, or knew, or believed, and what action he took in response. On appeal, the trial court's findings are upheld if they are supported by substantial evidence. (*Leyba, supra*, 29 Cal.3d at pp. 596-597.) The trial court then decides whether, on the facts found, the search was unreasonable within the meaning of the Constitution. (*Id.* at p. 597.) The appellant court exercises its independent judgment on that issue. (*Ibid.*)

The inquiry for juvenile competency determinations presents a similar situation. First, it is necessary for the juvenile court to review the expert's findings and to establish a detailed account of the basis for the expert's opinion on competency. Second, given those findings, the juvenile court must decide whether those findings established that the minor did not lack a sufficient present ability to consult with counsel and assist in preparing a defense with a reasonable degree of rational understanding, or lack a rational as well as factual understanding, of the nature of the charges

or proceedings against him or her, a predominantly legal question. The ultimate determination here is a mixed question of law and fact.

Selecting the proper standard of appellate review of a mixed question of law and fact is more difficult when the law goes to the heart of a constitutional right. (*Container Corp. v. Franchise Tax Bd.* (1983) 463 U.S. 159, 176, [103 S.Ct. 2933, 77 L.Ed.2d 545]; *Cromer, supra,* 24 Cal.4th at p. 894.) This Court's usual practice for reviewing mixed question determinations affecting constitutional rights is to conduct an independent, de novo review. (See *Cromer, supra,* 24 Cal.4th 889 [due diligence]; *People v. Majors* (1998) 18 Cal.4th 385, 417 [juror misconduct]; *People v. Jones* (1998) 17 Cal.4th 279, 296 [voluntariness of confession]; *People v. Alvarez* (1996) 14 Cal.4th 155, 182 [reasonableness of search]; *People v. Mickey* (1991) 54 Cal.3d 612, 649 [validity of *Miranda* waiver]; *Leyba, supra,* 29 Cal.3d at p. 597 [reasonableness of detention].)

In *Cromer,* this Court relied on *Thompson v. Keohane* (1995) 516 U.S. 99, 111, 114 [116 S.Ct. 457, 133 L.Ed.2d 383], to determine the proper standard of review for a due diligence determination. This Court acknowledged that the United States Supreme Court previously applied a deferential standard of review of a competency determination in *Maggio v. Fulford* (1983) 462 U.S. 111 [103 S.Ct. 2261, 76 L.Ed.2d 794].[5] (*Cromer, supra,* 24 Cal.4th at p. 895.) However, *Maggio* is not directly on point. *Maggio* dealt with the proper standard of review of a trial court's

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[5] *Maggio v. Fulford* dealt with the standard of review on federal habeas.

determination of whether there was substantial evidence warranting a competency hearing not with the standard of review of a competency determination at a subsequent competency hearing. Furthermore, as will be shown below, the reasoning used to justify deferential review of a trial court's determination of whether to hold a competency hearing does not apply to juvenile competency determinations.

To determine the proper standard of review of a juvenile competency determination made at a competency hearing it is instructive to examine the principles this Court discussed in *Ault, supra,* 33 Cal.4th 1250 and *Cromer, supra*, 24 Cal.4th 889. Based on these principles, appellant suggests that juvenile competency determinations are mixed questions of law and fact that require independent, de novo review rather than deferential review.

The proper standard of review is influenced by the importance of the legal rights or interests at stake. (*Ault, supra,* 33 Cal.4th at pp. 1265-1266; *Cromer, supra*, 24 Cal.4th 899.) Here, we are dealing with the fundamental constitutional right of a mentally incompetent juvenile not to be subjected to delinquency proceedings.

Another consideration is the consequences of an erroneous determination. (*Ault, supra,* 33 Cal.4th at p. 1266.) Independent review is appropriate when the claim is finally terminated and a trial court's determination is not independently appealable. (*Id.* at p. 1261.) This Court specifically explained that denying a new trial motion in juror bias cases is not independently appealable and requires independent review of the trial court's reasons because the reviewing court must protect the complaining

party's right to a fully impartial jury as an "inseparable and inalienable part of the [fundamental] right to jury trial. [Citations.]" (*Id.* at p. 1262.) This Court further explained "that in reviewing an order denying a motion for new trial based upon jury misconduct, the reviewing court has a constitutional obligation to determine independently whether the misconduct prevented the complaining party from having a fair trial." (*Id.* at pp. 1264-1265, quoting *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

Here, a finding of competency is not independently appealable. The minor must wait for final disposition before he can obtain appellate review on the juvenile court's findings. (§ 800.) In the meantime, a juvenile court's erroneous determination that a minor is competent could subject the minor to being adjudicated while incompetent in violation of the fundamental right of a mentally incompetent person not to be subjected to juvenile delinquency proceedings. (*Medina II, supra,* 505 U.S. at p. 453)

Although a deferential standard of review has traditionally been applied when resolution of an issue takes place in open court on a full record and depends heavily on the trial court's appraisal of witness credibility and demeanor, (*Ault, supra*, 33 Cal.4th at p. 1267; *Cromer, supra*, 24 Cal.4th 901; *Thompson, supra,* 516 U.S. at pp. 111, 114), competency determinations made at juvenile competency hearings do not really depend on witness credibility determinations.

While the initial decision to hold a competency hearing is oftentimes made in the courtroom with a "first-person vantage," juvenile courts

generally base their competency findings, in large part, on evidence obtained outside of the courtroom. Section 709 sets up a framework where juvenile courts rely on an expert's evaluation of the minor to make their determinations. The juvenile court does not have a "first-person vantage" on the expert's out-of-court examination of the minor. The court is also often relying on the minor's history, probation reports, school reports, police reports, social worker reports and other relevant reports regarding the minor's competency. Witness credibility is not the focus for juvenile competency hearings. Appellate courts can readily assess the credibility of the reports relied on by the expert and determine if the court's interpretation of those reports comports with the *Dusky* standard. The juvenile court does not have any more of a "first-person vantage" to make a competency determination then it has for determinations made from events that occurred outside of the courtroom that are reviewed independently. (See *Jones, supra,* 17 Cal.4th 279 [confession made in police car and at hospital]; *Alvarez, supra,* 14 Cal.4th 155 [reasonableness of search of defendant's car]; *Mickey, supra,* 54 Cal.3d 612 [whether defendant's statements made during a plane flight were in violation of *Miranda*]; *Leyba, supra,* 29 Cal.3d 591 [reasonableness of investigative stop of defendant's car].)

Another key factor in determining the standard of review is whether the trial court makes an individual-specific decision or one likely to have precedential value. (*Ault, supra*, 33 Cal.4th at p. 1267; *Cromer, supra,* 24 Cal.4th at pp. 895, 901.) Determinations that are reviewed de novo, such as what constitutes "in custody" or a "reasonable search" provide guidance in

future situations. De novo review of what constitutes competency would unify precedent for the courts and provide guidance to juvenile expert evaluators, probation departments, and attorneys on reaching a proper competency determination.

Furthermore, independent appellate review of a mixed law and fact question is crucial when an excessively deferential appellate affirmance risks error in the final determination of a party's rights, either as to the entire case, or on a significant issue. (*Ault, supra*, 33 Cal.4th at p. 1266.) That is, a deferential review increases the likelihood that an erroneous competency determination will go uncorrected on appeal.

Additionally, with a deferential standard of review for competency, a reviewing court will likely find substantial evidence of competency and uphold the trial court's finding even when incompetency has been shown by a preponderance of the evidence. The preponderance standard is low.[6] It asks only whether it is "more likely than not" that the defendant was incompetent. Because the preponderance standard assumes that there is up to a 49% probability that the defendant is competent, a standard of review that asks only whether there is evidence of competency that "inspires confidence and is of 'solid value'" (*People v. Marshall* (1997)15 Cal.4th 1, 34), disregards the lower burden needed to prove incompetency. Independent review would decrease the likelihood of erroneous appellate affirmance of competency findings.

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[6] A finding made by a preponderance of the evidence does not preclude independent review. (Cf. *Jones, supra,* 17 Cal.4th at p. 296; *Mickey, supra,* 54 Cal.3d at p. 649.)

The reasoning in *Cromer* and *Ault* weighs strongly in favor of independent review of a juvenile court's determination of competency. For those reasons, appellate courts should independently review a juvenile court's finding that a minor is competent. Without independent review, "[a] policy of sweeping deference would permit, '[i]n the absence of any significant difference in the facts,'" the application of the due process right not to be adjudicated while incompetent "'[to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute'" competency. (*Cromer*, *supra*, 24 Cal.4th at p. 901, quoting *Ornelas, supra,* 517 U.S. at p. 697.)

ARGUMENT

III.

UNDER EITHER STANDARD OF REVIEW, THE EVIDENCE PRESENTED AT THE COMPETENCY HEARING IN THIS CASE DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT APPELLANT WAS INCOMPETENT

Under either an independent, de novo review or a deferential substantial evidence review, the evidence demonstrated that appellant was incompetent.

A. Relevant Facts

On April 2, 2012, pursuant to section 709, defense counsel declared a doubt as to appellant's competency to stand trial. (CT 24; RT 11.) The court suspended proceedings and appointed Dr. Kojian, a forensic psychologist, to perform the 709 evaluation. (CT 25; RT 16, 17.) After completing his evaluation, Dr. Kojian submitted his report stating that in his opinion appellant was not competent to be adjudicated. (CT 36-45; RT 64.)

On April 27, 2012, the court held a competency hearing. (CT 80; RT 29-76.) Defense counsel submitted on Dr. Kojian's report. (CT 36-45; RT 29-30.) The court granted a defense request to take judicial notice of its own files. (CT 80; RT 29-30.) Dr. Kojian testified that in addition to examining appellant on April 11, 2012, he interviewed appellant's mother and reviewed the petition, various police reports, the detention report, a

May 23, 2011 child guidance center letter (Judicial Notice Exhibit A, p. 3),[7] and a twenty page school Conditional Educational Report dated 1/5/11[8] (Judicial Notice Exhibit A, p. 4-23). (RT 31, 38, 66.) These documents were included in the court file.

Dr. Kojian testified that he did not believe appellant met the standard for competency because there was ample evidence that he was struggling with some type of impaired cognitive process: Appellant was housed on a special unit in Juvenile Hall; the records Dr. Kojian reviewed indicated that appellant's teachers and even the police officer on duty the day of the incident thought that appellant was confused or impaired in some way. Appellant had inappropriate affect[9] (RT 47); appellant was very slow and deliberate in his speech and movements; he was stiff legged, his gait was inhibited and he appeared to be responding to internal stimuli (RT 52); appellant was somewhat catatonic in his presentation (CT 38); and school records indicated that appellant was very slow and that all his testing came back very low (RT 57).

Appellant appeared to Dr. Kojian to be legitimately confused. (RT 47.) Appellant's responses to Dr. Kojian indicated impaired thinking. When Dr. Kojian asked appellant competency related questions it appeared that appellant did not fully understand what was happening. (RT 47.)

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[7] Appellant has filed a Request for Judicial Notice concurrent with this Opening Brief on the Merits.

[8] The report was completed on 3/17/2011, but the testing had been done on 01/05/2011.

[9] The reporter's transcript uses the word "effect". (RT 47.)

Appellant had difficulty explaining his charges. (RT 53.) Appellant appeared to have a difficult time understanding the questions asked of him and was very unresponsive and confused about the incident. (RT 54.) Appellant made a number of significant errors that led Dr. Kojian to believe that appellant did not understand what was going on. (RT 48.) Dr. Kojian found evidence for response latency, which is a significant clue in assessing whether there is any cognitive impairment. (RT 52.) Dr. Kojian was not able to determine the etiology of appellant's cognitive impairment, but was able to conclude that appellant was cognitively impaired. (RT 53.) It did not appear to Dr. Kojian that appellant was attempting to malinger his impairment. (RT 47.) Based on the totality of this information, Dr. Kojian opined that appellant was not competent to be adjudicated. (RT 55, 63-64.)

During closing argument, defense counsel noted that based on appellant's presence and affect in court she had been unable to arraign him. (RT 68.) She also stated that the petition indicated that appellant's probation officer was unable to assist him because of his developmental disabilities. (RT 68.) Counsel noted that appellant had a longstanding history of suffering from some sort of deficit. (RT 70.)

B. The Juvenile Court's Finding Was Not Supported By The Evidence

After reviewing the court file, Dr. Kojian's report, and Dr. Kojian's testimony, the court found appellant did not sustain his burden to prove he was incompetent by a preponderance of the evidence and reinstated proceedings. (CT 81; RT 73.) Defense counsel disagreed with the competency ruling and did not join in appellant's waiver of rights or join in

his slow plea. (CT 81; RT 76-77.)

The juvenile court improperly focused on a few pieces of evidence it believed pointed to competence instead of considering the wealth of evidence of incompetency. In addition, the evidence the court relied on to find competence did not have solid value.

In finding appellant competent, the court explained that it did not accept the opinion of the social worker. (RT 75.) The letter from the social worker had been written the previous year, and requested an intake assessment of appellant to determine if appellant had a developmental disability. (Judicial Notice Exhibit A, p. 3.) The social worker did not express any opinion so there was nothing for the court to accept or disagree with. Plus, the *Dusky* standard looks at present ability, not the condition of a minor at an earlier time.

The court also explained that it did not accept the manifestation determination report[10] (Judicial Notice Exhibit A, pp. 4-23), because the report was not a full determination of what was needed for appellant's I.E.P. (Individualized Educational Program). (RT 75.) The court noted that the school did not completely rely on the I.E.P. testing for the manifestation determination because the school was not sure whether the cause of the cognitive and adaptive delays was drug induced. (RT 76.) (Judicial Notice Exhibit A, p. 22)

The court misinterpreted the manifestation determination report.

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[10] A manifestation determination report is done when a minor is on an I.E.P. before the school posts any type of disciplinary action based on some conduct. (RT 72.)

First, although the court acknowledged that the manifestation determination report had concluded that appellant's behavior was a manifestation of his disability which was apparently a mood disorder with extremely low cognitive and comprehensive skills (RT 72), the court found that the report did not support incompetency. (RT 73.) The section of the report that the court relied on to make this determination actually dealt with whether appellant met the criteria for mental retardation. (Judicial Notice Exhibit A, p. 22.) The court's reliance on this aspect of the report was not proper; a minor does not need to be mentally retarded to be incompetent. Additionally, the I.E.P. testing results that the court referred to were from appellant's 2009 I.E.P. and were used to determine mental retardation. (Judicial Notice Exhibit A, p. 22.) Also, the manifestation determination report had been completed almost a year before the competency hearing. (Judicial Notice Exhibit A, p. 4.) Moreover, school assessments, such as an I.E.P., are not focused on whether a minor is legally competent to stand trial.

The juvenile court noted Dr. Kojian had extensive experience, yet it did not accept his opinion that appellant could not assist counsel, partly because Dr. Kojian was not able to fully determine whether appellant was malingering and because appellant was unable to complete the REY 15 test. (RT 75.) Dr. Kojian testified that he was not able to administer any cognitive function tests because appellant refused to take the tests. (RT 45.) Despite the absence of testing, Dr. Kojian was 100% sure of his opinion that appellant was not competent. (RT 45-46.) Dr. Kojian explained that

competence is not based on cognitive tests but on whether the defendant meets the *Dusky* standard. Dr. Kojian also explained that the Rey 15 test was a very gross measure of malingering or attempting to malinger and that for a competency assessment, tests are not always required depending on the presentation of the minor and the questions being asked of the minor. (RT 39.)

Dr. Kojian made a definitive finding that appellant was not attempting to malinger his impairment, a finding that was corroborated by the police report, his interaction with appellant, appellant being housed in a special unit in juvenile hall, teacher records that appellant was impaired in some way, and information provided by appellant's mother and stepfather. (RT 47, 54-55, 75.) Also, appellant appropriately responded by correctly naming five items that Dr. Kojian showed him which suggested he was not malingering. (CT 42.) Dr. Kojian testified that even if he had been able to administer the Rey 15 test, the results would not have changed his opinion because there was ample evidence to corroborate his opinion that appellant was not malingering and was incompetent. (RT 46, 47.) In addition, there was no evidence that a doctor must administer the Rey 15 test to make a determination that a minor was not malingering or that a finding of no malingering was any less reliable if the test was not administered.

The court also relied on a couple of isolated statements appellant made to Dr. Kojian about his charges. (RT 75-76.) Those statements were taken out of context. The court did not take into consideration that when appellant was first asked about his charges, he said he was charged with

"not understanding," for being confused, and for his safety. (CT 41.) After Dr. Kojian told appellant that he was not being charged with being confused, appellant said he was being charged with disturbing the peace, but then changed and said it was thought he was using drugs. (CT 41.) Appellant was asked again and said he was being charged with disturbing the peace. (CT 42.) Dr. Kojian again tried to determine if appellant understood the charges and told him that he was not being charged with disturbing the peace and appellant replied, "messing up my house," "playing with mom and dad," "for not being serious," and "for not going to school." (CT 42.)

To find appellant competent the court focused on Dr. Kojian's statement that appellant understood that a misdemeanor was less serious than a felony. (RT 76.) The court failed to address that appellant did not know what a plea bargain was, did not know what his attorney's function was, and thought he was being charged with disturbing the peace. Furthermore, appellant thought whether he was guilty or not depended on whether he attended school. (CT 41, 42.)

While the court is not required to accept the opinion of the expert as to a defendant's competence to stand trial, the court should give the expert's opinion the weight it deserves. (*Marshall, supra,* 15 Cal.4th at pp. 31-32; Pen. Code, § 1127(b).) Given the specific qualifications required for a juvenile competency evaluator established in section 709 it is important to recognize the expert's role in the overall statutory scheme. Additionally, there was a substantial amount of evidence to support Dr. Kojian's opinion.

On appeal, under either standard of review, a juvenile court's findings of fact must be upheld if supported by substantial evidence. To be substantial the evidence the court relies on to make its findings must be "reasonable, credible, and of solid value." *Marshall, supra,* 15 Cal.4th at p. 35). In this case, even after the evidence is viewed with all of the required inferences, it still falls short of establishing that there was not a preponderance of evidence that appellant was incompetent.

C. The Court Of Appeal

The Court of Appeal held that substantial evidence supported the trial court's finding that appellant was competent. (G046961, Slip opinion at pp. 6-13.) The Court of Appeal found that the juvenile court had articulated its reasons for declining to adopt Dr. Kojian's opinion and substantial evidence supported those reasons. (G046961, Slip opinion at pp. 12-13.) Even though the juvenile court did not have to accept the expert's opinion, the determination must be reasonable, credible and of solid value. No reasonable trier of fact could have rejected the expert's finding of incompetency, based on a few isolated statements by appellant, school reports from 2011, and the failure to administer the REY 15 test. The reviewing court needed to look further to determine whether the juvenile court's reasons for declining the expert's opinion of incompetency and finding appellant competent were reasonable, credible and of solid value. The Court of Appeal did not do that here. Under either standard of review, the evidence did not support the juvenile court's finding that appellant was competent.

CONCLUSION

For all of the about reasons articulated in this brief, appellant respectfully urges this Court to find that: (1) Once substantial evidence raises a doubt as to the minor's competency, there is no presumption of competency for juveniles; (2) At the subsequent hearing wherein the court considers whether the minor is competent, neither party bears the burden of proof; (3) Because the competency question ultimately touches upon a minor's constitutional right not to be adjudicated when incompetent, the standard of review of a juvenile court's finding of competency should be independent, de novo review; (4) Finally, in light of all the evidence presented above appellant was incompetent and the juvenile court's true finding should be vacated.

DATED: March 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to California Rules of Court, rule 8.520(c)(1) that this opening brief on the merits contains 11,470 words according to my word processing program (Wordperfect X4).

DATED: March 7, 2014

Respectfully submitted,

CINDY BRINES
Attorney for Appellant
R.V.

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)

I, Cindy Brines, declare that: I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is P.O. Box 138, Verdugo City, CA 91046.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United State Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following document: **Appellant's Opening Brief on the Merits**, by placing a true copy in a separate envelope addressed to each addressee, respectively, as follows:

R.V.
c/o Cindy Brines
P.O. Box 138
Verdugo City, CA 91046

District Attorney
Lamoreaux Justice Center
341 The City Drive South
Orange, CA 92863-1569

Clerk of the Court
For Delivery to:
The Honorable Deborah Chuang
Superior Court, County of Orange
341 The City Drive South
P.O. Box 14170
Orange, CA 92863-1569

I then sealed the envelope and, with the postage fully prepaid, I placed the envelop in the United States mail, this same day, at Verdugo City, California.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)

Furthermore, I, Cindy Brines, declare I electronically served from my electronic service address of cindybrines@sbcglobal.net the above referenced document on March 7, 2014 at 9:35 a.m. to the following entities:
CALIFORNIA SUPREME COURT, via e-submission.
APPELLATE DEFENDERS INC., eservice-criminal@adi-sandiego.com
ATTORNEY GENERAL'S OFFICE, ADIService@doj.ca.gov
COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, via e-submission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 7, 2014

Cindy Brines
CINDY BRINES