

## **People v. RJ: Competency of sixteen year old to stand trial for robbery and criminal street gang conduct in adult criminal court.**

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In 2000 the California voters approved Proposition 21, a state constitutional initiative which, among other provisions, gives District Attorneys discretion to file statutorily enumerated criminal charges against a juvenile who is 16 years or older in adult court. (Welfare & Institutions Code section 707(b), Welf & I C section 707((d)(1).) In September 2009, the District Attorney in the County of Santa Barbara filed a second-degree robbery charge<sup>1</sup> against the 16 year-old R.J. This charge was accompanied by an allegation that the minor committed the robbery for the benefit of, or in association with, a criminal street gang in violation of a provision of the Street Terrorism Enforcement Act (Penal Code section 186.22(b)).<sup>2</sup> The property allegedly stolen through use of force or fear was a skateboard. While the maximum sentence for second-degree robbery is 6 years in the California State Prison, the maximum exposure would be enhanced to 16 years if a jury were to find that the Street Terrorism Enforcement Act allegation were true.

I was appointed to represent RJ in my capacity as an attorney at the Santa Barbara County Office of the Public Defender. The following is a brief description of the law and facts pertaining to the case, and an account of the litigation concerning R.J.'s competency to stand trial for the alleged crime in adult criminal court. The definition of competency in this regard is set forth in the United State Supreme Court case, *United States v. Dusky* (1960) 362 U.S. 402<sup>3</sup> and the California statutory provisions of Penal Code section 1367<sup>4</sup>.

### **Legal Competency to Stand Trial in Criminal Proceedings.**

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

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<sup>1</sup> Penal Code section 211: Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

<sup>2</sup> Penal Code section 186(b)(1) "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in [subdivision \(c\) of Section 1192.7](#), the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in [subdivision \(c\) of Section 667.5](#), the person shall be punished by an additional term of 10 years.

<sup>3</sup> The constitutional test of a defendant's competency is whether he has sufficient present ability to reasonably and rationally consult with his attorney with a degree of rational understanding and whether he has rational as well as factual understanding of proceeding against him. *Dusky v. U.S.* (1960) 362 U.S. 402

<sup>4</sup> (a) A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(b) [Section 1370](#) shall apply to a person who is charged with a felony and is incompetent as a result of a mental disorder. [Sections 1367.1](#) and [1370.01](#) shall apply to a person who is charged with a misdemeanor or misdemeanors only, and the judge finds reason to believe that the defendant is mentally disordered, and may, as a result of the mental disorder, be incompetent to stand trial. [Section 1370.1](#) shall apply to a person who is incompetent as a result of a developmental disability and shall apply to a person who is incompetent as a result of a mental disorder, but is also developmentally disabled.

## **Constitutional Competency to Stand Trial for a Criminal Offense.**

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

In California, the legislature enacted statutory rules to conform to the *Dusky* standard. These laws are enumerated in California Penal Code section 1367.<sup>5</sup> The statute's basic rule is that in order to be deemed competent to stand trial, a criminal defendant must understand the nature of the criminal proceedings and meaningfully participate in those proceedings. This includes a rational understanding of the roles and objectives of the judge, the prosecutor, the defense attorney, the jury, and that the defendant be able to rationally assist his lawyer to aid in his own defense. The statute not only mandates the nature of legal incompetence by definition, but also requires that such legal incompetency be on account of a "mental disorder" or "developmental disability." A mental disorder generally refers to a psychological disorder typically listed and defined in the Diagnostic and Statistical Manual of Psychiatric Disorders IV (DSM-IV), e.g., psychosis, Bi-Polar disorder, or other psychological disorders. A developmental disability is generally an early manifested mental or physical cognitive impairment, e.g., mental retardation, autism.

Although Penal Code section 1367(a) defines mental incompetence as a "mental disorder or "developmental disability" the California Court of Appeal created the binding precedent in *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4<sup>th</sup> 847 that under the mandatory constitutional standard set forth in *Dusky v. United States* (1960) 362 U.S. 402, a doubt may be raised and a finding may be made as to a minor's incompetence to stand trial notwithstanding the absence of a mental disorder or developmental disability.

[W]e construe rule 1498(d)[<sup>6</sup>] consistent with the constitutional test of competency stated in *Dusky v. United States* (1960) 362 U.S. 402 [4 L.Ed.2d 824, 80 S. Ct. 788] (*Dusky*) and hold that the rule does not require that a minor have a mental disorder or developmental disability before the juvenile court may hold a hearing to determine whether, or find after holding a hearing that, the minor is incompetent to stand trial.

(*Timothy J. v. Superior Court (supra)* 150 Cal. App. 4<sup>th</sup> 847, 852.) The court further stated that

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<sup>5</sup> Pen. Code, § 1367. Mentally incompetent persons; trial or punishment prohibited; application of specified sections (a) A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(b) Section 1370 shall apply to a person who is charged with a felony and is incompetent as a result of a mental disorder. Sections 1367.1 and 1370.01 shall apply to a person who is charged with a misdemeanor or misdemeanors only, and the judge finds reason to believe that the defendant is mentally disordered, and may, as a result of the mental disorder, be incompetent to stand trial. Section 1370.1 shall apply to a person who is incompetent as a result of a developmental disability and shall apply to a person who is incompetent as a result of a mental disorder, but is also developmentally disabled. (West's Ann.Cal.Penal Code § 1367)

<sup>6</sup> Former Cal. Rules of Court, Rule 1498(d) requires a juvenile court to stay the proceedings and conduct a hearing into a child's competency if the court finds there is reason to doubt that the child who is the subject of a petition filed under [Welf. & Inst. Code, §§ 601 or 602](#), is capable of understanding the proceedings or of cooperating with the child's attorney.

although section 1367(a) of the Penal Code “defines mental incompetency as a ‘mental disorder or developmental disability’ the test stated in *Dusky* does not.” (*Tomothy J.* at p. 859) The *Timothy J.* decision recognized that a previous precedential holding noted that the ‘legal pigeonhole of “mentally disordered” is not identical with the test of mental competency *to aid counsel* ... .(*James H., supra, 77 Cal.App.3d at p. 177.*)” (*Id* at p. 859.)

### **Reported Facts of Alleged Criminal Offense**

According to Santa Barbara Sheriff’s Department reports, in September 2009, Sheriff’s deputies responded to a “gang fight” in progress with three subjects assaulting one victim. A witness to the fight pointed to a departing vehicle that was subsequently stopped. Deputies detained three young adults, MZ, OC, and RM. Deputies contacted the 16 year-old victim who reported that he had been skateboarding home when a subject, later identified as OC asked him “what’s up” and punched him in the face, knocking him off his skateboard. The victim stated that MZ and RM also attacked him while he was on the ground. The victim stated he tried to fight back, but was overwhelmed. After suffering the attack, he asked his assailants if he could just have his skateboard. The victim reported that OC responded, “No. This is my fucking skateboard. What you going to do about it?” The victim reported that the three men then stomped on his head. After the assailants fled, the victim made a positive identification of RJ, whom the victim said was a fourth subject involved in the altercation, but did not hit him.

When questioned, RJ told deputies he had been outside his girlfriend’s residence when MZ, OC and RM drove up. OC said, “Hey fool, come over here.” RJ said that RM was trying to “check [him],” meaning check his willingness to do something on behalf of the street gang to which MZ, OC and RM affiliate. The three men wanted RJ to participate with them, to “bust a mission,” meaning to commit a crime in the name of the gang. RJ stated, “I don’t bang,” meaning he does not participate in crimes on behalf of the gang or associate with gang members or affiliates. RJ told deputies that he witnessed OC punch the victim as he was riding his skateboard and that RM also joined the attack and punched the victim. He stated the MZ had not been involved in the attack. According to RJ, MZ, OC, RM and RJ fled, fearing the police would arrive on scene. RJ said he then re-entered his girlfriend’s residence, and that RM followed him into the residence while in possession of the victim’s skateboard. According to RJ, RM hid the skateboard under the bed in RJ’s girlfriend’s bedroom. RM was told by occupants of the residence that he was not welcome and then left the residence.

When MZ was questioned he told deputies that RJ, OC and RM had attacked the victim. MZ also reported the RJ had taken the skateboard and hidden it inside the residence. MZ also stated that he was not a gang member, but that RJ, RM and OC were members of a local street gang.

### **The Competency Litigation**

As noted above, RJ was charged with second-degree robbery enhanced by the allegation that he committed the robbery for the benefit of, or in association with, a criminal street gang in violation of the Street Terrorism Enforcement Act (Penal Code section 186.22(b)). When counsel met RJ, it was apparent that RJ had considerable difficulty understanding and appreciating the nature of the criminal proceedings against him, and appeared to be unable to rationally cooperate with his lawyer to aid in his defense.

An attorney representing a criminal defendant has a duty to investigate the competency issue when he is in the possession of evidence of the defendant’s mental instability. The defendant’s mental competency may be called into question by such factors as the nature of the crimes, the defendant’s mental history, or current psychiatric evaluations of the defendant. Counsel faced with such evidence should determine the meaning of any medical diagnoses of the defendant and seek additional psychiatric examinations, if necessary, to establish the defendant’s incompetency. (*People v. Corona* (1978) 80 Cal. App. 3d 684, 709.)

A conflict may arise when an attorney represents a client who appears to the attorney to be incompetent, but who wishes to be found competent. The attorney faced with this situation is entitled to assume that the possibly incompetent client is incapable of acting in his or her own best interests. (*See People v. Hill* (1967) 67 Cal. 2d 105, 115 n.4.) Counsel may, therefore, present evidence of incompetency contrary to the client’s express wishes if it appears to be the proper

course of action to protect the client's interests. In fact, failure to do so may result in prejudicial error. (*People v. Harris* (1993) 14 Cal. App. 4th 984, 994; *People v. Bolden* (1979) 99 Cal. App. 3d 375, 379-380.)

In court, counsel for RJ declared a doubt as to RJ's competency to stand trial. Pursuant to statute, the judge appointed two psychologists to evaluate and file a written report stating their opinions as to RJ's competence to stand trial under the provisions of Penal Code section 1367. Weeks later, the psychologists issued reports with different opinions as to RJ's competence to stand trial under section 1367 and the mandates of *United States v. Dusky*. One psychologist, TB, opined that RJ was competent. TB determined that RJ did not suffer from a psychiatric disorder or developmental disability to the extent that it impeded his ability to understand the nature of the judicial proceedings or rationally aid his counsel in his own defense. The second psychologist determined that RJ was not competent to stand trial on account of psychiatric disorders in association with insufficient adolescent maturation, the latter factor not listed in Penal Code section 1367 but given legal authority by the opinion rendered in *Timothy J (supra)*. Given the split of opinion by the court appointed psychologists, the judge issued an order for a third psychological examination and report to assist in the determination of competency. The third court-appointed psychologist, AR, expressed the opinion that RJ was not competent to stand trial on account of a psychiatric disorder and insufficient adolescent cognitive development.

### **Right to Jury Trial**

In RJ's case, the prosecution refused to stipulate that RJ was not competent. Because a defendant has a constitutional right to a fair trial, the trial court has the duty to determine whether there is substantial evidence of incompetency to require a full competency hearing whenever the issue of competency is brought to the court's attention. (*People v. Campbell* (1987) 193 Cal. App. 3d 1653, 1667 Evidence is substantial if it raises a reasonable doubt as to the defendant's competency to stand trial. (*People v. Jones* (1991) 53 Cal. 3d 1515, 1552-1553.) If the defendant's showing of incompetence is substantial the trial judge must order a full hearing to resolve any conflict in the evidence bearing on the defendant's competency, and determine the defendant's ability to stand trial. (*People v. Pennington* (1967) 66 Cal. 2d 508, 518-519)

A competency hearing is considered a special proceeding rather than a criminal action. A defendant is entitled to a jury trial of the competency issue only if he or she demands one. (*People v. Hill* (1967) 67 Cal. 2d 105, 114, cert. denied, 389 U.S. 1009 (1967).) Because the defendant's right to a jury trial is statutory, and because his or her competence is in question and therefore cannot be entrusted to make basic decisions regarding the conduct of the competency proceeding, defense counsel may make the decisions regarding the jury trial, including whether jury trial should be waived. (*People v. Masterson* (1994) 8 Cal. 4th 965, 974.) Defense counsel may make these decisions even over the defendant's objection. (*People v. Masterson* (1994) 8 Cal. 4th 965, 974; *People v. Smith* (2001) 94 Cal. App. 4th 510.) In selecting the jury, if one is demanded, each side is entitled to only six peremptory challenges, as in civil trials. (*People v. Stanley* (1995) 10 Cal. 4th 764; see Code Civ. Proc. Section 231(c).) The defendant is presumed to be mentally competent. The party claiming that the defendant is incompetent bears the burden of proving the defendant's incompetency by a preponderance of the evidence. (*People v. Medina* (1990) 51 Cal.3d 870, 875.)

### **The Trial**

#### **A. Court Appointed Expert Evidence**

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

describe the names and roles of the judge, Deputy Public Defender, Deputy District Attorney, and the jury.”

Along with the testimony and report of psychologist TB, the prosecution also presented a clandestine video recording of RJ being interviewed about the alleged robbery by two sheriff's detectives. In this interview, RJ appeared rational in his discussion with Sheriff's detectives. Substantively, RJ admitted to former gang ties, but consistently denied he participated on the assault and robbery upon the victim and the taking of the skateboard.

The defense called both psychologists SF and AR who testified to the substance of their reports. SF determined that RJ was not able to sufficiently understand abstract concepts which could impeded his ability to understand the nature of the proceedings and meaningfully cooperate with his counsel. SF wrote that although RJ was “substantially informed of his charges, . . . it is not clear that he understands the meaning of the enhancements. RJ knows that he may be tried as an adult, but he does not appreciate the implications in trial procedure or outcome for his being tried as an adult.” Moreover, despite being told that a conviction a charged would be considered a violent felony “strike” and would have serious detrimental consequences if RJ were to ever commit another criminal offense, RJ failed to recall this discussion with his attorney and, in the course of SF's interview, failed to understand the importance of this information. Psychologist SF stated in court and in her report that she was concerned about RJ's ability to work cooperatively with his attorney. She wrote, “RJ's attitude toward his legal matter appears fixed and unmovable. He wants to be released from custody, and this desire appears to be constraining his ability to think rationally and clearly about his situation.” She further writes, “He views his attorneys' attempts to advise him as self serving unless their opinions support what he wants to do. RJ does not experience his attorneys as advocates. This causes him to opposes his attorneys' views and turn the attorney/client relationship inot a tug of war in which the attorney is either 'with' RJ or 'against' him if they disagree. Psychologist SF also opined that RJ was limited in his ability to think rationally and objectively about himself and his case. SF noted that “this is not due to a mental disorder, although he has a history of Attention Deficit/Hyperactivity Disorder.” Rather, is it on account of emotional immaturity. “He is 16 years old and emotionally immature. He relates to his attorneys in an oppositional way. He is unable to make adult judgments in his best interest.” In her final analysis, psychologist SF opines that in his current state of functioning, RJ is “incapable of thinking clearly and rationally about his case, and therefore he is likely not capable of cooperating with his attorney in his own defense.

The jury at the trial also heard from psychologist AJ, who also gave an opinion that RJ was not competent to stand trial in adult criminal court. AJ testified at trial in conformity with the following passage in her written report.

“What is evident is that RJ's cognitive abilities are dramatically impacted by the following: chronological age, developmental limitations, immature manner of processing information, cognitive abilities which are limited due to ADDD and possible Bipolar Disorder, present stressful environment, which appears to be exacerbating RJ's psychological symptoms . . . all of which impact RJ's ability to appropriately and adequately process information which requires complex cognitive processing skills.” AR's final analysis was that based on her psychological consultation and a “careful review of the police reports and medical records,” RJ was not competent to stand trial. “his psychiatric condition combined withhis emotional immaturity related to his chronological age of 16 and a developmental age which appears to be much younger (1) impairs his ability to aid and assist his attorney with his defense [and] (2) impedes his ability to cooperate with his attorney in a rational manner.”

## **B. Defense Expert Witness**

Counsel for RJ sought relevant scientific evidence which tended to prove that notwithstanding the possible absence of a “mental “or “developmental disorder” defined by Penal Code section 1367(a), RJ was not competent to stand based not only on the psychological evidence, but given his stage of adolescent cognitive development. For this purpose, counsel hired a research psychologist, Elizabeth Cauffman, whose own work and that of her colleagues established a superior method of assessing juvenile competence to stand trial in criminal court. At Dr. Cauffman's suggestion, Counsel for RJ read material which established that given the largely uncontroverted empirical and clinical data concerning adolescent development, the evaluator should employ specific methods to determine the understanding, appreciation, ability to assist

counsel and decision making ability.

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

In *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4th 847 an expert witness was permitted to testify that minors are different from adults because their brains are still developing and that due to biological factors a given stage of normal brain development distinguishes a minor’s ability to think logically and abstractly. The court in *Timothy J.* noted that such conclusions were supported by the scientific literature. Like in *Timothy J.* the defense in RJ’s case sought to present evidence -- through Dr. Cauffman’s testimony -- concerning the development of the brain’s frontal lobe and why, cognitively, the ability to think logically and abstractly is distinguished by an adolescent’s stage of cognitive development. As in *Timothy J.*, the defense received permission from the trial judge to allow an expert witness to testify that based on the peer-reviewed research, “these abstract concepts are still beyond [the juvenile’s] appreciation developmentally” and that the juvenile’s “competency to stand trial is limited by his developmental level....” (*Id.* at 854.) Counsel for RJ presented the same scope of testimony concerning the developmental impediments to competence as it relates to the generally accepted scientific literature based on large population based empirical studies and clinical research. Developmental factors such as the difficulty for the adolescent defendant to think abstractly and to make decisions by rationally comparing and weighing short-term and long-term consequences form the basis of the incompetency finding by court appointed psychologist SF and is a partial basis for the finding of incompetency by psychologist AR. At trial, Dr. Cauffman presented evidence that the current state of empirical and clinical research conforms to the reasoning and conclusions set forth by two of the psychologists appointed by the court pursuant to Penal Code section 1368.1. Moreover, Dr. Cauffman’s testimony tended to show the possibility that had psychologist TB *properly* considered such scientific literature and judicially established forensic tools to evaluate adjudicative competence under the *Dusky* standard, she may have asked additional questions in relation to the defendant’s ability to think abstractly and appreciate the nature and consequences of his thought processes and decision-making as it related to the ability to assist counsel in his own defense. Had TB done so, she may have come to a different conclusion.

There is no requirement that a research psychologist interview and evaluate the defendant/subject of a competency proceeding, and in fact, such an interview would defeat the purpose of the proffered evidence, i.e., to demonstrate the scientific basis in support of the court appointed clinicians’ analysis and conclusions. Indeed, this situation here is similar to one in which the prosecution seeks to establish the effects of a particular Blood Alcohol Content upon a defendant in a drunk driving prosecution. While a Department of Justice expert testifying in a DUI case does not evaluate the suspected drunk-driver defendant, his or her special knowledge of how ethyl alcohol affects the brain in the ability to form judgments, conduct divided attention tasks, and gross motor skills, is relevant and probative in much the same way as Dr. Cauffman’s testimony as to the effects of cognitive maturation and brain development vis-a-vis adjudicative competence.

Dr. Cauffman also provide probative evidence that the opinions and findings of the evaluators were rendered not on account of the defendant’s willful attempt to mislead the evaluators, but was consistent with a pattern consistent with adolescents and confirmed by empirical and clinical research.

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