# In the Supreme Court of the State of California

**IN RE ROSARIO V.,**

**a Person Coming Under the Juvenile Court,**

**v.**

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**ROSARIO V.,**

**Defendant and Appellant.**

Case No. S212346



Appellate District Division Three, Case No. G046961
Orange County Superior Court, Case No. DL034139
The Honorable Deborah Chuang, Judge

## RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## ISSUES FOR REVIEW

Minor put forth the following issues in his petition for review: (1) "Whether a minor is presumed competent and bears the burden to prove incompetency in a juvenile delinquency proceeding"; and (2) "Whether there was sufficient evidence to prove beyond a reasonable doubt[1] that [minor] was competent given that defense counsel told the court [minor] was not able to consult with her with a reasonable degree of rational understanding, the appointed doctor opined that [minor] was not competent, and the prosecution presented no evidence of competency."

## INTRODUCTION

Minor threatened three adults and destroyed property in his home because he did not want to go to school. Juvenile court proceedings began, and minor's attorney expressed a doubt as to minor's competency. Minor was evaluated by a court-appointed psychologist but refused to submit to any testing. The psychologist subsequently opined minor was not competent. The court rejected that opinion, found minor had failed to meet his burden of proving incompetence, and reinstated proceedings. On appeal, the court held minor was presumed to be competent, that the juvenile court properly placed the burden on minor, and that substantial evidence supported the juvenile court's finding.

The Court of Appeal was correct on all points: minor was presumed competent; he bore the burden of proving incompetence by a preponderance of the evidence; and a juvenile court's finding on this issue is reviewed for substantial evidence. First, Welfare and Institutions Code

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[1] Although minor cites the beyond a reasonable doubt standard in his questions presented, in his argument, minor does not dispute Welfare and Institutions Code section 709's use of the preponderance of the evidence standard. Respondent assumes this to be a typographical error in the questions presented and does not address this point further.

section 709 contains an implied presumption of competence. Additionally, the burden rests with minor because, under the plain language of Welfare and Institutions Code section 709 and Evidence Code section 500, minor is the party seeking to establish the facts necessary for relief, namely, incompetence. Requiring minor to prove incompetence also comports with the legislative history underlying section 709. Because minor and his attorney have better access to the relevant information pertaining to competency, the burden properly lies with minor. Finally, placing the burden on the People when a minor is claiming incompetence would wrongly incentivize minors and would, to a certain extent, conflict with existing presumptions in juvenile law.

Regarding the second point, substantial evidence supports the juvenile court's competency determination. Competency determinations are factual findings subject to the substantial evidence standard of review. In cases where the prosecution does not adduce evidence of competence and the court's determination rests on minor's failure to meet his burden, substantial evidence supports the court's finding so long as the court could reasonably reject the evidence of incompetence. Here, the juvenile court reasonably rejected the doctor's opinion because it was not supported by any testing, including testing for malingering, and the court was satisfied by many of minor's responses during his evaluation with the doctor.

This court should affirm the judgment below in its entirety.

## STATEMENT OF THE FACTS AND CASE

On March 9, 2012, 16-year old minor woke up angry and did not want to go to school. (CT 4.) When his mother's boyfriend tried to tell him he was going to miss the bus, minor threw a television to the floor and threatened to "fuck up" his mother's boyfriend. (CT 4.) When the boyfriend tried to calm minor down, minor pulled out a small knife and told the boyfriend he would kill him if he called the police. (CT 4, 16.) When

minor's mother entered the room, minor told her, "Don't come close to me I have a knife." (CT 69.)

Upon hearing the fight, the landlord, who had been working on the roof, came inside. (CT 4.) There, he saw minor kick a DVD player and threaten to stab the boyfriend. (CT 4.) When the landlord also tried to calm minor down, minor threatened to kill him as well. (CT 4, 16.) Minor then stabbed his bed three times with the knife. (CT 4.)

Consequently, on March 12, 2012, the Orange County District Attorney filed a petition pursuant to Welfare and Institutions Code[2] section 602 alleging the following: two counts of brandishing a deadly weapon, in violation of Penal Code section 417, subdivision (a)(1), and one count of vandalism, in violation of Penal Code section 594, subdivisions (a) and (b)(2)(A). (CT 1.)

On April 2, 2012, defense counsel expressed a doubt as to minor's competency pursuant to section 709, subdivision (a), and Dr. Haig J. Kojian was appointed to evaluate minor. (CT 18, 24; RT 11.) On April 20, 2012, during the scheduled competency hearing, minor's counsel submitted on Dr. Kojian's report, in which the doctor opined appellant was not competent. (RT 25.) The prosecutor requested a continuance in order to subpoena Dr. Kojian to testify. (RT 26.)

At the April 27, 2012 competency hearing, Dr. Kojian testified as to his interview with minor, and again opined minor was not competent to stand trial, based on his opinion that minor "was struggling under the duress of some type of impaired cognitive process." (RT 47.) The juvenile court stated that minor was presumed competent and had the burden to demonstrate incompetence by a preponderance of the evidence. (RT 73.)

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[2] Future statutory references are to the Welfare and Institutions Code unless otherwise indicated.

After finding that minor had not met that burden, the court declared minor competent and reinstated the proceedings against minor. (CT 81; RT 29, 73.) Minor admitted the allegations, and the court found the allegations to be true. (CT 82.) Minor was declared a ward and placed on probation. (CT 82; RT 80–81.)

On appeal, minor claimed the juvenile court improperly imposed upon him the burden of demonstrating incompetence rather than requiring the People to prove competence. Minor also claimed that, regardless of whose burden it was, substantial evidence demonstrated he was incompetent.

On June 19, 2013, Division Three of the Fourth District Court of Appeal issued its published opinion affirming the juvenile court's finding. On September 25, 2013, this court granted minor's petition for review.

## ARGUMENT

### I. A MINOR SUBJECT TO A WELFARE AND INSTITUTIONS CODE SECTION 601 OR 602 PETITION IS PRESUMED COMPETENT AND BEARS THE BURDEN OF PROVING INCOMPETENCE BY A PREPONDERANCE OF THE EVIDENCE

Minor contends the courts below erred by presuming his competence and by requiring him to prove incompetence by a preponderance of the evidence. (ABOM 9.) According to minor, under section 709, there is no presumption of competence and neither party is allocated the burden the proof. (ABOM 19, 21.) Alternatively, minor argues the burden of proof is on the People to prove competence. (ABOM 27.)

Respondent disagrees. The juvenile court properly required minor to prove his alleged incompetence by a preponderance of the evidence. Section 709 contains an implied presumption of competence and requires proof of incompetence. As minor was the party alleging incompetence, under the plain language of section 709 and under Evidence Code section 500, minor bore the burden of proof. Placing the burden on minor also

comports with the legislative intent behind section 709. Moreover, as a matter of policy, placing the burden on minor was proper because (1) minor was the party with access to the type of information necessary to prove incompetence, (2) placing the burden on the People when the minor alleges incompetence would create improper incentives for minors, and (3) a contrary rule would be inconsistent with existing presumptions in juvenile law.

### A. Background: Competency in the Adult Context

Under the federal Constitution, a defendant may not be put to trial unless he '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.'" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [116 S.Ct. 1373, 134 L.Ed.2d 498], citing *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (*Dusky*).) The conviction of a defendant who lacks the above abilities violates due process. (*Pate v. Robinson* (1966) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815].) In order to protect this right, the trial court must employ adequate procedures and safeguards. (*Ibid.*; see *Drope v. Missouri* (1975) 420 U.S. 162 [95 S.Ct. 896, 43 L.Ed.2d 103].)

Penal Code sections 1368 and 1369 set forth the relevant statutory procedures for adult defendants. Section 1368, subdivision (a), provides that if "a doubt arises in the mind of the judge as to the mental competence of the defendant," the court shall inquire of defense counsel regarding the defendant's competence and, if counsel believes defendant may be incompetent, the court shall order a hearing on the matter. The section further provides that even if defense counsel believes his client is competent, the court may, in its discretion, order a competency hearing. (Pen. Code, § 1368, subd. (b).) Once the hearing is ordered, "all proceedings in the criminal prosecution shall be suspended until the

question of the present mental competence of the defendant has been determined." (Pen. Code, § 1368, subd (c).) Penal Code section 1369 sets forth the procedures for a competency hearing. Subdivision (f) of that section provides, in pertinent part, that "[i]t 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."

Both this court and the United States Supreme Court have found these procedures satisfactorily protect the due process rights of adult defendants. In *People v. Medina* (1990) 51 Cal.3d 870 (*Medina I*), the defendant challenged Penal Code section 1369 as unconstitutional because it required him to prove incompetence even though "fitness to stand trial is fundamental to an adversary system of justice." (*Id.* at p. 882.) This court rejected that challenge and found the allocation of the burden of proof constitutional. (*Id.* at p. 885.)

In doing so, this court reasoned that "a critical factor is the extent to which either party has access to the relevant information." (*Medina I, supra*, 51 Cal.3d at p. 885.) This court concluded it was the defendant and his counsel who had better access to the facts relevant to the court's competency inquiry while, "[t]he People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings." (*Ibid.*)

This court also rejected the defendant's argument that it was irrational to apply Penal Code section 1369's presumption of competence after a doubt arises regarding the defendant's competence. (*Medina I, supra*, 51 Cal.3d at p. 885.) In rejecting that argument, this court explained that the purpose of the presumption was to assign the party contesting it the burden of rebutting it. (*Ibid.*) Because the presumption operated to affect the

burden of proof, this court reasoned that it "remains in effect despite the introduction of some evidence of incompetence." (*Ibid.*)

The United States Supreme Court affirmed this court's decision in *Medina v. California* (1992) 505 U.S. 437 [112 S.Ct. 2572, 120 L.Ed.2d 353] (*Medina II*). In *Medina II*, the court held due process was satisfied so long as a state "provides a defendant access to procedures for making a competency evaluation." (*Id.* at p. 449.) The court held there was "no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial." (*Ibid.*) The court also agreed with this court's reasoning as to the defendant being better suited to bear the burden of proof due to his or her superior access to the relevant information, stating, "the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Id.* at p. 450.)

Justice O'Connor, in her concurring opinion, voiced a potential concern that could arise if the burden fell to the People rather than the defendant. She stated: "If the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state." (*Medina II*, *supra*, 505 U.S. at p. 455 (conc. opn. of O'Connor, J.).) Justice O'Connor went on to reason that requiring a defendant to prove incompetence could be a way for states to obtain "a more complete picture of a defendant's competence" by giving the defense "the incentive to produce all the evidence in its possession." (*Ibid.*)

The majority in *Medina II* also addressed the presumption of competence in Penal Code section 1369. In so doing, the court cited approvingly to this court's reasoning *in Medina I* regarding the presumption of competence. The court in *Medina II* saw no reason to disturb this court's conclusion that the presumption was essentially "a restatement of the burden on proof," and further held the presumption did not violate due process. (*Medina II*, *supra*, 505 U.S. at pp. 453–454.)

Thus, it is well-settled that in California an adult defendant is presumed competent and must prove incompetence by a preponderance of the evidence and that this framework is constitutional. The question now becomes whether these procedures – approved by this court and the United States Supreme Court – apply equally to juveniles.

### B. The Relevant Law and Statutory Framework for Juveniles

As the "essentials of due process and fair treatment" apply to juvenile proceedings as well as to adult criminal proceedings, the *Dusky* competency standard applies to minors in delinquency proceedings. (*In re Ricky S.* (2008) 166 Cal.App.4th 232, 234; *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857 (*Timothy J.*); see also *In re Gault* (1967) 387 U.S. 1, 30 [87 S.Ct. 1428, 18 L.Ed.2d 527].)

Prior to 2010, the procedures governing competency determinations in the juvenile context derived from case law and the Rules of Court. (See *Timothy J.*, *supra*, 150 Cal.App.4th at p. 851.) In 2010, the Legislature introduced section 709 in order to codify the competency processes for juveniles. (Stats. 2010, ch. 671, § 1.)

Subdivision (a) of section 709 sets forth the initial procedures for declaring a doubt as to a minor's competency. Under subdivision (a), either the minor's attorney or the court may express a doubt as to the minor's competency. (§ 709, subd. (a).) Once a doubt is expressed, the court must

determine if there is substantial evidence of incompetence, meaning substantial evidence that minor "lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable 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." (§ 709, subd. (a).) If the court finds substantial evidence of incompetence, the court must suspend proceedings. (§ 709, subd. (a).)

Subdivision (b) sets forth the procedures for a competency hearing. Under subdivision (b), the court must 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." (§ 709, subd. (b).) The court-appointed expert must have training and expertise in juvenile development and in the forensic evaluation of juveniles and must be familiar with competency standards and criteria used in evaluating competence. (§ 709, subd. (b).) Thus, under subdivision (b), while the *Dusky* standard still applies, juvenile incompetency is not defined solely in terms of mental illness or disability, but also encompasses developmental immaturity, because minors' brains are still developing. (*Timothy J.*, *supra,* 150 Cal.App.4th at p. 860.)

Finally, subdivision (c) provides that, following the competency hearing, "[i]f the minor is found to be incompetent by a preponderance of the evidence," all proceedings remain suspended for a reasonable period of time in order to determine whether there is a substantial probability the minor will attain competency. (§ 709, subd. (c).)

### C. In a Juvenile Proceeding, the Minor is Presumed Competent and Bears the Burden of Proving Incompetence by a Preponderance of the Evidence

The Court of Appeal correctly held that minor was presumed to be competent and bore the burden of proving incompetence. Section 709 contains an implied presumption of competence and assigns the burden of proving otherwise to the party alleging incompetence. This construction is consistent with the legislative intent of section 709. Further, policy concerns dictate that minor should bear the burden of proof because he is the party with better access to the relevant information and placing the burden on the People, or holding that neither party bears the burden, would lead to undesirable consequences where the minor is the party alleging incompetence.

#### 1. Section 709 contains an implied presumption of competence; the party alleging incompetence bears the burden of proof

Whether a minor is presumed competent and has the burden of proving incompetence under section 709 is a question of statutory construction. In construing statutes, the "goal is 'to ascertain the intent of the enacting legislative body so that [a court] may adopt the construction that best effectuates the purpose of the law.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 54–55, citations omitted.) A reviewing court must '"first examine the words of the statute, "giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent."'" (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 54–55.) Additionally, "[a] statute must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result

in wise policy rather than mischief or absurdity." (*People v. Zambia* (2011) 51 Cal.4th 965, 972, citation and quotations omitted.)

As appellant correctly notes, section 709 does not contain an express presumption of competence like Penal Code section 1369, subdivision (f). (ABOM 17.) Nor does section 709 explicitly state which party bears the burden of proof. Nonetheless, the language of section 709 indicates that a minor is presumed to be competent and that the minor bore the burden of proving incompetence by a preponderance of the evidence.[3]

Section 709, subdivision (a), states, "during the pendency of any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency." The fact that competency proceedings are triggered by the declaration of a doubt as to competency indicates an initial presumption of competence. If minor were not presumed competent, the Legislature would have required an affirmative showing of competence before any juvenile petition could proceed.

Likewise, subdivision (c) provides for suspension of proceedings "[i]f the minor is found to be *incompetent* by a preponderance of the evidence." (§ 709, subd. (c), italics added.) This subdivision indicates that even after an initial doubt is raised, the fact to be established is incompetence, not competence. The same is true in subsection (b), which charges the appointed expert with evaluating "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

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[3] Respondent is not contending the minor must *always* bear the burden. Rather, the burden of proof falls to the party who is alleging incompetence. Ordinarily, this will be the minor, as was the case here; however, in cases where the People allege incompetence, the People should properly bear the burden of proof. For simplicity's sake, rather than repeatedly clarifying this point, respondent will refer to minor as the party with the burden of proof because he was the party alleging incompetence.

competency. (§ 709, subd. (b).) Thus, as the Court of Appeal properly noted: "the statute mandates suspension of proceedings only upon a finding that a minor is "incompetent," rather than requiring suspension *unless* minor is found to be competent." (Slip opn. at p. 11, italics in original.) Accordingly, subdivisions (a) through (c) of section 709 establish that, like an adult defendant, a minor is presumed to be competent. Consequently, as with adult defendants, a minor has the burden of proving incompetency.

This interpretation of section 709 is supported by Evidence Code section 500, which provides: "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Under subsections (b) and (c), the juvenile court is tasked with determining whether *incompetence* has been demonstrated by a preponderance of the evidence. Under Evidence Code section 500, the party alleging the existence of that incompetence bears the burden of proving it.

Placing the burden on the minor based on the language of section 709 is consistent with case law from this court and various courts of appeal on analogous issues involving statutory construction. For example, in *People v. Nguyen* (1990) 222 Cal.App.3d 1612, the Court of Appeal had to determine which party bore the burden of proving the defendant's age in order to determine whether jurisdiction was proper under section 604.[4] (*Id.*

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[4] Section 604 provides, in relevant part: "(a) Whenever a case is before any court upon an accusatory pleading and it is suggested or appears to the judge before whom the person is brought that the person charged was, at the date the offense is alleged to have been committed, under the age of 18 years, the judge shall immediately suspend all proceedings against the person on the charge. The judge shall examine into the age of the person, and if, from the examination, it appears to his or her satisfaction that the person was at the date the offense is alleged to have been committed under the age of 18 years, he or she shall immediately certify

(continued...)

at p. 1618.) The court recognized that section 604 did not explicitly answer that question, but construed the section as imposing the burden of proof on the party seeking certification in the juvenile court. (*Id.* at pp. 1618–1619.) In so holding the court reasoned the language of section 604 sought proof that the person was "under the age of 18 years" and noted that if such evidence was not adduced, "the suspension is lifted and the adult criminal proceedings go forward." Based on the statutory language as well as Evidence Code section 500, the court concluded "the burden of proof is on the party seeking to establish the existence of the defendant's minority." (*Id.* at p. 1619.) Similarly, here, section 709, subdivision (c), allows for proceedings to go forward unless the court is satisfied the minor is incompetent to proceed. As such, the burden should fall on the party seeking to establish the existence of the minor's incompetence – in this case, minor.

The mere fact that unlike Penal Code section 1369, section 709 does not include an express presumption of competence does not suggest a different result in the juvenile context. For example, in *People v. Rells* (2000) 22 Cal.4th 860, this court determined whether a defendant bore the burden of proving incompetence by a preponderance of the evidence under Penal Code section 1372, which sets forth the procedures for establishing recovery of mental competence. This court noted that while Penal Code section 1369 expressly provides a presumption of competence and places the burden on the defendant to demonstrate incompetence, Penal Code section 1372 does not. Ultimately, this court held both the presumption and the burden were the same as under Penal Code section 1369. (*Id.* at p.

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(...continued)
[various information] to the juvenile court of the county: . . . ." (§ 604, subd. (a).)

868.) In so holding, this court noted that "if mental incompetence were to be characterized as either a 'claim for relief' on the part of a defendant or a 'defense' at his disposal, Evidence Code section 500, as a general matter at least, would impose the burden of proof on the defendant himself rather than the People." (*Id.* at p. 868, fn. 4, citations omitted.) The court should apply the same reasoning here to place the burden of demonstrating incompetence on minor.

Minor, however, argues that section 709 should not be read to imply a presumption of competence or to allocate the burden of proof. Minor first contends that because section 709 adopts some, but not all, of the procedures from the adult competency statutes, the omitted portions must have been left out intentionally. (See ABOM 18.) While reference to a particular subject in a statute can, at times, show a different intention where that provision is omitted from a similar statute (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 26), no such inference should be drawn here. The express presumption of competency for adults is contained in a subdivision detailing how to *instruct* the jury in a jury trial. (Pen. Code, § 1369, subd. (f).) Because all juvenile matters are handled by the court, rather than a jury, the Legislature may well have found the language pertaining to an express presumption to be unnecessary in the juvenile context. At the very least, a statutory provision regarding jury instructions would have been unnecessary. Further, despite the lack of an express presumption, as will be explained below, in enacting section 709, the Legislature intended to codify procedures similar to those afforded adults. A statutory construction inferring that the Legislature intended to reverse the presumption of competence or reallocate the burden of proof would not lead to that intended result.

Additionally, with respect to the presumption of competence, minor asserts the "statutory trigger of expressing a doubt over a juvenile's competency does not . . . imply a presumption of competency." (ABOM 20.) According to minor's reasoning, 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." (ABOM 20.) Rather than relying on this sort of tacit agreement as to competence, the better approach is to conclude that where no doubt as to competency is declared, proceedings continue because the minor is presumed competent. Because such a presumption is logically necessary in order for section 709 to operate effectively, contrary to minor's position (ABOM 18), the fact that it is not expressly included in the language of the statute is of no consequence. (See *Johnson v. Baker* (1914) 167 Cal. 260, 264 [whatever is necessarily implied in a statute is as much a part of it as that which is expressed]; see also *People v. Romero* (1996) 43 Cal.App.4th 440, 448–449 [statute that requires the defendant to demonstrate inability to pay impliedly presumes an ability to pay absent proof to the contrary].)

Minor also points to section 709's use of the phrase "attain competency" (as opposed to "restore competence") as evidence that there is no presumption of competence. (ABOM 19–20.) This word choice, however, is simply reflective of the Legislature's expansion of the definition of competence to include developmental immaturity. Juveniles whose incompetence is based on developmental immaturity must attain competency rather than have competency restored. The fact that some juveniles might ultimately be found to be too immature to be deemed competent does not mean that they should not have been *presumed* competent at the outset and required to demonstrate otherwise. After all, '"[t]here is no precise age which determines the question of competency.'"

(*Timothy J., supra*, 150 Cal.App.4th 847, 861, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 741, fn. 11 [107 S.Ct. 2658, 96 L.Ed.2d 631].) A minor's young age, therefore, is not reason, in and of itself, to disregard the presumption of competence.

Minor further contends that a presumption of competence would "ignore the development as well as the psychology and the research on adolescent brain development" that suggests many minors are legally incompetent. (ABOM 21.) Accepting minor's arguments regarding the cognitive differences between juveniles and adults as true,[5] as will be explained further below, the Legislature properly accounted for these differences by defining legal incompetence to include developmental immaturity and by requiring specialized training of the experts conducting the competency evaluations. These procedures adequately account for the differences between juveniles and adults; to further presume all minors to be incompetent would be improper and unnecessary.

Moreover, as the Court of Appeal emphasized below, due to the nature and goals of the juvenile justice system, a presumption of incompetence or placing the burden of proving competence on the People might not inure to the minor's benefit. The reformative tools and services

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[5] There is conflicting evidence on this point. Studies have repeatedly shown older juveniles, age 16 and 17, consistently outperforming adults on tests designed to measure competency. (Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading through the Rhetoric and the Evidence* (2009) 99 J. Crim. L. & Criminology 135 at p. 23.) Additionally, even in studies showing that juveniles performed poorer than adults in competency assessments, "the majority of all youths scored above the threshold level acknowledged as competent." (*Id.* at p. 25.) That the juveniles may have scored lower than adults is not of great consequence, as competency is a legal threshold that is either met or not met rather than a relative term subject to variations or degrees. (See *Id.* at p. 23.)

at the juvenile court's disposal are many: mental health and medical diagnosis and treatment, substance abuse education and testing, counseling, court orders to perform community service or to pay fines and restitution, placement in the family home or other appropriate setting, commitment to juvenile hall or the Juvenile Justice Department, and education and other services for the minor's parent or guardian. (See, e.g. §§ 635.1; 704; 713 (in certain counties); 726, subd. (a); 727, 727.2; 727.7; 729.3; 729.8; 729.9; 729.10; 730, subd. (a); 730.5; 730.6, 731; 6550.) Considering this "panoply" of rehabilitative treatment options available to adjudicated minors in the juvenile court system, the Court of Appeal reasoned that minor's argument for presuming minors incompetent could be "turned on its head." (Slip opn. at pp. 9–10.) As the Court of Appeal reasoned, presuming a competent minor to be incompetent "deprives him or her of the full panoply of reformative options available under the juvenile justice system and thereby diminishes the chances for true rehabilitation." (Slip opn. at p. 10.)

Accordingly, the plain language of section 709, especially when read in light of Evidence Code section 500, implies a presumption of competence and allocates the burden of rebutting that presumption to the party alleging incompetence; minor's arguments to the contrary should be rejected.

**2. The legislative history indicates that in enacting section 709, the Legislature did not intend to eliminate the presumption of competence and burden of proof that is used in the adult context**

As set forth above, the fundamental task in any case involving statutory interpretation is "'to determine the Legislature's intent so as to effectuate the law's purpose.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265, citing *People v. Murphy* (2001) 25 Cal.4th 136, 142.) If, after examining the plain language of the statute, there exists any ambiguity, the

reviewing court may then turn to "various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People v. King* (2006) 38 Cal.4th 617, 622.) Even assuming section 709 were ambiguous, presuming competence and placing the burden of proof on the minor also comports with the legislative history of section 709.

The legislative history of section 709 demonstrates that the purpose of the statute was to fill the statutory void in the area of juvenile competency. Prior to the passage of section 709, there was no statutory framework available to the juvenile courts for dealing with competency issues; thus, in enacting section 709, the Legislature sought to "codify competency processes for juveniles, similar to those afforded adults." (Assem. Com. on Appropriations, com. on AB 2212, as amended April 22, 2010, p. 2.[6])

While the Legislature intended for proceedings under section 709 to be similar to those afforded adults, it also recognized particular areas where different procedures were necessary. Specifically, the Legislature recognized that the type of "developmental immaturity" discussed in *Timothy J., supra*, 150 Cal.App.4th at p. 851, should be incorporated into the statutory definition for juvenile competency. (Assem. Com. on Appropriations, com. on AB 2212, as amended April 22, 2010, p. 2.) Additionally, the Legislature recognized that experts charged with evaluating minors should have specialized training in the field of child development and in the use of "assessment instruments unique to evaluations of children in order to identify a mental disorder or developmental disability" in minors. (Assem. Com. on Appropriations, com. on AB 2212, as amended April 22, 2010, p. 2.)

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[6] See Exhibit A of Respondent's Motion for Judicial Notice, filed concurrently with the Answer Brief on the Merits.

The fact that the Legislature commented on the specific ways in which the adult competency statute needed to be modified in order to fit the needs of juveniles and did not mention the presumption of competence or the requirement that the defendant bear the burden of proof as areas in need of modification strongly indicates an intent to maintain those procedures in the juvenile context, especially in light of the Legislature's stated purpose to codify competency procedures "similar to those afforded adults."

Moreover, the specific modifications the Legislature did make, with respect to developmental immaturity and including evaluations by an expert specializing in juvenile development, show that the Legislature was well aware of the research on juvenile competency indicating potential differences in the cognitive abilities of juveniles and adults. As such, minor's argument that applying the adult presumption and burden of proof in the juvenile context would "ignore" this research (ABOM 21) is incorrect. Rather, in light of this research, the Legislature identified discrete areas in which modification of the adult statute was appropriate and decided not to include the presumption or burden of proof among those areas.

This decision makes good sense. Cognitive differences between juveniles and adults should go to the type of expert called upon to evaluate the minor, the way the expert conducts that evaluation, and the information the expert called upon to evaluate. Section 709 allows for exactly that. The existence of cognitive differences, if any, should not affect the presumption of competence or the burden of proof because, as will be explained below, regardless of any cognitive differences and regardless of whether some juveniles are more likely to be found incompetent, juveniles still remain the party with better access to competency-related information and policy concerns still direct that minors should bear the burden of proving alleged incompetency.

### 3. Policy concerns support minor bearing the burden of proof

In addition to furthering the Legislature's intent in passing section 709, placing the burden on the minor also comports with policy concerns because the minor and his attorney have better access to the relevant information regarding competency and placing the burden on the People when the minor is claiming incompetence would create improper incentives and conflict with existing presumptions in juvenile law.

#### a. The minor and his attorney have superior access to information relevant to competency

Just as this court found that adult defendants have better access to the relevant information regarding competency, so too do minors in juvenile court.

Under the *Dusky* standard and section 709, a juvenile competency determination focuses on whether the minor can consult with his attorney, assist in the preparation of his defense, and understand the proceedings against him. (*Dusky, supra,* 362 U.S. at p. 402; § 709, subd. (a).) Relevant to this determination is whether the minor suffers from a mental disorder, developmental disorder, developmental immaturity, or other condition. (§ 709, subd. (b).)

The minor and his attorney have superior access to all of the above information. It is the minor's attorney, and not the prosecutor, who knows and can demonstrate whether the minor is able to consult with counsel and assist in his own defense. And it is the minor, and perhaps his family members, who are better able to call upon relevant witnesses – such as teachers, doctors, or friends – to attest to incompetence generally or to provide evidence of developmental disorders or immaturity. The People, on the other hand, as this court found in *Medina I*, "have little or no access to information regarding the defendant's relationship with his counsel, or

defendant's actual comprehension of the nature of the . . . proceedings." (*Medina I*, *supra*, 51 Cal.3d at p. 885.)

There is no reason why this holds any less true for a minor in juvenile court than for an adult defendant. Minor, in his opening brief, claims it is the People who have the better access in the juvenile context, but provides no satisfactory support for this claim. Minor states, "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." (ABOM 22.) In arguing that the burden should fall to the People, minor further argues both the prosecutor and defense counsel have access to the court appointed expert's report and information upon which the expert relies. (ABOM 28.)

These arguments miss the point. While the court-appointed expert undoubtedly plays a role in a juvenile competency determination, an expert's evaluation does not lessen or negate the superiority of the minor's access as compared to the People's. Though both parties may have equal access to the expert and to his or her report, the minor and his attorney remain the parties with superior access to information concerning their ability to interact with one another and prepare a defense. Moreover, if the existence of the expert evaluation truly changed anything with regard to which party had better access to the relevant information, this court would not have relied upon that information as a "critical factor" in determining "the propriety of a particular proof allocation" in *Medina I*. (*Medina I*, *supra*, 51 Cal.3d at p. 885.) After all, in the adult context, Penal Code section 1369 also provides for the appointment of an expert to examine the defendant and render an opinion as to competence. (Pen. Code, § 1369,

subd. (a).) Yet, despite the fact that an expert was involved in the process and that, presumably, both parties have equal access to the expert and to his report, this court still found it "critical" that the defendant, as compared to the People, was the party with better access to the relevant information regarding competency.

**b. A system that does not allocate the burden to either party or that places the burden on the People would provide the minor with the wrong incentives**

Minor argues that because section 709 does not explicitly allocate the burden of proof, "no single party has the burden to prove the minor incompetent." (ABOM 27.) Rather, minor contends, "all parties are tasked with the important obligation to make sure that the minor is not adjudicated while incompetent." (ABOM 27.) Alternatively, minor argues the burden falls to the People "to ensure fairness and accuracy of the adjudication." (ABOM 28.) Essentially, minor posits that the goals of the juvenile justice system can only be met if the minor is competent and, because the prosecutor is the party bringing the initial charges, he or she should be required to prove the minor is competent before proceeding on those charges. (ABOM 28–29.)

Initially, minor's argument that neither party should bear the burden of proof should be rejected as unworkable in cases where the minor is alleging incompetence. Minor correctly notes that in cases where neither the prosecutor nor the defense seeks a finding of incompetence, neither party bears the burden and it is up to the court to adduce evidence of incompetence.[7] (ABOM 24; *People v. Skeirik*, *supra*, 229 Cal.App.3d at

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[7] Thus, in the adult context, even in cases where both the prosecutor and the defendant seek a finding of competence, the prosecutor is not (continued...)

pp. 459–460.) Requiring the court to adduce evidence of incompetence in that unique situation is appropriate because the defendant should not be required to prove something that he is not alleging to be true. Outside this narrow situation, however, the burden of proof should be assigned to the party alleging incompetence. Otherwise, if neither party is assigned the burden of proof, neither party has the burden of producing evidence of either competence or incompetence. (See Evid. Code, § 550, subd. (b); see also *In re Marriage of Mehlmauer* (1976) 60 Cal.App.3d 104, 108 ["We think it obvious that in a contested proceeding a burden of proof is necessary in order to get the proceeding off the ground"].)

Minor's argument for assigning the burden of proof to the People (ABOM 27) must also be rejected, as it ignores the fact that the minor is the conduit through which evidence of competence or incompetence must pass. The minor must converse with his attorney and with the appointed expert in order for there to be evidence from which to make a competency determination. The People cannot force the minor to either speak to his attorney or cooperate with the appointed expert. As such, if the People are charged with proving competence, the minor will have an incentive to remain silent and to refuse to submit to a full evaluation or to competency testing. Without such evidence, it will be difficult for the People to prove competence. This is the exact concern Justice O'Connor expressed in *Medina II* when she stated, "If the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative

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(...continued)
required to prove competence. (See *People v. Skeirik* (1991) 229 Cal.App.3d 444, 459–460.)

in making available friends or family who might have information about the defendant's mental state." (*Medina II*, *supra*, 505 U.S. at p. 455 (conc. opn. of O'Connor, J.).)

The facts of the instant case aptly illustrate this point. Minor here refused to participate in testing, therefore impeding Dr. Kojian's ability to determine whether he was malingering. Placing the burden on the People in this scenario would likely lead to a number of competent minors being deemed incompetent for lack of proof.

On the other hand, a minor who bears the burden of proving incompetence would have every incentive to participate in testing, cooperate with the evaluation, and provide access to relevant witnesses because doing so would be the best way to adduce sufficient evidence of incompetence. The latter scenario best serves the goals of the juvenile justice system. The goal of the system is not simply treatment for treatment's sake, but rather to provide an effective treatment program geared, as best as possible, to the specific needs of the individual minor. (*In re James R.* (2007) 153 Cal.App.4th 413 [juvenile statutory framework is designed "to provide the juvenile court maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it"].)

It is through full and frank conversations between the minor, the court, and the appointed expert that proper treatment and placement can be determined. As the Court of Appeal below pointed out, encouraging silent or uncooperative minors by failing to place the burden on the minor would, in effect, obstruct the goals of the juvenile justice system because the minor who is deemed "incompetent" based on silence or lack of proof would not have the "full panoply of reformative options available under the juvenile justice system . . . thereby diminish[ing] the chances for true rehabilitation." (Opn. at p. 10.)

### c. Placing the burden on the People would be inconsistent with existing presumptions in juvenile law

In addition to creating an incentive for minors to refuse full evaluations, placing the burden on the People would also be inconsistent with other presumptions applicable to minors; namely, the presumption of capacity in Penal Code section 26 and the presumptions regarding fitness and unfitness in section 707.

Penal Code section 26 provides that minors over the age of 14 are "capable of committing crimes," unless they fall under one of the enumerated excepted groups. (Pen. Code, § 26.) Section 707, subdivision (c), provides that minors charged with certain enumerated felonies are presumed to be unfit for juvenile court treatment and bear the burden of proving fitness.[8] (§ 707, subds.(b) & (c); *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 805.)

Admittedly, it is theoretically possible for a minor to be capable of committing a crime and be unfit for treatment in juvenile court yet also be incompetent because the inquiries underlying these determinations are different. (See *Timothy J., supra*, 150 Cal.App.4th at p. 862.) Nonetheless, "some of the same factors may be relevant" to more than one type of inquiry. (See *Ibid.*) As such, it would be to some extent logically inconsistent for the court to presume the same minor capable of committing a crime – meaning that he comprehends the wrongfulness of the act – and presume him to be unfit for juvenile court – meaning that he exhibited a certain level of criminal sophistication – yet, at the same time, presume him

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[8] Under both statutes, consistent with Evidence Code sections 500 and 606, the party rebutting the presumption bears the burden of proof. (*People v. Cottone* (2013) 57 Cal.4th 269, 303 [Penal Code section 26]; *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 805 [section 707].)

to be *unable* to understand the nature of the proceedings against and *unable* to communicate effectively with his attorney. Instead, at least with respect to those minors over the age of 14, it would be consistent for the court to presume – as it does with capacity – that the minor is competent to proceed absent proof from the minor to the contrary.

As for minors under 14, the People would already be required to demonstrate capacity pursuant to Penal Code section 26. A capacity determination requires consideration and examination of the minor's age, experience, and understanding in order to determine whether the minor appreciated the wrongfulness of his conduct. (*In re Gladys R.* (1970) 1 Cal.3d 855, 864.) Hence, the presumption of competence in section 709 would only apply to those minors under age 14 whose age, experience, and understanding demonstrates sufficient capacity to meet the requirements of Penal Code section 26.

Accordingly, for the above reasons, this court should affirm the Court of Appeal's holding that minor bore the burden of proving his alleged incompetence by a preponderance of the evidence.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE JUVENILE COURT'S FINDING THAT MINOR FAILED TO PROVE INCOMPETENCE BY A PREPONDERANCE OF THE EVIDENCE

Minor contends this court should independently review the juvenile court's competency finding, which he claims is a mixed question of law and fact. (ABOM 32, 28.) Minor further contends that, whether viewed independently or under the substantial evidence test, the juvenile court's competency finding was not supported by substantial evidence. (ABOM 39.)

Respondent disagrees. The Court of Appeal properly applied the substantial evidence standard of review and properly upheld the juvenile court's finding. The substantial evidence standard is appropriate because

competency determinations are factual findings. Under the substantial evidence standard of review, this court should affirm the juvenile court's finding because the juvenile court could reasonably reject the evidence of incompetence based on the fact that the minor refused to submit to any testing. Moreover, the juvenile court was in the best position to determine the credibility of both the minor and the expert.

### A. Standard of Review

Competency determinations are factual findings reviewed on appeal for substantial evidence. (*People v. Marks* (2003) 31 Cal.4th 197, 215 [applying the substantial evidence standard of review to an adult defendant's competency finding]; *People v. Samuel* (1981) 29 Cal.3d 489, 493 [reviewing an adult defendant's competency determination for substantial evidence and giving deference to the trier of fact]; *People v. Marshall* (1997) 15 Cal.4th 1, 31 [same]; *People v. Dunkle* (2005) 36 Cal.4th 861, 885, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 422, fn. 22.) The United States Supreme Court has defined issues of fact as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" (*Townsend v. Sain* (1963) 372 U.S. 293, 309 at fn. 6 [83 S.Ct. 745, 9 L.Ed.2d 770], quoting *Brown v. Allen* (1953) 344 U.S. 443, 506 [73 S.Ct. 397, 97 L.Ed. 469].) In *Thompson v. Keohane* (1995) 516 U.S. 99 [116 S.Ct. 457, 133 L.Ed.2d 383], the court reasoned that, in the context of habeas review, a competency determination is factual because its resolution "depends heavily on the trial court's appraisal of witness credibility and demeanor." (*Id.* at p. 111.) This court has also found a variety of analogous issues to be factual findings. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680, 681, fn. 3 (*Jones*) [a court's ruling on whether a minor is fit or unfit for treatment under juvenile court law is treated as a factual finding]; *In re Hawthorne* (2005) 35 Cal.4th 40, 49 [whether a

capital defendant is mentally retarded is a question of fact].) Additionally, while declining to decide the burden of proof issue, the courts of appeal have consistently applied the substantial evidence test when reviewing juvenile competency findings. (See, e.g., *In re Alejandro G.* (2012) 205 Cal.App.4th 472, 480; *In re Christopher F.* (2011) 194 Cal.App.4th 462, 472.)

Findings of fact are reviewed under the "substantial evidence" standard. (*Jones*, *supra*, 18 Cal.4th at p. 681.) The standard is deferential: "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination...." (*Ibid.*) This is because the power to evaluate witnesses, resolve testimonial conflicts, weigh evidence and draw factual inferences reposes with the trial court alone and, on appeal, presumptions favor the trial court's proper exercise of its authority. (*People v. Morton* (2003) 114 Cal.App.4th 1039, 1047–1048.)

With respect to competency determinations, where the court's finding is based on affirmative evidence of competence, by way of either prosecution evidence or expert opinion testimony that a minor is competent, a reviewing court should apply the well-settled test for substantial evidence and uphold the findings if the evidence supporting it is "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

The substantial evidence test is also the appropriate appellate test in cases – such as this one – where the court's finding is based on the minor's failure to meet his burden of demonstrating incompetence rather than on any affirmative evidence of competence. This court held as much under analogous circumstances in *People v. Drew* (1978) 22 Cal.3d 333, 351.

There, this court was tasked with determining whether substantial evidence supported the court's finding that the defendant was sane. (*Id.* at p. 349.) Both of the court-appointed experts in *Drew* testified the defendant was unaware of the wrongfulness of his acts and the prosecution presented no evidence at the sanity trial. (*Id.* at pp. 350–351.)

This court held the trial court's finding was supported by substantial evidence. In so holding, the court reasoned: "Defendant . . . has the burden of proof on the issue of insanity; if neither party presents credible evidence on that issue the jury must find him sane." (*Drew*, *supra*, 22 Cal.3d at p. 351.) The court then explained how the substantial evidence test functioned under circumstances where the defense bears the burden of proof, stating: "the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it." (*Ibid.*) Applying that test to the facts of the case, the court determined that the jury could reasonably reject the opinions that the defendant was insane on the ground that the experts failed to present sufficient material and reasoning to justify their opinions. (*Ibid.*) As such, the court concluded that "the jury's verdict cannot be overturned as lacking support in the trial record." (*Ibid.*) The same test should govern here. In applying the substantial evidence test, the question for the Court of Appeal was whether the juvenile court could reasonably reject the expert's opinion and therefore determine that minor failed to meet his burden to demonstrate incompetency.

Although minor did not contest the application of the substantial evidence standard of review below, he now contends that competency determinations are mixed questions of law and fact subject to independent review. (ABOM 32–33.) Minor's claim should be rejected because

competency determinations are not mixed questions of law and fact but, even if they were, the substantial evidence test is still appropriate.

First, minor's argument that competency determinations involve mixed questions of law and fact is incorrect. In so arguing, minor reasons: "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." (ABOM 32–33.) According to minor, the second inquiry constitutes a "predominantly legal question." (ABOM 33.)

This reasoning fails to withstand scrutiny. Though minor attempts to liken competency determinations to established mixed law and fact questions, the attempt fails because, in the case of competency determinations, both inquiries are factual in nature. This is because both inquiries are purely subjective and specific to the minor at issue. This is in stark contrast to other mixed law and fact inquiries such as determining due diligence, reasonableness of a search, or issues pertaining to custodial interrogation under *Miranda*,[9] where the court accepts the factual findings of the trial court but then applies those facts to a purely *objective* standard. (See, e.g. *Cromer, supra,* 24 Cal.4th at p. 895 [discussing the objective nature of in-custody determinations under *Miranda* and of findings of reasonable suspicion and probable cause].) With competency determinations, the question is not whether, under the facts found by the

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[9] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*).

expert, a theoretical minor would understand the nature of the proceedings against him; the question is always whether *this* minor is incompetent to proceed.

However, even if competency determinations were mixed questions, the substantial evidence standard is still appropriate. Mixed questions of law and fact may be subject to either independent review or substantial evidence review. (*Cromer*, *supra*, 24 Cal.4th at pp. 893–894.) In deciding mixed law and fact questions, this court has found the substantial evidence test most appropriate where the issues presented are predominantly factual or credibility based. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 730, [whether suspect in custody initiated new discussion after invoking *Miranda* right to counsel].)

Both this court and the United States Supreme Court have referenced competency determinations as issues appropriate for substantial evidence review. In *Thompson v. Keohane*, *supra*, 516 U.S. 99, the United States Supreme Court considered the appropriate standard of review for questions involving the Fifth Amendment right against self-incrimination. While the court concluded independent review was appropriate in that context, in reaching that conclusion it distinguished the situation before it from the competency to stand trial context, noting that, for competency determinations, a deferential standard of review was appropriate both because (1) determinations of competency take place in open court on a full record with the trial court having a "first-person vantage" and (2) the court's determination as to whether a defendant was competent to stand trial is an "individual-specific decision" unlikely to have precedential value. (*Id.* at pp. 113–114.); see also *Miller v. Fenton* (1985) 474 U.S. 104, 114 [106 S.Ct. 445, 88 L.Ed.2d 405] [when an "issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of

applying law to fact to the trial court"].) Similarly, in *People v. Holmes* (2004) 32 Cal.4th 432, 442, this court commented that a deferential standard of review is appropriate in cases where the "trial court makes an individual-specific decision, such as for juror bias or competency to stand trial."

In addition to its having been highlighted as a prime example of a predominantly factual inquiry, competency determinations are appropriately reviewed for substantial evidence under the factors set forth in *Cromer*, *supra*, 24 Cal.4th 889, and *People v. Ault* (2004) 33 Cal.4th 1250, 1267. In *Cromer*, this court analyzed the proper standard of review when evaluating a trial court's due diligence determination. (*Cromer*, *supra*, 24 Cal.4th at p. 893.) Relying on the United States Supreme Court's guidance in *Thompson v. Keohane*, *supra*, 516 U.S. 99 and *Ornelas v. United States* (1996) 517 U.S. 690 [116 S.Ct. 1657, 134 L.Ed.2d 911], this court found that independent review was most appropriate because (1) the due diligence determination required application of an objective, constitutionally based legal test to the historical facts; (2) the trial court does not have a first-person vantage on the prosecution's out-of-court efforts to locate an absent witness; and (3) a due diligence determination is not "highly individualized" because it could potentially guide law enforcement officers by offering a defined set of rules. (*Cromer*, *supra*, 24 Cal.4th at pp. 900–901.)

More recently, in *Ault*, *supra*, 33 Cal.4th 1250, this court examined the proper standard of review in analyzing the People's appeal following a trial court's grant of a new trial based on juror misconduct. Ultimately, this court determined that while the issue was a mixed question of law and fact, the trial court's order should be deferentially reviewed for abuse of discretion. (*Id.* at p. 1255.) In so holding, the court relied upon the factors considered in *Cromer* as well as the following considerations: (1) the

importance of the legal rights or interests at stake; and (2) the consequences of an erroneous determination. (*Id.* at p. 1267.)

While a minor's competence is no doubt important and courts must employ adequate procedures to guard against erroneous determinations, the majority of the *Cromer* and *Ault* factors point to application of the substantial evidence standard as the appropriate standard of review. First, as explained above, in contrast to mixed questions of law and fact that require independent review, competency determinations do not require application of an objective legal test to the historical facts. In reviewing a competency finding, the reviewing court is not analyzing the facts to see if they meet the level at which a typical minor would be considered competent or incompetent – rather, the focus is on the specific, subjective competence of the minor.

Second, competency determinations are, in part, dependent upon the juvenile court's first-person vantage. Minor argues competency determinations do not "really" depend on witness credibility because the expert's evaluation of the minor takes place outside of the courtroom. (ABOM 35–36.) This court stated in *Cromer* that competency to stand trial entails a "first-person vantage" for the trial court. (*Cromer*, *supra*, 24 Cal.4th at p. 901.) Moreover, minor's argument ignores the fact that in cases where the expert testifies as to his conclusions from that out-of-court evaluation, the juvenile court must evaluate the credibility of the expert (as well as the credibility of any other witness including, perhaps, the minor himself) from a first-person vantage. Because the ultimate question is whether the minor is incompetent to proceed, the court's ability to view and evaluate the minor's demeanor, behavior, and interactions with counsel are also critical components of a competency determination that are unavailable to a reviewing court. As the United States Supreme Court aptly stated in *United States v. Oregon Medical Society* (1952) 343 U.S. 326, 339 [72

S.Ct. 690, 698, 96 L.Ed. 978], "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . how can we say the judge is wrong? We never saw the witnesses . . . ." Even in cases where the expert does not testify before the court and the court bases its opinion entirely upon the written reports, the juvenile court's findings are still entitled to deference. (See *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, fn. 3 ["that the trial court's findings [in denying motion to recuse prosecutor] were based on declarations and other written evidence does not lessen the deference due those findings"].)

Third, the substantial evidence test is appropriate because competency determinations are highly individualized and unlikely to have wide-spread precedential value. As set forth above with respect to the subjective versus objective nature of competency determinations, the goal of a competency determination is to determine whether the specific minor before the court is incompetent. That any one minor is found to be incompetent under a certain set of particular facts does not have any effect on a separate competency determination of another minor. In other words, if Minor No. 1 is of a certain age, has a certain I.Q., and gives certain responses during an evaluation and is found to be incompetent, Minor No. 2, who shares the same characteristics and gives the similar responses, may or may not be incompetent to proceed. Competency determinations are fact specific to the individual minor and, as such, they are unlikely to hold much precedential value. This court stated in *Ault* that where a mixed question of law and fact "depend[s] heavily on the unique circumstances of the particular case" and is "so factually idiosyncratic and highly individualized as to lack any [significant] precedential value," independent review is not required. (*Ault, supra*, 33 Cal.4th at p. 1267.)

Accordingly, under the *Cromer* and *Ault* factors, even if a competency determination constitutes a mixed question of law and fact, the substantial evidence standard of review is appropriate.

### B. Substantial Evidence Supports the Juvenile Court's Finding

Under the substantial evidence standard of review, this court should affirm the juvenile court's finding because the juvenile court could reasonably reject the evidence of incompetence.

The primary evidence of incompetence was Dr. Kojian's opinion. That opinion, however, was based on the doctor's interview with minor, during which minor refused to participate in any sort of testing, stating, "I decline tests." (Conf. RT 42.) Due to this refusal, Dr. Kojian was unable to determine whether minor was malingering and was unable to determine the cause of minor's apparent "disruption in cognition." (Conf. RT 43.)

Dr. Kojian's admitted there were "a plethora" of tests designed to test cognitive functioning, yet claimed his opinion was not affected by minor's refusal to submit to testing because there was no test he could have administered that would have changed his opinion. (RT 41, 46–47.) The doctor also based his opinion on the fact that minor was housed in a special unit in juvenile hall, minor's teachers and the officers who arrested him "thought that he was impaired," and minor's mother provided information that "there is some type of mental process going on." (RT 47.) But there was no evidence in the record as to why minor may have been housed in a "special unit," and the documentation from minor's school did not clearly indicate any developmental disability. (See RT 76.) In fact, the

manifestation determination[10] from minor's school indicated that minor's testing was not complete because the observed cognitive and adaptive delays "may have been drug induced," and testing from 2009 did not show any such delays. (RT 76.)

Additionally, even if the court accepts Dr. Kojian's opinion that minor suffered from some sort of cognitive impairment, minor failed to demonstrate that any impairment rendered him legally incompetent. Admittedly, some of minor's statements during his evaluation may have suggested confusion: appellant said that he did not know his mother, that he was arrested for "not understanding," and that he did not know the duties of his defense counsel or the prosecutor. (Conf. RT 41-42.) However, when Dr. Kojian attempted to administer a test to "rule out malingering," minor flatly declined the test. (Conf. RT 42.) Accordingly, there is no way of knowing how truthful minor was being during the interview. It simply cannot be that a minor can meet his burden to demonstrate incompetence by a preponderance of the evidence by making outlandish statements and then refusing to participate in any sort of testing in order to determine the validity of those statements.

Moreover, as the juvenile court noted, many of minor's responses to Dr. Kojian were "appropriate." (RT 75.) Minor indicated the court "makes a decision," a guilty verdict means he is "responsible," and a not guilty verdict means "he could be released home." (Conf. RT 42.) Moreover, although minor believed he was charged with "disturbing the peace," it is understandable that minor could think of his actions of fighting with and threatening his family members as disturbing the peace. Minor was also

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[10] A manifestation determination seeks to determine whether a student's violation of a code of student conduct was a manifestation of the student's disability. (See 20 U.S.C. 1415, subd. (k).)

able to clarify that he was in trouble for "messing up [his] house," and "playing with mom and dad." (Conf. RT 42.) Minor also stated that the court determines guilty versus innocence based on whether appellant attends school or not (Conf. RT 42), which is incorrect, but school attendance is often an important factor considered by juvenile courts in determining the proper placement for a minor pending trial and during adjudication.

For these reasons, the juvenile court's finding that minor failed to meet his burden of demonstrating incompetence was supported by substantial evidence, as the Court of Appeal properly found. This court should affirm.

## CONCLUSION

Accordingly, for the reasons set forth above, respondent respectfully asks this court to affirm the judgment of the Court of Appeal in its entirety.

Dated: May 8, 2014

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,639 words.

Dated: May 8, 2014

KAMALA D. HARRIS
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## DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Rosario V.**
Case No.: **S212346**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 9, 2014, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable Judge Deborah Chuang
Orange County Superior Court
Lamoreaux Justice Center
341 City Drive South
Department L34
Orange, CA 92868-3205

Clerk of the Court
Court of Appeal of the State of California
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

The Honorable Tony J. Rackauckas
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on May 9, 2014, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at cindybrines@sbcglobal.net.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 9, 2014, at San Diego, California.

A. Brooks
Declarant

Signature

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