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Juveniles' Competency to Stand Trial: Wading through the Rhetoric and the Evidence

Joseph B. Jr. Sanborn

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CRIMINOLOGY

JUVENILES' COMPETENCY TO STAND TRIAL: WADING THROUGH THE RHETORIC AND THE EVIDENCE

JOSEPH B. SANBORN, JR., PHD*

This Article examines and refutes the validity of the explosion of claims in the literature that juveniles are not competent to stand trial in criminal court. After providing a framework through which to analyze the legal relationship between juvenile defendants and the requirements for competency to stand trial, this Article summarizes the current advocacy presented by researchers in favor of finding that juvenile defendants are categorically incompetent to stand trial. However, this Article argues that the research in support of such a finding relies upon faulty premises and suffers from critical methodological problems. In support of this conclusion, this Article surveys various studies of juvenile competence undertaken by developmental psychologists, and explains that many such studies share particular logical and practical flaws. Thus, this Article argues that there is in fact no categorical problem of juvenile incompetency to stand trial, and that the solutions proposed to solve this so-called problem are in fact worse than the legal dilemma itself. This Article concludes with a number of proposals that would better serve to protect the rights of juvenile defendants, in lieu of a universal finding that such defendants are incompetent to stand trial.

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I. THE PROBLEM: MINIMAL REQUIREMENTS FOR BEING COMPETENT TO STAND TRIAL IN CRIMINAL COURT

Historically, the right to be competent to stand trial has required little in a defendant's wherewithal. A finding of competency to stand trial requires little, probably because the more that it demands, the fewer the defendants that will answer for their crimes. Even so, the right to be competent to stand trial is considered fundamental. Only if defendants are competent can a meaningful exercise of their trial-related rights occur. For example, an incompetent defendant is unable to assist counsel, to testify, or to effectively confront and cross-examine accusers, and perhaps unable to receive a fair trial.

The competency standard was announced by the U.S. Supreme Court in 1960 in *Dusky v. United States*.¹ To be competent to stand trial,

¹ 362 U.S. 402, 402 (1960).

defendants must have a rational and factual understanding of the nature of the proceedings against them, and an ability to consult with a lawyer with a reasonable degree of rational understanding.² Thus, if defendants are basically aware that they are on trial for committing crimes—and could be headed to probation, jail, or prison—and can communicate with their attorneys about those offenses, they are likely to be found competent. Typically, a serious mental illness or an advanced stage of mental retardation would have to exist for a defendant to be incompetent to stand trial. Appellate courts have upheld the criminal prosecutions of mentally ill and retarded defendants who have been diagnosed as neurotic, psychotic, or paranoid schizophrenic, including those with low IQs.³ Even those with amnesia have been found competent to stand trial.⁴

II. THE ISSUE: THE RELATIONSHIP BETWEEN JUVENILE DEFENDANTS AND COMPETENCY TO STAND TRIAL

Regardless of its limits, the *Dusky* standard applies to criminal court. Both juvenile and adult defendants in criminal court certainly have a constitutional right to be competent to stand trial.⁵ However, it is not as certain whether *Dusky* applies equally to juvenile court, and whether *Dusky* standards should differ for juvenile defendants in criminal court.

A. THE APPLICATION OF *DUSKY* TO DEFENDANTS IN JUVENILE COURT

All appellate courts in recent times have held that youths have to be competent in order to face an adjudicatory hearing in the juvenile system.⁶ *In re Gault* made a youth's competency relevant by granting juvenile defendants basic trial-related rights.⁷ *In re Gault* has been used to

² *Id.*

³ See Annotation, *Competency to Stand Trial of Criminal Defendant Diagnosed as "Schizophrenic"—Modern State Cases*, 33 A.L.R. 4th 1062 (1984); Deborah B. Dove, Annotation, *Competency to Stand Trial of Criminal Defendant Diagnosed as "Mentally Retarded"—Modern Cases*, 23 A.L.R. 4th 493 (1983).

⁴ See Dennis Koson & Ames Robey, *Amnesia and Competency to Stand Trial*, 130 AM. J. PSYCHIATRY 588 (1973); Jonathan M. Purver, Annotation, *Amnesia as Affecting Capacity to Commit Crime or Stand Trial*, 46 A.L.R. 3d 544 (1972).

⁵ See *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Drope v. Missouri*, 420 U.S. 162 (1975).

⁶ The one exception to this is that the Oklahoma Court of Criminal Appeals held several years ago that due to the rehabilitative nature of juvenile court proceedings, competency is not required of juvenile defendants. See *G.J.I. v. State*, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

⁷ 387 U.S. 1 (1967). *In re Gault* granted the right to notice of charges, counsel, the protection against self-incrimination, and the right to confront and cross-examine witnesses. *Id.*

recognize a due process or fundamental right to competency to stand trial in juvenile court.⁸ This has occurred even when state statutes have been silent regarding competency to stand trial and juvenile court judges have been opposed to recognizing the right.⁹

Appellate courts have held that the right to counsel has little meaning if the juvenile is incompetent to stand trial,¹⁰ and that counsel cannot be effective if youths are unable to communicate or to cooperate with their attorneys.¹¹ Moreover, the competency requirement ensures that the juvenile understands the nature of the charges,¹² and can prepare and present a defense, increasing the accuracy of the proceedings.¹³ Competency is necessary to be able to confront and cross-examine witnesses,¹⁴ and to be able to testify.¹⁵ Even the right to be present at a hearing demands competency to stand trial.¹⁶ Adjudicating a juvenile who

⁸ See, e.g., *State v. J.S.*, No. 0312013339, 2005 Del. Fam. Ct. LEXIS 75, at *11 n.2 (Fam. Ct. Aug. 2, 2005), *aff'd sub nom.*, *Smith v. State*, 918 A.2d 1144 (Del. 2007); *In re K.G.*, 808 N.E.2d 631, 635 (Ind. 2004); *State ex rel. Causey*, 363 So. 2d 472, 474 (La. 1978); *In re Welfare of S.W.T.*, 277 N.W.2d 507, 512 (Minn. 1979); *In re Jeffrey C.*, 366 N.Y.S.2d 826, 829-30 (Fam. Ct. 1975); *In re B.M.S.*, 847 N.E.2d 506, 509-10 (Ohio Ct. App. 2006); *In re Smith*, No. 5-01-34, 2002 WL 255126, at *2 n.5 (Ohio Ct. App. Feb. 22, 2002); *In re Lloyd*, No. 96-CA-86, 1997 Ohio App. LEXIS 1004, at *4-5 (Ct. App. Jan. 27, 1997); *In re McWhorter*, No. CA94-02-047, 1994 Ohio App. LEXIS 5421, at *4 (Ct. App. Dec. 5, 1994); *In re Johnson*, No. 7998, 1983 Ohio App. LEXIS 14017, at *12 (Ct. App. Oct. 25, 1983); *In re D.G.*, 698 N.E.2d 533, 534-35 (Ohio Ct. Com. Pl. Juv. Div. 1998); see also *In re B.M.R.*, No. 2005-CA-1, 2005 WL 2978951, at *2 (Ohio Ct. App. Nov. 4, 2005); *In re Wood*, No. 04CA0005-M, 2004 WL 2808913, at *2 (Ohio Ct. App. Dec. 8, 2004); *In re Adams*, No. 01-CA-237, 2003 WL 21783682, at *5 (Ohio Ct. App. July 29, 2003); *In re Bailey*, 782 N.E.2d 1177, 1179 (Ohio Ct. App. 2002); *In re Grimes*, 769 N.E.2d 420, 422-23 (Ohio Ct. App. 2002); *In re Anderson*, No. 2001AP030021, 2002 WL 253855, at *3 (Ohio Ct. App. Feb. 13, 2002); *In re Williams*, 687 N.E.2d 507, 510-11 (Ohio Ct. App. 1997); *State v. E.C.*, 922 P.2d 152, 155-56 (Wash. Ct. App. 1996).

⁹ See, e.g., *In re W.A.F.*, 573 A.2d 1264, 1266-67 & n.6 (D.C. 1990); *In re S.H.*, 469 S.E.2d 810, 811 (Ga. Ct. App. 1996); *In re T.D.W.*, 441 N.E.2d 155, 156-57 (Ill. App. Ct. 1982), *overruled by* *People v. Gentry*, 815 N.E.2d 27, 32 (Ill. App. Ct. 2004); *In re Carey*, 615 N.W.2d 742, 745-46 (Mich. Ct. App. 2000); *In re Welfare of D.D.N.*, 582 N.W.2d 278, 281-82 (Minn. Ct. App. 1998).

¹⁰ See, e.g., *State ex rel. Dandoy v. Superior Court*, 619 P.2d 12, 15 (Ariz. 1980); *Golden v. State*, 21 S.W.3d 801, 803 (Ark. 2000); *In re S.H.*, 469 S.E.2d at 811.

¹¹ See *James H. v. Superior Court*, 143 Cal. Rptr. 398, 400 (Ct. App. 1978); *In re Carey*, 615 N.W.2d at 746; *In re Two Minor Children*, 592 P.2d 166, 169 (Nev. 1979).

¹² See *In re S.H.*, 469 S.E.2d at 811.

¹³ See *In re W.A.F.*, 573 A.2d at 1267; *ex rel. Causey*, 363 So. 2d at 476.

¹⁴ See *In re Carey*, 615 N.W.2d at 745.

¹⁵ See *id.*

¹⁶ See *In re W.A.F.*, 573 A.2d at 1267; *ex rel. Causey*, 363 So. 2d at 476; see also Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues in Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV.

is incompetent to stand trial violates due process requirements even if the court seeks rehabilitation.¹⁷ For rehabilitation to be legitimate, the necessary precedent is a determination that a youth has violated the law.¹⁸

B. *DUSKY* AND COMPETENCY STANDARDS FOR DEFENDANTS IN JUVENILE COURT

Recently, several states have adopted formal positions regarding competency to stand trial in juvenile court. Nevertheless, twenty states continue to process defendants in juvenile court without a clearly and broadly applicable competency standard.¹⁹ Thirteen states have mostly or completely transported *Dusky* or their criminal court provision on competency to stand trial to juvenile court.²⁰ Finally, eighteen jurisdictions have adopted specific standards on competency to stand trial in juvenile court, via either juvenile court statutes or court rules.²¹

CONFINEMENT 321, 327 (1994) ("If a person is not mentally present and able to defend oneself, then it is not fair to proceed against him or her.").

¹⁷ See *In re J.M.*, 769 A.2d 656 (Vt. 2001).

¹⁸ *In re W.A.F.*, 573 A.2d at 1267.

¹⁹ See *infra* tbl.1. Alaska's Delinquency Rule 17(c) says notice of intention to offer evidence of mental disease or defect in juvenile court is governed by the relevant criminal court statute. ALASKA DELINQ. R. 17(C). It does not appear that this rule includes any provision for competency to stand trial per se.

²⁰ For states using *Dusky* or their criminal court competency provision, see ARK. CODE ANN. § 9-27-502(a)(1) (2008); ME. REV. STAT. ANN. tit. 15, § 3318 (2003); N.C. GEN. STAT. § 7B-2401 (2007); S.C. CODE ANN. § 44-23-410(A) (Supp. 2008); W. VA. CODE ANN. § 27-6A-9 (LexisNexis 2008); *State v. J.S.*, No. 0312013339, 2005 Del. Fam. Ct. LEXIS 75, at *10-15 (Fam. Ct. Aug. 2, 2005), *aff'd sub nom. Smith v. State*, 918 A.2d 1144 (Del. 2007); *In re T.D.W.*, 441 N.E.2d 155, 156-57 (Ill. App. Ct. 1982), *overruled by People v. Gentry*, 815 N.E.2d 27, 32 (Ill. App. Ct. 2004); *In re K.G.*, 808 N.E.2d 631, 637-38 (Ind. 2004); *In re A.B.*, No. 5-791/05-0868, 2006 Iowa App. LEXIS 189, at *7-9 (Ct. App. Mar. 1, 2006); *In re Carey*, 615 N.W.2d at 746-47; *In re Two Minor Children*, 592 P.2d 166, 169 (Nev. 1979); *In re Johnson*, No. 7998, 1983 Ohio App. LEXIS 14017, at *12-14 (Ct. App. Oct. 25, 1983); *State v. E.C.*, 922 P.2d 152, 155-56 (Wash. Ct. App. 1996).

²¹ For jurisdictions creating a juvenile court rule or statute, see ARIZ. REV. STAT. ANN. § 8-291.02 (2007); CAL. FAM. & JUV. R. 5.645; COLO. REV. STAT. § 19-2-1301 (2008); CONN. SUPER. CT. R. 31A-14; D.C. CODE ANN. § 16-2315 (LexisNexis 2005 & Supp. 2008); FLA. STAT. ANN. § 985.19 (West Supp. 2008); GA. CODE ANN. § 15-11-152 (West 2007); KAN. STAT. ANN. § 38-2348 (Supp. 2007); LA. CHILD. CODE ANN. art. 832 (2004 & Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.1 (LexisNexis 2006); MINN. R. JUV. DELINQ. PROC. 20.01; N.M. STAT. § 32A-2-17 (2008); N.Y. JUD. CT. ACTS LAW § 322.1 (McKinney 2008); TEX. FAM. CODE ANN. § 55.31 (Vernon 2008); VT. R. FAM. PROC. 1(I); VA. CODE ANN. § 16.1-356 (2003 & Supp. 2008); WIS. STAT. ANN. § 938.295 (West 2000 & Supp. 2008); WYO. STAT. ANN. § 14-6-219 (2007).

Table 1
*State of the Law for Determining Competency to
 Stand Trial in Juvenile Court (JC)*

States with no Formal Position Identified (20):	
AL, AK, HI, ID, KY, MA, MS, MO, MT, NE, NH, NJ, ND, OK, OR, PA, RI, SD, TN, UT	
States Applying <i>Dusky</i>/Criminal Court Statute to JC (13):	
Via JC Statute: AR, ME, NC Via Adult Court Statute: SC, WV Via Case Law: DE, IL, IN, IA, MI, NV, OH, WA	
Jurisdictions with Relevant JC Statute/Court Rule (18):	
Court Rule: CA, CT, MN, VT Statute: AZ, CO, DC, FL, GA, KS, LA, MD, NM, NY, TX, VA, WI, WY	

The thirteen states that have relied upon *Dusky* or a criminal court statute in developing juvenile court standards have not created special criteria; four states have exceptions. For example, Arkansas law requires *Dusky*-level abilities and also a reliable episodic memory, the ability to think into the future and consider the impact of behavior, and verbal articulation and logical decision-making abilities.²² Importantly, however, these capabilities are required only of defendants who are under the age of thirteen and who are charged with capital or first degree murder. Although these youths are prosecuted in juvenile court, failure to respond to the state's rehabilitation efforts can result in a life sentence.

Other exceptions include a recent ruling from the Iowa Court of Appeals that immaturity and intellectual capacity can lead to a finding of incompetency to stand trial,²³ and an opinion from the Michigan Court of Appeals that "competency evaluations should be made in light of juvenile, rather than adult, norms."²⁴ Similarly, Ohio appellate courts refer to the adult statute on competency to stand trial as applying to juvenile court, provided that "juvenile norms" are utilized.²⁵ These rulings appear to

²² ARK. CODE ANN. § 9-27-502(b)(7)(C)(ix)(b)(1).

²³ See *In re A.B.*, 2006 Iowa App. LEXIS 189, at *10-11.

²⁴ *In re Carey*, 615 N.W.2d at 748.

²⁵ See, e.g., *In re Bailey*, 782 N.E.2d 1177, 1179 (Ohio Ct. App. 2002); *In re York*, 756 N.E.2d 191, 200 (Ohio Ct. App. 2001).

permit a “watering down” of *Dusky* standards for defendants in juvenile court.

The eighteen jurisdictions that have a statute or court rule for juvenile court tend to hold that competency to stand trial requires only an ability to understand the proceedings and to assist counsel. For example, Virginia’s statute provides:

If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on any or all of the following: (i) the juvenile’s age or developmental factors; (ii) the juvenile’s claim to be unable to remember the time period surrounding the alleged offense, or (iii) the fact that the juvenile is under the influence of medication.²⁶

The only special consideration for juveniles among these jurisdictions can be found in four states. Florida’s and Maryland’s competency laws include a capacity to appreciate the charges, range of penalties, and adversarial nature of the process; to disclose pertinent facts to counsel; to display appropriate courtroom behavior; and to testify relevantly.²⁷ Louisiana holds that incompetency to stand trial can stem from immaturity.²⁸ Vermont’s juvenile court rule mentions age and developmental maturity, mental illness, developmental disorders, any other disability, and “any other factor” that could affect competency in juvenile court.²⁹

Most of the law related to competency to stand trial in juvenile court addresses the mental illness or mental retardation connection to competency (and treatment prognosis and restoration services)³⁰ and what should be done with defendants who are incompetent to stand trial.³¹

²⁶ VA. CODE ANN. § 16.1-356(F). In addition, Arizona law states that age alone does not render a person incompetent. *See* ARIZ. REV. STAT. ANN. § 8-291(2).

²⁷ FLA. STAT. ANN. 985.19(1)(f) (West Supp. 2008); MD. CODE ANN., CTS. & JUD. PROC. 3-8A-17.3(a)(3)(ii) (LexisNexis 2006).

²⁸ *See* LA. CHILD. CODE ANN. art. 837(D) (2004 & Supp. 2009). Similarly, New Mexico statutes mention that incompetency can stem from mental illness or developmental disability, but the statute does not articulate any special capabilities required of juvenile defendants. *See* N.M. STAT. 32A-2-21(A) (2008).

²⁹ R. FAM. P. 1(i). The inspiration for the rule was *In re J.M.*, 769 A.2d 656 (Vt. 2001).

³⁰ Juvenile court law that evidences a strong concern for identifying the mental illness, disease, or defect cause of incompetency and the specific treatment plan needed for restoration of the defendant includes ARIZ. REV. STAT. ANN. § 8-291.07 (2007); CAL. FAM. & JUV. R. 5.645(a); D.C. CODE ANN. § 16-2315(b)(3)(B) (LexisNexis 2005 & Supp. 2008); GA. CODE ANN. § 15-11-152 (West 2007); KAN. STAT. ANN. § 38-2348(a) (Supp. 2007); LA. CHILD. CODE ANN. art. 835(c) (Supp. 2009); MINN. R. JUV. DELINQ. P. 20.01(1)(B).(3) (D); N.M. STAT. § 32A-2-21(A) (2008); N.Y. JUD. CT. ACTS LAW § 322.2(5) (McKinney 2008); TEX. FAM. CODE ANN. § 55.31(b) (Vernon 2008); WYO. STAT. ANN. § 14-6-219(c) (2007). Interestingly, the Arizona Court of Appeals recently held that mental disease, defect, or

C. MENTALLY CHALLENGED DEFENDANTS FOUND COMPETENT TO
STAND TRIAL IN JUVENILE COURT

The profile of defendants deemed competent to stand trial in juvenile court mirrors the case law pertaining to adult defendants. A juvenile in Texas underwent preliminary testing that revealed an IQ of 49. A psychiatrist determined the youth's ability to learn new facts, information, and routines was more like someone with an IQ in the 80-90 range, and the youth was ultimately found competent to stand trial.³² Another Texas youth suffered from mental illness, suicidal ideations, and hallucinations. Despite these handicaps, the youth was able to understand the delinquent conduct alleged, the consequences of being adjudicated, and the results of waiving trial via a guilty plea; he actively participated in his defense and was declared fit by the juvenile court judge and the Texas appellate court.³³ Another Texas juvenile found competent to stand trial suffered from head trauma, Tourette syndrome, attention deficit hyperactivity disorder (ADHD), and borderline intellectual functioning or mild mental retardation.³⁴

A fifteen-year-old boy from Minnesota scored in the low average category in performance, while his verbal IQ actually fell in the intellectually deficient range.³⁵ He was described as having "very limited verbal memory, poor verbal abstraction abilities, minimal verbal reasoning and a marginal vocabulary."³⁶ The youth was limited in his communication and slow in responding to questions.³⁷ Nevertheless, he understood the roles of the court participants, his relationship to defense counsel, the nature of the trial process, and what his attorney had told him regarding his case.³⁸ His trial went forward.

In another case, a fourteen-year-old mentally retarded youth in Vermont understood the charges against him and the conditions of his release, knew who his attorney was, that the judge would decide guilt, and

disability is not required for a finding of incompetency in juvenile court. See *In re Hyrum H.*, 131 P.3d 1058 (Ariz. Ct. App. 2006).

³¹ See *infra* Part VI.

³² *In re L.D.M.*, No. 05-95-01264-CV, 1997 Tex. App. LEXIS 2127 (Ct. App. Apr. 23, 1997).

³³ *In re J.K.N.*, 115 S.W.3d 166 (Tex. Ct. App. 2003).

³⁴ *In re A.D.V.*, No. 03-99-00020-CV, 1999 Tex. App. LEXIS 9505 (Ct. App. Dec. 23, 1999).

³⁵ *In re Welfare of D.D.N.*, 582 N.W.2d 278, 281 (Minn. Ct. App. 1998).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 282.

that he could be incarcerated.³⁹ He also could communicate his version of the alleged incident and had a rudimentary understanding of the plea bargaining process.⁴⁰ He was declared marginally competent with assistance.⁴¹

A Wisconsin case involved a ten-year-old child who had ADHD and was of average intelligence.⁴² A defense psychiatrist testified that the youth lacked the mental capacity to understand the proceedings and to assist in his defense.⁴³ The expert reported that due to the ADHD and immaturity, the youth “did lack in his depth of understanding concepts” and “lacked the ability to fully consider the charges and the meaning associated with long-term consequences.”⁴⁴ Thus, there were serious limitations in his ability to assist in his own defense.⁴⁵ However, the juvenile was able to define witness and prosecutor and to identify the punishments he was facing.⁴⁶ He said he could explain to counsel the conduct that brought him to court and to identify untruthful testimony.⁴⁷ He was found competent to stand trial.⁴⁸

Ohio appellate cases include a youth diagnosed with ADHD, bipolar II disorder, expressive language disorder, and cognitive disorder;⁴⁹ a fifteen-year-old functioning with mild mental retardation and operating at a mental age of ten years;⁵⁰ another with a history of mental illness, various mental health treatment, and a long-standing history of bipolar disorder, schizoaffective disorder, bipolar type;⁵¹ and a twelve-year-old with bipolar disorder and ADHD.⁵² This last defendant had an IQ of 63 and had experienced three emergency psychiatric hospitalizations, one of which followed an attempted suicide.⁵³

³⁹ *In re J.M.*, 769 A.2d 656, 660 (Vt. 2001).

⁴⁰ *Id.* at 660-61.

⁴¹ *Id.* at 661.

⁴² *In re Jacob M.W.*, 690 N.W.2d 886, 2004 WL 2452567, at *3 (Wis. Ct. App. 2004) (unpublished table decision).

⁴³ *Id.* at *7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at *8.

⁴⁷ *Id.*

⁴⁸ *Id.* at *10.

⁴⁹ *In re Anderson*, No. 2001AP030021, 2002 WL 253855 (Ohio Ct. App. Feb. 13, 2002).

⁵⁰ *In re Smith*, No. 5-01-34, 2002 WL 255126 (Ohio Ct. App. Feb. 22, 2002); *see also In re Stone*, No. CA2002-09-035, 2003 Ohio App. LEXIS 2754 (Ct. App. June 16, 2003).

⁵¹ *In re Gooch*, No. 19339, 2002 Ohio App. LEXIS 6650 (Ct. App. Dec. 13, 2002).

⁵² *In re J.J.*, No. 21386, 2004 Ohio App. LEXIS 1286, at *13 (Ct. App. Mar. 24, 2004) (Carr, J., dissenting).

⁵³ *Id.* at *21.

Finally, a fourteen-year-old from Delaware was in ninth grade although his abilities in spelling, reading comprehension, reading decoding, and arithmetic were scored at the second grade level, while his written expression was assessed to be at the kindergarten level.⁵⁴ He had a full scale IQ of 67 and was classified as mildly mentally retarded.⁵⁵ A psychologist found the youth had "scored extremely low on the ability to communicate effectively, care for himself, direct himself or function academically."⁵⁶ This defendant was found competent to stand trial because the defense attorney would coach the youth and offer explanations during numerous recesses in the trial.⁵⁷

D. PROVISIONS FOR DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL IN JUVENILE COURT

The majority of statutory and court rule activity concerning competency to stand trial in juvenile court has involved what happens when a youth is declared incompetent. Some states have time limits for restoring the defendant to competency, ranging from 240 days in Arizona, to one year in New Mexico and Wisconsin, to eighteen months in Iowa, to two years in Florida.⁵⁸ Similarly, some states have focused on how long the charges can remain viable while a youth is incompetent to stand trial; this can depend on the severity of the offense.⁵⁹

In order to restore the youth to competency, numerous states provide for and may demand temporary civil commitment.⁶⁰ Case law in five states

⁵⁴ *State v. J.S.*, No. 0312013339, 2005 Del. Fam. Ct. LEXIS 75, at *3 (Fam. Ct. Aug. 2, 2005).

⁵⁵ *Id.* at *4.

⁵⁶ *Id.* at *5.

⁵⁷ *Id.* at *4-9.

⁵⁸ ARIZ. REV. STAT. ANN. § 8-291.10(G), (H) (2007); FLA. STAT. ANN. § 985.19(5)(a) (West Supp. 2008); N.M. STAT. § 32A-2-21(G) (2008); WIS. STAT. ANN. § 938.30(5)(e)(1) (West 2000 & Supp. 2008); *In re A.B.*, No. 5-791/05-0868, 2006 Iowa App. LEXIS 189 (Ct. App. Mar. 1, 2006).

⁵⁹ COLO. REV. STAT. § 19-2-1303(3)(C) (2008); D.C. CODE ANN. § 16-2315(C)(2) (LexisNexis 2005 & Supp. 2008); GA. CODE ANN. § 15-11-155(h) (West 2007); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.9(1), (2) (LexisNexis 2006); MINN. R. JUV. DELINQ. P. 20.01(7); VA. CODE ANN. § 16.1-358 (LexisNexis 2008); WIS. STAT. ANN. § 938.30(e)(1).

⁶⁰ Statutory law or court rules permit or command civil commitment in order to restore juvenile defendants to competency in many jurisdictions. *See, e.g.*, ARIZ. REV. STAT. § 8-291.09 (2007); CAL. FAM. & JUV. R. 5.645(b), (c); COLO. REV. STAT. § 19-2-1302 (2008); D.C. CODE ANN. § 16-2315(c)(8) (LexisNexis 2005 & 2008); GA. CODE ANN. § 15-11-155; LA. CHILD. CODE ANN. art. 835(B)(3) (Supp. 2009); ME. REV. STAT. ANN. tit. 15, § 3318(1)(A), (B) (2003); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.6 (LexisNexis 2006); N.M. STAT. § 32A-6-13(K) (2008); N.Y. JUD. CT. ACTS LAW § 322.2(4), (5) (McKinney 2008); TEX. FAM. CODE ANN. § 55.33(a)(1)(A) (Vernon 2008); VA. CODE ANN.

has granted judges permission to impose civil commitment for restoration of competency.⁶¹ Some states have identified a time limit for this commitment, ranging from 60 days in Minnesota and New Mexico to 90 days in Texas and Virginia to 120 days in Kansas to 360 days in the District of Columbia.⁶² Florida law prohibits commitment to its state agency for children (the Department of Children and Family Services (DCFS)) if the basis for the incompetency is age or immaturity; instead, a referral to a community treatment center is provided.⁶³ Similarly, an Arizona court recently explained:

The analog to “restoration” in the case of a normal child who is too young to understand the proceedings would be to either allow the juvenile to mature naturally to the point where he becomes competent or subject him to special education in the legal process to try to speed the process of rendering him competent⁶⁴

If restoration appears impossible, some states allow the judge to dismiss the petition with or without prejudice; some states have restricted the “with prejudice” to misdemeanors and status offenses.⁶⁵ Three states permit the judge to convert some delinquency charges into status offenses,

§ 16.1-357(A)-(B) (LexisNexis 2008); WIS. STAT. ANN. § 938.295(2)(a) (West 2000 & Supp. 2008); WYO. STAT. ANN. § 14-6-219(a) (2007). Florida law requires commitment if the youth is mentally ill or retarded and a felony is involved. *See* FLA. STAT. ANN. § 985.19(2) (Supp. 2008). Similarly, New York says residential treatment can be mandated if the youth has been charged with a designated felony. *See* N.Y. JUD. CT. ACTS LAW § 322.2(5)(c). Nebraska statutes allow a thirty-day placement for evaluation of the defendant’s competency to stand trial, but do not specify limits to commitment for restoration purposes. *See* NEB. REV. STAT. § 43-258(2) (2004).

⁶¹ *See, e.g.,* James H. v. Superior Court, 143 Cal. Rptr. 398 (Ct. App. 1978); *In re K.G.*, 808 N.E.2d 631 (Ind. 2004); *People ex rel. Thorpe v. Clark*, 403 N.Y.S.2d 910 (App. Div. 1978); *In re D.G.*, 698 N.E.2d 533 (Ohio Ct. Com. Pl. Juv. Div. 1998); *Bettelyoun v. Talbott*, 286 N.W.2d 526 (S.D. 1979).

⁶² *See* D.C. CODE ANN. § 16-2315(C)(7)(A) (LexisNexis 2005 & Supp. 2008); KAN. STAT. ANN. 38-2348(b)(2) (Supp. 2007); MINN. R. JUV. DELINQ. P. 20.01(3)(C); N.M. STAT. § 32A-6-13(K) (2008); TEX. FAM. CODE ANN. § 55.33(a)(1)(A)-(B); VA. CODE ANN. § 16.1-357(A)-(B) (2008). The Virginia statute also allows extensions of the commitment for additional three-month periods. VA. CODE ANN. § 16.1-357(A)-(B). The Maine statute says the defendant can remain committed until no longer mentally ill. *See* ME. REV. STAT. ANN. tit. 15, § 3318 (1)(A)-(B).

⁶³ FLA. STAT. ANN. § 985.19(1)(C)(2).

⁶⁴ *In re Charles B.*, 978 P.2d 659, 661 (Ariz. Ct. App. 1998).

⁶⁵ Dismissing petitions is possible in several jurisdictions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 8-291.08(D) (2007); COLO. REV. STAT. § 19-2-1303(3)(c) (2008); D.C. CODE ANN. § 16-2315(c)(8) (LexisNexis 2005 & Supp. 2008); FLA. STAT. ANN. § 985.19(5)(c); GA. CODE ANN. § 15-11-155(d); LA. CHILD. CODE ANN. art. 837(C), (D) (2008 & Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.7, 17.9 (); MINN. R. JUV. DELINQ. P. 20.01(5)(B), (7)(B); N.M. STAT. § 32A-2-21(G) (2008); N.Y. JUD. CT. ACTS LAW § 322.2(4) (McKinney 2008); VT. R. FAM. P. 1(i)(7); VA. CODE ANN. § 16.1-358 (LexisNexis 2008); WYO. STAT. ANN. § 14-6-219(d).

but another four require competency to stand trial in all cases.⁶⁶ Some jurisdictions allow the civil commitment of youths who are permanently incompetent to stand trial.⁶⁷

E. DUSKY AND JUVENILE DEFENDANTS IN CRIMINAL COURT

Several appellate court cases have applied *Dusky* to juvenile defendants in criminal court without creating special interpretations for these youths.⁶⁸ For example, a fifteen-year-old was found competent to stand trial in Minnesota despite falling into trance or dissociative states during jury selection.⁶⁹ A sixteen-year-old in Alabama had an IQ of 76, and the defense psychologist had testified that the youth had a mental age of twelve years and a third grade reading ability.⁷⁰ Nevertheless, the juvenile understood the charges, legal strategies, and possible punishments.⁷¹

A lower Alabama court upheld the criminal prosecution of a fifteen-year-old who had an IQ score of 48, but was capable of behaving in an appropriate manner when it was beneficial to him.⁷² The psychologist who declared the youth was competent to stand trial testified that the IQ score did not reflect the youth's true potential, and that individuals with little

⁶⁶ For states that allow incompetent delinquents to be adjudicated status offenders, see ARK. CODE ANN. § 9-27-502(b)(9)(C) (2008); LA. CHILD. CODE ANN. art. 837(B)(2) (Supp. 2009); WIS. STAT. ANN. 938.30(5)(d) (2000 & Supp. 2008). For states that require competency to stand trial for all juvenile defendants, see ARIZ. REV. STAT. ANN. 8-291.01A; CAL. FAM. & JUV. R. 5.645; GA. CODE ANN. § 15-11-152(a) (West 2007); TEX. FAM. CODE ANN. 55.31(a). Georgia does not allow an incompetent-to-stand trial defendant in juvenile court to be adjudicated a delinquent or status offender, but a youth so charged can be declared a dependent. See GA. CODE ANN. § 15-11-153(e) (West 2007).

⁶⁷ Civil commitment is suggested or demanded for youths permanently regarded IST in several jurisdictions. See, e.g., ARIZ. REV. STAT. ANN. § 8-291.08(D); D.C. CODE ANN. § 16-2315(C)(8); FLA. STAT. ANN. § 985.19(5)(C); GA. CODE ANN. § 15-11-155(d); KAN. STAT. ANN. § 38-2349(c) (Supp. 2007); LA. CHILD. CODE ANN. art. 837.3(C) (Supp. 2009); MD. CODE ANN., CTS. & JUD. P. § 3-8A-17.7(a); MINN. R. JUV. DELINQ. P. 20.01(5)(B)(1); N.M. STAT. 32A-2-21(G); TEX. FAM. CODE ANN. §§ 55.37-.42; VA. CODE ANN. § 16.1-358; WIS. STAT. ANN. § 938.30(5)(d) (West 2000 & Supp. 2008); WYO. STAT. ANN. § 14-6-219(c)-(d). Appellate case law has reached the same conclusion in California and Indiana. See James H. v. Superior Court, 143 Cal. Rptr. 398 (Ct. App. 1978); *In re K.G.*, 808 N.E.2d 631 (Ind. 2004).

⁶⁸ See, e.g., *Mullinax v. State*, 440 S.E.2d 720 (Ga. Ct. App. 1994); *State v. Dillard*, 718 P.2d 1272 (Idaho 1986); *Lockridge v. State*, 338 N.E.2d 275 (Ind. 1975); *State v. Kempf*, 282 N.W.2d 704 (Iowa 1979); *State v. Lewis*, 556 P.2d 888 (Kan. 1976); *Hayden v. Commonwealth*, 563 S.W.2d 720 (Ky. 1978); *Humphrey v. Commonwealth*, No. 2003-CA-000906, 2004 Ky. App. LEXIS 147 (Ct. App. May 21, 2004).

⁶⁹ *State v. Mitchell*, 577 N.W.2d 481 (Minn. 1998).

⁷⁰ *Brown v. State*, 540 So. 2d 740, 742-43 (Ala. 1989).

⁷¹ *Id.* at 742.

⁷² *M.D. v. State*, 701 So. 2d 58, 61 (Ala. Crim. App. 1997).

formal education typically achieve scores that underestimate their true abilities.⁷³ A second psychologist described the defendant as between slow learner and mildly retarded (an IQ between 60 and 70), but as severely academically retarded.⁷⁴ Although the youth was also emotionally immature and impulsive, the psychologist concluded the youth could aid in his own defense and was competent to stand trial.⁷⁵

In other cases from around the country, a seventeen-year-old Arizona youth was found by three psychologists to have a schizoid personality, but was able to make competent choices.⁷⁶ The three experts agreed the defendant was competent to waive his right to trial.⁷⁷

A fourteen-year-old Illinois youth had below average intelligence and had sniffed glue.⁷⁸ He understood the charges and cooperated with defense.⁷⁹ At the beginning of the proceedings, he did not comprehend his right to jury trial and the concept of waiving that right, but his attorney and parents educated him to the point that he was found competent to stand trial.⁸⁰

A thirteen-year-old Nebraska youth had been found by a psychologist to have a persistent preoccupation with death, violence, and other morbid content.⁸¹ He was emotionally detached and escaped into fantasy when faced with stressful situations.⁸² Nevertheless, he was determined to be competent to stand trial.⁸³

A sixteen-year-old in Oklahoma suffering from hallucinations and depression was found competent to stand trial.⁸⁴ Another sixteen-year-old, in Pennsylvania, was diagnosed as schizophrenic with a schizoid personality.⁸⁵ He was able to understand the proceedings and assist counsel, and was declared competent to stand trial.⁸⁶

⁷³ *Id.*

⁷⁴ *Id.* at 62.

⁷⁵ *Id.*

⁷⁶ *State v. Thompson*, 545 P.2d 925, 926 (Ariz. 1976).

⁷⁷ *Id.* at 926-27.

⁷⁸ *People v. Hammond*, 259 N.E.2d 44, 47 (Ill. 1970).

⁷⁹ *Id.* at 48.

⁸⁰ *Id.*

⁸¹ *State v. McCracken*, 615 N.W.2d 902, 911 (Neb. 2000).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Mooney v. State*, 990 P.2d 875, 881-82 (Okla. Crim. App. 1999).

⁸⁵ *Commonwealth v. Hughes*, 555 A.2d 1264, 1271 (Pa. 1989).

⁸⁶ *Id.* at 1269.

In Tennessee, a fifteen-year-old had an adjustment disorder, conduct disorder, and alcohol and cannabis abuse in his past.⁸⁷ He was also diagnosed with a brief psychotic disorder with marked stressors.⁸⁸ He had had two beers the night of the offense and could not remember parts of the night prior to his arrest, yet he, too, was declared competent to stand trial.⁸⁹

III. THE ADVOCACY: MILITATING TO PREVENT THE PROSECUTION OF JUVENILES IN CRIMINAL COURT

The question of juveniles' competency to stand trial has been raised in response to the fact that many more prosecutions of juvenile offenders occur in criminal court today than they did twenty to thirty years ago.⁹⁰ Historically, the competency question would not have been raised in juvenile court because trials were rare there before *In re Gault*. Youths' incompetency to stand trial would have been considered a valid reason to adjudicate them so as to offer treatment.

Since the very first days of juvenile court's existence, it has been possible to transfer serious and chronic juvenile offenders to criminal court. Historically, the juvenile court judge made this decision.⁹¹ A significant increase in violent juvenile crime twenty years ago led legislatures in nearly all states to expand the potential of excluding offenders from juvenile court. Particularly troublesome to opponents of exclusion is the legislation that allocated greater transfer decision-making power to prosecutors.⁹²

For decades there have been challenges to idea of exclusion, but they did not involve juveniles' competency to stand trial in criminal court. It is the recently increased presence of juvenile defendants in criminal court that has spurred the inquiry into their competency to stand trial. Despite competency's limited requirements, the literature is being inundated with claims that adolescents en masse are incompetent to stand trial, especially—and perhaps only—if the trial occurs in criminal court.

These claims have been offered principally by developmental psychologists (DPs) who have employed developmental psychology

⁸⁷ State v. Sexton, No. E2000-01779-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 651, at *28 (Crim. App. Aug. 2, 2002).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Elizabeth S. Scott et al., *Public Attitudes About the Culpability and Punishment of Young Offenders*, 24 BEHAV. SCI. & L. 815, 816 (2006).

⁹¹ See David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13 (Jeffery Fagan & Franklin E. Zimring eds., 2000).

⁹² See Joseph B. Sanborn, Jr., *Policies Regarding the Prosecution of Juvenile Murderers: Which System and Who Should Decide?*, 18 LAW & POL'Y 151 (1996).

principles and research methods to support their claims.⁹³ Although they are not the only observers who oppose prosecuting juveniles in criminal court, the DPs have selected a line of reasoning that lies within their discipline. They claim that adolescents lack the maturity of judgment to be competent to stand trial, arguing that adolescents are less mature than adults due to deficiencies in maturity of judgment which render it impossible for adolescents to competently participate in a criminal court trial.⁹⁴

A. THE CASE FOR JUVENILE ADJUDICATIVE INCOMPETENCY (JAI)

DPs have constructed two maturity-of-judgment models that purport to explain why juveniles are incompetent to stand trial in criminal courts. The two models, both of which emerged in 1995, identify three psychosocial factors that share common elements.

The first model, proposed by Cauffman and Steinberg, contains the factors of "responsibility, temperance, and perspective."⁹⁵ Responsibility pertains to the ability to be self-reliant, and to enjoy clarity of identity and healthy autonomy.⁹⁶ Temperance involves one's ability to limit impulsivity, to avoid extremes, and to evaluate situations before acting.⁹⁷ Perspective relates to one's ability to understand the complexity of a situation and place it in a broader context.⁹⁸

Scott, Reppucci, and Woolard developed the second model, which addresses the factors of "conformity, risk perception, and temporal perspective."⁹⁹ Conformity pertains to one's susceptibility to influence or tendency to comply with peers and parents.¹⁰⁰ Risk perception involves just that, in addition to attitudes toward risk and a tendency to focus more on the

⁹³ See, e.g., Thomas Grisso & Laurence Steinberg, *Between a Rock and a Soft Place: Developmental Research and the Child Advocacy Process*, 34 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 619 (2005).

⁹⁴ Legal experts and some from other disciplines have joined the ranks of the developmental psychologists in opposing excluding juveniles from juvenile court for the reasons cited by the psychologists. Nevertheless, for the sake of convenience, this Article lumps all of those who focus on the incompetency aspect in opposing exclusion together as developmental psychologists. Although maturity of judgment involves both competency to stand trial and juvenile offenders' culpability, this Article considers only the competency issue.

⁹⁵ Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1773 (1995).

⁹⁶ *Id.* at 1774-80.

⁹⁷ *Id.* at 1778-83.

⁹⁸ *Id.* at 1783-87.

⁹⁹ See Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229 (1995).

¹⁰⁰ *Id.* at 299-30.

possibility of gains than losses.¹⁰¹ Temporal perspective relates to the ability to consider both long and short term implications of behaviors, and to make decisions without being influenced by external pressures.¹⁰²

Adolescents are seen as impulsive and sensation seeking, inclined to use information less effectively than adults, less experienced, apt to discount future fear, likely to misread threats, and subject to stress and mood variations.¹⁰³ Youths are also seen as being vulnerable to peer influence, to looking at the short-term rather than to the long-term, and to reacting to risk by seeing potential gains more than losses.¹⁰⁴ Adolescents are also thought to be less capable than adults when it comes to understanding others' perspectives and differing points of view.¹⁰⁵ These traits mean that adolescents cannot be as competent as adults due to possibly making "different choices when faced with decisions in legal contexts."¹⁰⁶

Adolescents' lack of maturity vis-à-vis adults can lead to thinking, understanding, and behaving much differently than mature individuals in a criminal prosecution. These differences, in turn, are theorized to render adolescents generally incompetent defendants. DPs have theorized that, compared to adult defendants, juvenile defendants may:

(1) perceive and calculate the probability of risk differently in that they are more likely to underestimate the likelihood of risks or to undervalue their negative implications;¹⁰⁷

(2) be less aware of—and less alert to—information, or to use what information they have less effectively in making choices;¹⁰⁸

(3) fixate on an initial possibility in the decision-making process and fail to adjust as new information becomes available;¹⁰⁹

¹⁰¹ *Id.* at 230-31.

¹⁰² *Id.* at 231-32.

¹⁰³ See Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 153-56 (2003).

¹⁰⁴ See Scott, Reppucci & Woolard, *supra* note 99.

¹⁰⁵ See Randy K. Otto & Alan M. Goldstein, *Juveniles' Competence to Confess and Competence to Participate in the Juvenile Justice Process*, in JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION 179 (Kirk Heilbrun et al. eds., 2005).

¹⁰⁶ Jennifer Lee Woolard, *Developmental Aspects of Judgment and Competence in Legally Relevant Contexts* 12 (May 1998) (unpublished Ph.D. dissertation, University of Virginia) (on file with Proquest).

¹⁰⁷ Thomas Grisso, *Juveniles' Competence to Stand Trial: New Questions for an Era of Punitive Juvenile Justice Reform*, in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 23, 32 (Patricia Puritz et al. eds., 1997); Taylor-Thompson, *supra* note 103, at 144.

¹⁰⁸ See Grisso, *supra* note 107, at 32.

¹⁰⁹ See *id.*

(4) experience difficulty in contemplating the meaning of a consequence, particularly a long-term one, and have less capacity to anticipate harm as an unintended result of their actions;¹¹⁰

(5) have less experience to draw on;¹¹¹

(6) make choices that they would not make when their values and sense of personal identity have matured;¹¹² and

(7) make different legal decisions than adults and not be as able to resist the influence of others to change their mind.¹¹³

DPs tell us that, as defendants, adolescents may be expected to:

(1) misinterpret the role of counsel and think that they must be truthful with their attorney so the latter will decide whether to advocate for the defendant's interests;¹¹⁴

(2) distrust defense counsel and not be forthcoming with that person due to a belief that adult defense attorneys would not work for a juvenile the way they would for adults;¹¹⁵

(3) overestimate the probability of desired events that may result in a greater likelihood of rejecting plea bargains;¹¹⁶ and

(4) have difficulty comprehending the significance of the length of sentences, which can interfere with an ability to appreciate the consequences of various dispositions and to make informed legally-relevant decisions.¹¹⁷

B. GENERAL RESEARCH AND CONCLUSIONS ON JUVENILES' LEGAL ABILITIES

A good deal of research has explored juveniles' capabilities, frequently in legally-oriented contexts, without examining trial competency per se. In

¹¹⁰ See *id.*

¹¹¹ See Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 26 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹¹² See Grisso, *supra* note 107, at 32; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Laurence Steinberg et al., *Juveniles' Competence to Stand Trial as Adults*, 17 SOC. POL'Y REP. 3 (2003).

¹¹³ See Steinberg et al., *supra* note 112, at 4.

¹¹⁴ Grisso, *supra* note 107, at 31.

¹¹⁵ See Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996); Naomi E. Goldstein et al., *Advocating a Functional Approach to Determining Adjudicative Competency in Juveniles*, 2 J. FORENSIC PSYCHOL. PRAC. 89, 93 (2002).

¹¹⁶ Goldstein et al., *supra* note 115, at 93.

¹¹⁷ *Id.*

1980, Melton found that most children had some idea of the nature of rights by the third grade, while most understood a right as a guaranteed entitlement by age fourteen.¹¹⁸ Grisso reported the next year that as many thirteen-year-olds (80-90%) understood that a defense attorney serves as an advocate or helper as did older teens and adults.¹¹⁹ Later, two other studies documented the legal abilities of youths. Warren-Leubecker, Tate, Hinton, and Ozbek discovered that by the age of eight, 92% knew that a judge is in charge of the courtroom, and 90% of thirteen-year-olds understood that jurors decide whether a person is guilty or not guilty based on what they hear in court.¹²⁰ Saywitz determined that youths had accurate concepts of a court and the roles of judges, witnesses, and attorneys by the age of eight to nine years.¹²¹ For eight- to eleven-year-olds, 93% gave accurate responses for the roles of the judge and lawyer, while 86% understood witnesses; for twelve- to fourteen-year-olds, 91% gave accurate responses concerning the judge, and 100% were on mark with both witnesses and lawyers.¹²²

These results parallel the findings of numerous studies that have found few differences between adolescents and adults in formal decision-making abilities.¹²³ The conclusions reached in several studies is that by age fourteen or fifteen, little distinguishes adolescents from adults in the cognitive-capacity aspect of decision-making.¹²⁴ This considerable body of

¹¹⁸ See Gary B. Melton, *Children's Concepts of Their Rights*, 9 J. CLINICAL CHILD PSYCHOL. 186 (1980).

¹¹⁹ See generally THOMAS GRISSE, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* (1981); Richard A. Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of Their Rights*, 34 JUV. & FAM. CT. J., Winter 1983, at 49, 52 (1984).

¹²⁰ See Amye Warren-Leubecker et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 158 (S.J. Ceci et al. eds., 1989).

¹²¹ Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball,"* in PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 120, at 131.

¹²² *Id.* at 145.

¹²³ See, e.g., Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Ellen Greenberg Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 J. CLINICAL CHILD PSYCHOL. 78 (1991); Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980); David G. Scherer, *The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions*, 15 LAW & HUM. BEHAV. 431 (1991); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982).

¹²⁴ See, e.g., Ruth Beyth-Marom et al., *Perceived Consequences of Risky Behaviors: Adults and Adolescents*, 29 DEVELOPMENTAL PSYCHOL. 549 (1993); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992); Thomas Grisso & Linda Vierling, *Minors Consent to*

literature has led Professor Grisso to declare that "formal reasoning or problem-solving abilities continue to improve through adolescence, but normatively they may not be substantively different from adults' abilities after age fourteen or fifteen" ¹²⁵

Other conclusions drawn by Professor Grisso, prior to the recent onslaught of research on juveniles' competency to stand trial, include the following:

(1) By age thirteen, most juveniles accurately identify trial participants and their roles, as well as the purposes of trial and that as defendants they are charged with offenses and are facing punitive consequences. ¹²⁶

(2) By age fourteen, there are few differences vis-à-vis adults in understanding trial-related matters, ¹²⁷ and some will have the same abilities related to competency to stand trial as adults. ¹²⁸

(3) By age fifteen, juveniles are as capable as adults in providing information to attorneys from their experiences, ¹²⁹ they can track the trial process as it unfolds and can relate one event to another later one (as in contradictory testimony), ¹³⁰ and they begin to develop the ability to think in terms of hypothetical conditions. ¹³¹

C. EMPIRICAL RESEARCH ON JUVENILES' COMPETENCY TO STAND TRIAL

The first study focused specifically on juveniles' competency to stand trial was conducted by Savitsky and Karras in 1984. ¹³² They used the Competency Screening Test, which gauges knowledge of legal items. There are no instructions provided and no way to ascertain whether the test-taker is ignorant of court-related facts or cannot comprehend what a criminal trial is all about even after an explanation. Savitsky and Karras administered the test to three groups of individuals: twelve nonincarcerated

Treatment: A Developmental Perspective, 9 PROF. PSYCHOL.: RES. & PRAC. 412 (1978); Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265 (1989); Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare: Guidelines for Professionals*, in CHILDREN'S COMPETENCE TO CONSENT 235 (Gary B. Melton et al. eds., 1983).

¹²⁵ Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL, *supra* note 111, at 139.

¹²⁶ *Id.* at 146; Grisso, *supra* note 107, at 29.

¹²⁷ See Scott & Grisso, *supra* note 112, at 169.

¹²⁸ See Grisso, *supra* note 107, at 33.

¹²⁹ See Scott & Grisso, *supra* note 112, at 167.

¹³⁰ See *id.* at 156; Grisso, *supra* note 107, at 31.

¹³¹ See Grisso, *supra* note 107, at 32.

¹³² Jeffrey C. Savitsky & Deborah Karras, *Competency to Stand Trial Among Adolescents*, 19 ADOLESCENCE 349 (1984).

twelve-year-olds; eighty fifteen to seventeen-year-olds, one half of whom were incarcerated; and nineteen adults.¹³³ The researchers found that the mean scores on the test improved with each age group.¹³⁴ However, Savitsky and Karras could form no conclusions on the percentage of the sample's three groups that was competent to stand trial.¹³⁵

Cowden and McKee reviewed 136 South Carolina juveniles between the ages of nine and sixteen who had been referred for a competency evaluation between January 1987 and January 1994.¹³⁶ Competency to stand trial was correlated with age, previous severe mental health diagnosis, and remedial education.¹³⁷ No correlation was discovered for gender, race, number or severity of charges, mental health services history, or juvenile court history.¹³⁸ The majority of thirteen- (55.6%), fourteen- (67.7%), fifteen- (84.4%), and sixteen-year-olds (72%) were found competent to stand trial; only a minority of eleven- (18.2%) and twelve-year-olds (27.3%) were competent to stand trial, however.¹³⁹ The fifteen- and sixteen-year-olds found incompetent to stand trial suffered from mental illness or mental retardation.¹⁴⁰

McKee later examined another sample of 108 juvenile defendants between the ages of seven and sixteen referred for a competency evaluation between January 1994 and June 1996; 85.2% of the juveniles were deemed competent to stand trial.¹⁴¹ Adults and those between ages thirteen and sixteen displayed a better understanding of the charges, court procedure, and how to assist an attorney than did youths younger than thirteen. Although seventeen-year-olds were *not* counted among them, juveniles as a group outperformed adults on several dimensions of the evaluation (knowing and defining charges, court officers, and the adversarial nature of the court; appropriate court behavior; testifying and challenging witnesses; and disclosing facts to the attorney), while fifteen- and sixteen-year-olds

¹³³ *Id.* at 353.

¹³⁴ *Id.* at 355.

¹³⁵ *Id.* at 355-57.

¹³⁶ Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 J. FAM. L. 629, 648 (1995).

¹³⁷ *Id.* at 652-54.

¹³⁸ *Id.* at 654-55.

¹³⁹ *Id.* at 652.

¹⁴⁰ *Id.* at 657.

¹⁴¹ Geoffrey R. McKee, *Competency to Stand Trial in Preadjudicatory Juveniles and Adults*, 26 J. AM. ACAD. PSYCHIATRY & L. 89, 91 (1998).

were considered equal to adults in terms of competency to stand trial, except in their knowledge of plea bargaining.¹⁴²

The same sample (with four more juveniles referred for a competency evaluation between July 1996 and January 1997) was reexamined by McKee and Shea; 85.7% of the juveniles were considered competent to stand trial.¹⁴³ Only age, intelligence, and prior juvenile arrest were significantly related to clinical opinions of juveniles' competency to stand trial.¹⁴⁴ Severity of mental health diagnosis and history of remedial education were not found to be associated with incompetency to stand trial.¹⁴⁵ Competent youths were older, less likely to be mentally retarded, and more likely to have had prior juvenile court experience.¹⁴⁶

Cooper's dissertation targeted 112 juveniles between the ages of eleven and sixteen who had been placed at the South Carolina Department of Juvenile Justice Reception and Evaluation Center after having been adjudicated delinquent.¹⁴⁷ Cooper administered the Georgia Court Competency Test (GCCT) for which she created a "juvenile version" (GCCT-JR). Cooper hypothesized that *all* thirteen-year-olds, a *majority* of fourteen- to fifteen-year-olds, and *one-half* of the sixteen-year-olds would be incompetent to stand trial even though all had been prosecuted.¹⁴⁸ Cooper believed that restoration training would assist older, but not younger, members of her sample; the research called for a training session for all those initially found incompetent to stand trial.¹⁴⁹

Cooper added six "critical" questions and required accurate responses to all six to be found competent to stand trial, even if the youth surpassed the cut-off score on the GCCT.¹⁵⁰ The six critical questions are confusing. One asks: when a prosecutor offers a plea bargain, does that mean the prosecutor is "for" or "against" the defendant?¹⁵¹ All of the youths had already been found delinquent;¹⁵² many likely had plea bargained their

¹⁴² *Id.* at 94-95.

¹⁴³ Geoffrey R. McKee & Steven J. Shea, *Competency to Stand Trial in Family Court: Characteristics of Competent and Incompetent Juveniles*, 27 J. AM. ACAD. PSYCHIATRY & L. 65, 67, 69 (1999).

¹⁴⁴ *Id.* at 69-70.

¹⁴⁵ *Id.* at 71.

¹⁴⁶ *Id.* at 69-70.

¹⁴⁷ Deborah Kay Cooper, *Juvenile Competency to Stand Trial: The Effects of Age and Presentation of Factual Information in the Attainment of Competency in Juveniles* (1995) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).

¹⁴⁸ *Id.* at 25, 44.

¹⁴⁹ *Id.* at 42-44.

¹⁵⁰ *Id.* at 41.

¹⁵¹ *Id.* at 99.

¹⁵² *Id.* at 26.

cases. It is possible that many were told by their attorneys that the prosecutor had done them a favor and that sentencing would be more lenient due to the youth's cooperation. Another question asks: when the public defender reveals that the youth will probably be committed to a juvenile facility, does this mean the attorney is "for" or "against" the defendant?¹⁵³ Adjudicated juveniles might not be convinced that the public defender actually worked to avoid commitment. A third question asks whether it is okay to tell the public defender when there is a lack of understanding of what is happening or what people are saying in court.¹⁵⁴ Although this question seems straightforward, the training protocol made it very confusing as to whether youths should talk or remain silent.¹⁵⁵ Finally, youths were told:

The judge knows how many times you've been in trouble before and what they said you did each time, and what happened to you each time If you've been in trouble before, the judge holds this against you. So each time you get in trouble, the judge will get harsher and harsher with you.¹⁵⁶

The training protocol is not clear that this judicial knowledge refers to sentencing only. Juveniles could be confused, then, when asked two of Cooper's critical questions: "When you have to go to court, does the judge know if you have ever been in trouble before?"; "Does the judge think about whether you have ever been in trouble before when s/he decides what is going to happen to you?"¹⁵⁷ Juveniles who are thinking of trial will receive zero points by answering *no* or *sometimes* instead of an unequivocal *yes*.¹⁵⁸

Two of the 112 youths were determined to be competent to stand trial, which made them ineligible; incompetent to stand trial findings were necessary for the study to occur.¹⁵⁹ Total score at the initial testing period correlated significantly with race, IQ, and sibling history in criminal activity.¹⁶⁰ Thirteen-year-olds had significantly lower scores than the other three age groups at the pretest, but not at the posttest.¹⁶¹ There were no significant differences among fourteen-, fifteen-, and sixteen-year-olds at either the pre- or posttest.¹⁶² Mean scores for all age groups rose

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 101.

¹⁵⁵ *See id.* at 116.

¹⁵⁶ *Id.* at 42-44.

¹⁵⁷ *Id.* at 100.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 47.

¹⁶⁰ *Id.* at 48-49.

¹⁶¹ *Id.* at 49.

¹⁶² *Id.* at 50.

considerably from the pre- to the post-test period, indicating some success for the restoration training.¹⁶³

Schnyder's dissertation examined 163 males, the majority of whom were between thirteen and nineteen years of age.¹⁶⁴ All had been found guilty and incarcerated. Seventy percent of the respondents were black, while the rest were white.¹⁶⁵ Schnyder examined defendants' trust in and understanding of the role of defense counsel and the relationship among these elements, one's age, and competency. She developed four hypotheses: (1) younger defendants would have less trust in their attorneys, in people, and in authority; (2) younger age would be related to a poorer understanding of the role of defense counsel and a lower trust in the defense attorney; (3) less trust in the attorney would mean one is less likely to be assessed competent; and (4) competency to stand trial scores would be correlated with age.¹⁶⁶

Schnyder employed numerous measures, including borrowing Cooper's juvenile adaptation of the GCCT and creating a *Trust in My Lawyer Scale* and an *Understanding About Lawyers Scale* specifically for this research.¹⁶⁷ In addition, Schnyder used the Alienation Scale of the Jesness Inventory to ascertain distrust in relationships, and had the sample respond to statements connected to doubt about trustworthiness of people.¹⁶⁸ Finally, the Kaufman Brief Intelligence Test (K-BIT) was utilized to determine verbal and non-verbal IQ.¹⁶⁹

Schnyder rejected her first hypothesis. Age was not related to trust in one's lawyer, other people, or authority figures.¹⁷⁰ Age was related to understanding the attorney's role; younger individuals had a poorer understanding, but the correlation was not significant. A poorer understanding in counsel's role was significantly correlated with lower trust in the attorney.¹⁷¹ Less trust in the attorney did mean one was less likely to be assessed competent.¹⁷² However, Schnyder admitted that answers to the

¹⁶³ *Id.*

¹⁶⁴ See Christine Schnyder, *The Competence of Juveniles to Assist in Their Own Defense: An Investigation of Trust and Understanding in the Attorney Relationship* (1998) (unpublished Ph.D. dissertation, University of Alabama) (on file with author).

¹⁶⁵ *Id.* at 32. One participant self-identified as Native American, but "[h]is data were excluded from analyses involving Race as a factor." *Id.*

¹⁶⁶ *Id.* at 50-57.

¹⁶⁷ *Id.* at 36-38.

¹⁶⁸ *Id.* at 42-43.

¹⁶⁹ *Id.* at 43-44.

¹⁷⁰ *Id.* at 50-53.

¹⁷¹ *Id.* at 54-57.

¹⁷² *Id.* at 59.

GCCT-JR may have been influenced more by cynical attitudes than by cognitive abilities.¹⁷³ She acknowledged the confusion in a defense attorney's role in juvenile court and conceded that "[t]here may be good reasons for some juveniles to misunderstand and mistrust their attorneys."¹⁷⁴ She also conceded that some of the participants in her study "may have had attorneys who were neither competent, [nor] diligent [T]hus, distrust of the attorney was justified."¹⁷⁵ The sample had been convicted and incarcerated, which may have influenced their perceptions of counsel's role and ability. Nevertheless, youths' beliefs that defense attorneys are not dedicated to advocacy, and that they share confidential information with others, resulted in findings that the youth is mistrustful of and lacks understanding of counsel's role, and is incompetent to stand trial.¹⁷⁶

Competency to stand trial scores were significantly related to age. After eliminating the two twelve-year-olds who averaged a score of 18 in the GCCT-JR and the one twenty-year-old who had a score of 32, however, all age groups registered a mean score of either 28 (fourteen-year-olds), 29 (thirteen-year-olds), 30 (fifteen- and sixteen-year-olds) or 31 (seventeen-, eighteen-, and nineteen-year-olds).¹⁷⁷

Schnyder's research disclosed that defendants with court-appointed lawyers had significantly less trust in their attorneys than did those with private counsel.¹⁷⁸ While lower-IQ white defendants were less trusting in their attorneys than higher-IQ whites were, the reverse was true for black offenders.¹⁷⁹ Lower-IQ black defendants were more trusting than higher-IQ blacks.¹⁸⁰ Overall, black youths were less trusting of their attorneys than were white youths, but 90% of the defense attorneys were white.¹⁸¹ Interestingly, higher IQ was significantly related to less trust in others. Contrary to maturity of judgment theory, neither age nor any other variable was associated with trust in authority figures.¹⁸² Schnyder found that IQ was significantly related to competency scores.¹⁸³

¹⁷³ *Id.* at 89-90.

¹⁷⁴ *Id.* at 21.

¹⁷⁵ *Id.* at 88.

¹⁷⁶ *See id.* at 50-59.

¹⁷⁷ *See id.* at 59.

¹⁷⁸ *Id.* at 60.

¹⁷⁹ *Id.* at 61.

¹⁸⁰ *Id.* at 63.

¹⁸¹ *Id.* at 55, 63.

¹⁸² *Id.* at 63, 65.

¹⁸³ *See id.* at 65.

Schnyder assumed that mistrust in an attorney means unwillingness to cooperate with counsel, which means one would be considered incompetent to stand trial.¹⁸⁴ Schnyder's study did not investigate willingness to assist counsel or holding back information from counsel, however. Most importantly, this study did not ascertain actual mistrust of defense counsel. Rather, Schnyder examined relative degrees of greater or lesser trust of counsel.

Krause and Woolard used the same samples for their doctoral dissertations.¹⁸⁵ The all-male sample involved: (1) sixty detainees fifteen years of age and younger, (2) sixty detainees ages sixteen and seventeen, and (3) sixty-one detainees between the ages of nineteen and thirty-five.¹⁸⁶ Whereas Krause was examining *adjudicative* competence, Woolard was looking at *adolescent* competence. Both used the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA), which ascertains the individual's abilities in three contexts: *Understanding* (the roles of opposing counsel, judge, jury); *Reasoning* (distinguishing more from less legally relevant information); and *Appreciation* (perception of being treated fairly).¹⁸⁷ The MacCAT-CA has twenty-two items and involves the reading of a vignette.¹⁸⁸

Krause also utilized measures of intelligence, temperance, perspective, risk perception, and emotional functioning to test the maturity of judgment theory.¹⁸⁹ Krause hypothesized that juveniles would demonstrate deficits in adjudicative competence, which would be associated with age.¹⁹⁰ Instead, she found that scores registered by the three age groups in the three contexts of Understanding (U), Reasoning (R), and Appreciation (A) were similar and not significantly different.¹⁹¹ Krause concluded:

The results of the current study provided no evidence to support either of [the] hypotheses, as the performance of both juvenile groups on the MacCAT-CA was remarkably similar to that of the adult sample on all three subscales. Furthermore, the

¹⁸⁴ See *id.* at 75.

¹⁸⁵ See Meredith Susanne Krause, *Methodological and Developmental Issues in the Assessment of Adjudicative Competence* (May 1998) (unpublished Ph.D. dissertation, University of Virginia) (on file with author); Woolard, *supra* note 106.

¹⁸⁶ Krause, *supra* note 185, at 16-18.

¹⁸⁷ See MacArthur Research Network on Adolescent Dev. & Juvenile Justice (MacArthur Research Network), *Method, Measures, and Procedures for the Juvenile Adjudicative Competence Study 9*, 16-19 (Aug. 2002) (unpublished working paper), http://www.adjj.org/downloads/9213method_archival_and_tables.pdf.

¹⁸⁸ Woolard, *supra* note 106, at app. A, pp 91-114.

¹⁸⁹ See Krause, *supra* note 185, at 15.

¹⁹⁰ *Id.* at 72.

¹⁹¹ *Id.*

juveniles' scores were quite similar to those of competent adult detainees included in the original MacCAT-CA validation study¹⁹²

Krause also found no significant difference by age on *sensation seeking, suppression of aggression, impulse control, responsibility, or time perspective/future orientation*. Krause explained "age did not appear to contribute significantly to differences in . . . decisional temperance or risk perception/sensation seeking."¹⁹³ No significant correlations existed between MacCAT-CA scores for any age and emotional distress, decisional temperance, risk perception, and perspective.¹⁹⁴ The only significant correlation was between perspective and reasoning for adults only.¹⁹⁵ This correlation supports the developmental theory that reasoning abilities improve the more one has the ability to consider others' feelings and reactions. However, younger adolescents nearly equaled, while older adolescents actually outscored, adults on the reasoning subscale.¹⁹⁶

The strongest correlation involved IQ, which was significantly correlated with understanding for all age groups, with reasoning for adults, and with appreciation for sixteen- and seventeen-year-olds. This led Krause to comment that:

[I]ntelligence alone, and not age or the interaction between age and intelligence, appears to be contributing to differences in MacCAT-CA performance, especially on the Understanding and Reasoning Subscales [Krause noted that her] results suggest that differences in MacCAT-CA Understanding and Reasoning scores can be attributed to differences in intelligence, regardless of the impact of age or race.¹⁹⁷

Krause finally observed:

[T]he results . . . indicate that juveniles do not, by nature of their developmental status alone, possess deficits in adjudicative competence relative to similarly functioning adults. Indeed, the juveniles included in this study demonstrated a level of understanding, reasoning, and appreciation that was no different from that of the adult comparison group [T]heir youth alone is not a bar to their ability to possess "a reasonable degree of rational understanding as well as a factual understanding of the proceedings" or to "assist in preparing" a defense.¹⁹⁸

Woolard hypothesized that several developmental factors would affect the decision-making process for juveniles.¹⁹⁹ These factors included "risk perception, temporal perspective, parent/peer influence, responsibility,

¹⁹² *Id.*

¹⁹³ *Id.* at 45.

¹⁹⁴ *Id.* at 62, 65, 67.

¹⁹⁵ *See id.* at 75.

¹⁹⁶ *Id.* at 34.

¹⁹⁷ *Id.* at 41. The Appreciation scale was not given to the comparison group.

¹⁹⁸ *Id.* at 78.

¹⁹⁹ *See Woolard, supra* note 106, at 55.

temperance and perspective.”²⁰⁰ Her goal “was to clarify the meaning of adolescent competence as a function of both adult competence factors and judgment factors.”²⁰¹ She utilized a number of measurement instruments, including the Judgment Assessment Tool—Adolescents/Adults (JATA), which was developed for this study.²⁰² The JATA measured reaction to a fifteen-year-old accused facing two potential decisions in a criminal justice context: talking to police and accepting a plea bargain.²⁰³ Inasmuch as talking to police occurs long before trial, only the decision of accepting a plea bargain is related to adjudicative competence.

The participant was asked to report (1) what options were available for an accused individual when talking to police and accepting a plea bargain and what he or she would recommend for this suspect, (2) what the accused’s parents or peers would recommend, (3) what the participant would recommend in light of a parent or peer recommendation that contradicts the sample’s recommendation, and (4) what he or she would do in a similar situation.²⁰⁴ Woolard also examined sensation seeking or risk proclivity, decisional temperance (as measured via suppression of aggression and impulse control), responsibility, and optimistic beliefs about the future.²⁰⁵

She found significant age effects on only three maturity of judgment elements: consideration of others, responsibility, and peer attachment (particularly among older white adolescents).²⁰⁶ Both younger and older adolescents scored lower than adults on consideration of others.²⁰⁷ Supporting this, Krause had found consideration of others and reasoning were significantly correlated for adults; however, the sixteen- and seventeen-year-olds in Krause’s sample outscored the adults on the reasoning subscale, while the fifteen and younger group did not score significantly lower than the adults. The disadvantage that adolescents would experience due to a lower score on consideration of others is unclear. Woolard discovered sixteen- and seventeen-year-olds scoring lower than adults on the responsibility measure, while the fifteen and younger group finished between the other two groups (and not significantly different from either).²⁰⁸ Thus, juveniles do not appear to suffer from being significantly

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 19.

²⁰³ *Id.* at 19-20.

²⁰⁴ *Id.* at 20.

²⁰⁵ *Id.* at 22-24.

²⁰⁶ *Id.* at 28-29.

²⁰⁷ *Id.* at 29.

²⁰⁸ *See id.*

different from adults in the responsibility category. Moreover, Krause had found responsibility and reasoning were significantly correlated for adults, but that the older adolescent group performed better than adults in the reasoning capacity and the younger adolescents were nearly as capable as the adults.²⁰⁹

Woolard found adolescents scoring higher than adults on peer attachment such that they have stronger feelings about their peers.²¹⁰ She did not directly measure peer influence, however, and it is questionable whether adolescents would have considered their peers had they not been forced to do so. And, the disadvantage due to peer influence remains unclear since Woolard found *fewer* adolescents than adults said their peers would want them to talk to the police, and *more* younger adolescents than older ones and adults (who were tied) said their peers would recommend that they remain silent at police interrogation. Similarly, there were no significant differences among the three age groups as to whether they would accept or refuse a plea bargain offer.²¹¹

Although Woolard's research revealed some differences between the thinking processes of adolescents and adults, she found no age differences in parent attachment, impulsivity, suppression of aggression, and degree of sensation seeking. She concluded:

[T]he stereotypes and research describing greater impulsivity and risk preferences in adolescents as compared to adults were not supported by these data The theory that adolescents focus more on losses than gains, and short term rather than long term consequences is not fully supported by the data²¹²

Boyd's dissertation used the MacCAT-CA to assess the competency to stand trial of eighty-six males between the ages of thirteen and seventeen detained and awaiting trial in criminal court in North Carolina where the maximum juvenile court age is fifteen.²¹³ Of the eighty-six, twenty-six were fifteen and younger (nine were thirteen- or fourteen-years-old), and thirty each were sixteen and seventeen years old; a comparison group of thirty eighteen-year-old pretrial inmates was randomly selected from the validation study of the MacCAT.²¹⁴ Boyd screened out three adults whose

²⁰⁹ *Id.* at 34.

²¹⁰ *Id.* at 57.

²¹¹ *See id.* at 42-45.

²¹² *Id.* at 58, 66.

²¹³ *See* Jenine C. Boyd, *The Competence-Related Abilities of Juveniles Prosecuted in Criminal Court* 36, 44 (1999) (unpublished Ph.D. dissertation, University of South Florida) (on file with author).

²¹⁴ *See* Randy K. Otto et al., *Psychometric Properties of the MacArthur Competence Assessment Tool—Criminal Adjudication*, 10 PSYCHOL. ASSESSMENT 435 (1998).

full scale IQ was below 60.²¹⁵ Boyd hypothesized that age and intelligence would be positively correlated, and mental status would be negatively correlated with MacCAT-CA scores.²¹⁶

Boyd found IQ was associated with Understanding and Reasoning, but not with the Appreciation subscale.²¹⁷ The number of years of education completed, depression, anxiety, and thinking disturbance were not associated with any of the subscales.²¹⁸ Age was not associated with understanding and reasoning, but was associated with Appreciation.²¹⁹ The author conceded that the correlation between age and appreciation "is probably not meaningful given the poor internal consistency of the Appreciation measure in this study."²²⁰ All juvenile groups outscored the adults on understanding, while youths fifteen and younger tied the adults on reasoning, and sixteen- and seventeen-year-olds nearly accomplished this feat.²²¹ Boyd concluded that, based on her findings, "the juveniles prosecuted as adults have similar competence-related abilities to those of adults."²²² Boyd's study shows that qualified defendants are being chosen for criminal prosecution in North Carolina.

Burnett's dissertation used the MacCAT-CA with seventy boys and forty girls between the ages of ten and seventeen; seventy were in detention awaiting trial in juvenile court, and forty were a comparison group not involved with juvenile court.²²³ The comparison group differed significantly from the offender group in several respects: gender, race, IQ score, socioeconomic status (SES), father's and mother's education, and the criminal history of father, mother, and siblings; the comparison group's mean IQ score was 101.6, while the offender group's was 84.16.²²⁴ Burnett hypothesized that age, IQ, SES, education level, and prior contacts with the system would be positively related to scores on the subscales of the MacCAT-CA, while parent and sibling criminal history would be

²¹⁵ See Boyd, *supra* note 213, at 40.

²¹⁶ *Id.* at 35.

²¹⁷ *Id.* at 55 tbl.6.

²¹⁸ See *id.* at 55 tbl. 6, 57 tbl.8, 69.

²¹⁹ *Id.* at 57 tbl.8.

²²⁰ *Id.* at 70-71.

²²¹ See *id.* at 60, 61 & tbl.11.

²²² *Id.* at 70.

²²³ Darla Michele Rutherford Burnett, Evaluation of Competency to Stand Trial in a Juvenile Population 57 (Dec. 1999) (unpublished Ph.D. dissertation, University of Southern Mississippi) (on file with author).

²²⁴ *Id.* at 62 tbl.3, 63.

negatively related.²²⁵ The comparison group was predicted to score higher than the offender group.²²⁶

The offender group scored significantly lower than the comparison group on the Reasoning subscale, but the two groups did not differ significantly on the Understanding measure.²²⁷ When Burnett controlled for the nine variables that distinguished the offender and comparison groups, significant differences in Reasoning scores remained.²²⁸ Age was found to be related to the MacCAT-CA scores among the juveniles, especially in the Appreciation measure.²²⁹ To compare her sample with adults, she borrowed adult scores from a previous study that had measured the psychometric properties of the MacCAT-CA.²³⁰ Significant differences were found between juveniles (ten to sixteen) and adults on both Understanding and Reasoning, and some juveniles (ten to fourteen) and adults on Appreciation.²³¹ The seventeen-year-olds did not differ significantly from adults on any scores, and the fifteen- to sixteen-year-olds equaled adults on Appreciation.²³²

Burnett further analyzed the correlation between seven other variables (IQ, SES, education level, prior court contacts, and father/mother/sibling criminal history) and MacCAT-CA scores.²³³ Only IQ contributed significantly (and mother's criminal history somewhat) to the Understanding score;²³⁴ only education level and prior court contacts contributed significantly to Reasoning scores.²³⁵ Burnett found no gender correlation with the MacCAT-CA scores, but she did find that blacks scored significantly lower than whites on the Understanding and Reasoning scales, but not on the Appreciation scale.²³⁶

Lexcen examined sixty-six male psychiatric inpatients between the ages of ten and seventeen for her dissertation.²³⁷ She administered the MacCAT-CA and several other tests. Two-thirds of her sample were

²²⁵ *Id.* at 71-74.

²²⁶ *See id.* at 62.

²²⁷ *See id.* at 75. The Appreciation scale was not given to the comparison group.

²²⁸ *See id.* at 76.

²²⁹ *Id.* at 72.

²³⁰ *See* Otto et al., *supra* note 214.

²³¹ Burnett, *supra* note 194, at 75 tbl.4.

²³² *Id.* at 74-75.

²³³ *Id.* at 76-77.

²³⁴ *Id.* at 78 tbl.5.

²³⁵ *Id.* at 78-80 Tables 5, 6, 7.

²³⁶ *See id.* at 77.

²³⁷ *See* Frances J. Lexcen, Factors Associated with Juvenile Competence to Stand Trial: Neuropsychological, Psychopathological and Psychosocial Variables (May 2000) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

fourteen years of age and older, and most (78.9%) were white (black = 10.6%); nearly one-half (47%) had prior experience with the juvenile system.²³⁸ Higher K-BIT verbal scores were associated with higher scores on both the Understanding and Reasoning subscales; those with higher factor scores for bipolar disorder symptoms were also more likely to score higher in verbal intelligence tests.²³⁹ Poor motor coordination and a history of disrupted family structure during childhood were associated with lower Understanding scores.²⁴⁰ Higher reasoning scores were also associated with lower scores on both motor coordination and long-term verbal memory.²⁴¹ Higher scores involving behavior disorder symptoms were predictive of lower Reasoning scores, while difficulty in problem solving had lower scores on Appreciation.²⁴² Age did not appear as a significant predictor of competence.²⁴³

The sample was asked to make decisions via the JATA developed by Woolard.²⁴⁴ Youths who scored better on perceptual organization and short-term visual memory were more likely to talk to the police without consulting a lawyer, and to recommend that the vignette character do the same.²⁴⁵ Youths with higher factor scores for psychotic symptoms were less likely to recommend anyone cooperate with an attorney, and those with better long-term verbal memory were more likely to say they would cooperate with their attorney.²⁴⁶ Somewhat puzzling, those with higher K-BIT verbal scores were likely to recommend a plea bargain for others, but not for themselves, and subjects with better planning-organization and problem-solving skills were less likely to recommend that the vignette character accept a plea bargain that would substantially reduce the risk of sanctions.²⁴⁷ Lexcen explains these two "counter-intuitive" results respectively as "compliance with authority figures" and evidence "that judgment and decision-making arise from resources other than intelligence."²⁴⁸

Lyle's dissertation sample consisted of sixty urban minority males between the ages of twelve and seventeen; the sample averaged four prior

²³⁸ *Id.* at 25.

²³⁹ *See id.* at 43-45.

²⁴⁰ *Id.* at 45.

²⁴¹ *Id.* at 35.

²⁴² *See id.* at 35, 45.

²⁴³ *See id.* at 47.

²⁴⁴ *See supra* notes 202-04 and accompanying text.

²⁴⁵ Lexcen, *supra* note 237, at 37.

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 37, 47.

²⁴⁸ *Id.* at 47.

juvenile court appearances.²⁴⁹ Lyle believed there would be a significant relationship between emotional intelligence (EQI) and the defendants' ability to appreciate their legal situation.²⁵⁰ Emotional intelligence is "an array of emotional, personal and interpersonal abilities that influence one's overall ability to cope with environmental demands and pressures."²⁵¹ Ten factors influence emotional intelligence: self-regard, emotional self-awareness, assertiveness, empathy, interpersonal relationship, stress tolerance, impulse control, reality testing, flexibility, and problem-solving. She hypothesized that the total EQI would be correlated with the three MacCAT-CA measures.²⁵² The relevant elements of EQI were interpersonal and intrapersonal skills, stress management, and adaptability.²⁵³ Lyle divided the juveniles into two age groups: twelve-to-fifteen and sixteen-to-seventeen.²⁵⁴ The only significant difference between the groups occurred in the Appreciation scale, not in the Understanding or Reasoning scales.²⁵⁵

There was no significant relationship between Understanding or Reasoning and EQI, but EQI and Appreciation had significant correlations for both age groups.²⁵⁶ IQ scores were significantly correlated with performances in the three subscales (except for the Reasoning scores for sixteen- to seventeen-year-olds).²⁵⁷ The most significant correlation occurred between IQ and Understanding. Lyle also found a significant correlation between previous court experience and Understanding.²⁵⁸ Two of Lyle's three hypotheses were not supported: EQI did not impact Understanding or Reasoning among juvenile defendants.²⁵⁹

Schmidt, Reppucci, and Woolard used a dataset that served as the population from which Krause and Woolard drew their samples; they were male, detained offenders (101 youths aged twelve to fifteen, 102 juveniles

²⁴⁹ See Victoria K. Lyle, *Emotional Maturity and Trial Competence in Urban Male Adolescents* 15, 31 (May 2003) (unpublished Ph.D. dissertation, Walden University) (on file with author).

²⁵⁰ *Id.* at 8, 31.

²⁵¹ *Id.* at 10.

²⁵² *Id.* at 8.

²⁵³ See *id.* at 8, 10, 29.

²⁵⁴ *Id.* at 31.

²⁵⁵ See *id.* at 43.

²⁵⁶ *Id.* at 44 tbl.2.

²⁵⁷ *Id.*

²⁵⁸ See *id.* at 43-44.

²⁵⁹ *Id.* at 45-46.

aged sixteen and seventeen, and 110 adults aged nineteen to thirty-five).²⁶⁰ The researchers employed the MacCAT-CA, but the main focus was the attorney-client relationship.²⁶¹ The JATA was used to determine if age was related to identifying options in interacting with counsel, mentioning consequences of these options, telling the vignette character how to proceed, and reporting what they would do in the vignette character's situation.²⁶²

Schmidt and her colleagues hypothesized:

[T]hat adolescents [would] be more likely than adults to identify and select options such as refusing to talk to an attorney and denying involvement in the offense . . . [m]ention more total short-term consequences and more consequences associated with potential short-term gains . . . [and particularly among African-American youths,] make more negative references to their attorney's effectiveness, their level of trust in their attorneys, and their views toward court-appointed attorneys.²⁶³

The study found juveniles were more likely than adults to identify refusing to talk to the attorney, to recommend that the vignette character both deny involvement in the offense and not communicate honestly with defense counsel.²⁶⁴ Blacks and minorities were less likely than whites to tell the vignette character to talk to counsel (as were those with a detention history, who were also less likely to report that they would talk to their attorney).²⁶⁵ The exact import and significance of these findings is to be seriously questioned, however. This is so because neither IQ nor the adjudicative competence measure (that is the MacCAT-CA score) was a significant predictor of the recommendation to the vignette character. Even more critical, the data also revealed that neither age nor race nor IQ nor MacCAT-CA score was related to subjects' reporting whether *they* would talk to their attorneys and would admit the offense; the vast majority of all segments of the sample stated they would communicate truthfully with counsel.²⁶⁶

Redlich, Silverman, and Steiner examined thirty-five subjects, eighteen of whom were between the ages of fourteen and seventeen, and

²⁶⁰ Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 181 (2003).

²⁶¹ *Id.* at 177-81.

²⁶² *Id.* at 184-85.

²⁶³ *Id.* at 181.

²⁶⁴ *Id.* at 191.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

seventeen of whom were young adults.²⁶⁷ The hypothesis was that younger age, higher suggestibility, lower IQ, and lower frequency of police contacts would be associated with lower competency-to-stand-trial scores.²⁶⁸ Redlich, Silverman, and Steiner used the MacCAT-CA, and examined relationships among age, suggestibility, intelligence, and frequency of police contacts.²⁶⁹ The only significant correlation was the inverse relationship between frequency of police contacts and intelligence.²⁷⁰ Redlich, Silverman, and Steiner found age related to the Understanding score as well as to total test scores, but not related to the Reasoning or Appreciation subscales.²⁷¹ Higher school grades were associated with improved competence.²⁷²

Baerger, Griffin, Lyons, and Simmons examined 132 youths that had been declared incompetent to stand trial between 1989 and 1999, and 473 youths that were deemed competent to stand trial between 1995 and 1996, all from areas surrounding Chicago.²⁷³ The profile of the incompetent to stand trial defendants was a fourteen-year-old black youth with a history of special education needs, an IQ in the mildly retarded range, and a history of previous arrests and alcohol and drug use.²⁷⁴ The researchers found that age, a history of special education needs, and prior mental health treatment all had a predictive effect on the competent to stand trial determination.²⁷⁵

The MacArthur Study, which was funded by the MacArthur Foundation and conducted by the leading DPs in the juvenile competency to stand-trial area, investigated 927 adolescents (ages eleven through seventeen) in detention and community settings, and 466 adults (ages eighteen through twenty-three) in jails and community settings.²⁷⁶ Grisso and his team used the MacCAT-CA.²⁷⁷ Two comments in the MacArthur Study claim an absence of research reports involving the use of the

²⁶⁷ Allison D. Redlich, Melissa Silverman & Hans Steiner, *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 BEHAV. SCI. & L. 393, 397 (2003).

²⁶⁸ *Id.* at 397.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 401.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See Dana Royce Baerger et al., *Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants*, 31 J. AM. ACAD. PSYCHIATRY & L. 314, 316 (2003).

²⁷⁴ *Id.* at 318.

²⁷⁵ *Id.* at 317.

²⁷⁶ Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 337 (2003).

²⁷⁷ *Id.* at 336.

MacCAT-CA with adolescents: (1) "There are no reports on its use with youths"²⁷⁸ and (2) "At the time of the present study, there were no publications reporting use of the MacCAT-CA with adolescents."²⁷⁹

Besides the MacCAT-CA, the MacArthur Study focused on previous experiences in the justice system, IQ level, mental health problems, risk perception, future time perspective, compliance with authority, and resistance to peer influence.²⁸⁰ The psychosocial factors were measured via the MacJen, a variation of the JATA used by Woolard and Lexcen in their dissertations. Juveniles were divided into three groups: eleven to thirteen, fourteen to fifteen, and sixteen to seventeen.²⁸¹ Nearly 50% of the juveniles were detained, while one-half of the adults were jailed.²⁸² The average IQ score of those detained (86.28) was substantially lower than that of the community participants (97.46).²⁸³ The detained juveniles' IQ (85.58) was significantly lower than the jailed adults (87.65), while the IQ of juveniles in the community (96.41) was also significantly lower than adults in that location (99.59).²⁸⁴ The demographics also suggest that the mean IQ score was the lowest for the two youngest detained groups (eleven to thirteen = 84.8; fourteen to fifteen = 84.3), which also had a disproportionate distribution of the lowest IQ groupings (60-74).²⁸⁵ The eleven- to thirteen-year-old group also had the highest concentration of minority males from the lowest SES group.²⁸⁶

There were no age differences found for consultation with either a public defender or a private attorney.²⁸⁷ More than 75% of each age group recommended full disclosure to defense counsel.²⁸⁸ There was a significant age difference for accepting a plea bargain, but none in the resistance to

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 339. At the beginning of data collection, only the Krause and Woolard dissertations were published. By the end of data collection, however, a few more dissertations involving the MacCAT-CA and adolescents had materialized—Boyd's, Burnett's, and Lexcen's. Woolard and Lexcen were on the MacArthur team. If these comments are a reference to the fact that none of the dissertations were published, then the second statement may be technically correct. The MacArthur Study reviewed none of the previous research in this area, and to suggest that there are no reports on MacCAT use with juveniles is misleading, if not disingenuous.

²⁸⁰ *Id.* at 338-39.

²⁸¹ *Id.* at 337.

²⁸² *Id.*

²⁸³ See MacArthur Research Network, *supra* note 187, at 11-12.

²⁸⁴ *Id.*

²⁸⁵ Grisso et al., *supra* note 276, at 350, 360. Approximately two-thirds of detained fifteen-year-olds and younger had an IQ score below 89.

²⁸⁶ See MacArthur Research Network, *supra* note 187.

²⁸⁷ See Grisso et al., *supra* note 276, at 351-52 fig.9.

²⁸⁸ *Id.*

peer influence measure.²⁸⁹ The eleven- to thirteen-year-old age group (74%) was much more inclined than young adults (50%) to accept the prosecutor's offer.²⁹⁰

Age was found to be related to "compliance with authority" as eleven- to thirteen-year-olds and fourteen- to fifteen-year-olds were both more compliant than sixteen- to seventeen-year-olds and young adults; the latter two groups did not significantly differ from each other.²⁹¹ This compliance with authority factor was determined in part by recommending confessing to police, which is not an aspect of adjudicative competence. Compliance with authority was also measured by full disclosure to defense counsel (expected of competent defendants), and acceptance of a plea bargain (not an inappropriate or incompetent decision of itself). Thus, the relationship between compliance with authority and competence to stand trial is unclear, if not paradoxical.

Age was related to risk appraisal and recognition, and to future orientation. The eleven- to thirteen-year-old group scored lower than both the sixteen- to seventeen-year-old and adult groups in recognizing risk; the fourteen- to fifteen-year-old group was not significantly different from any other group.²⁹² Similarly, eleven- to thirteen-year-olds reported fewer long range consequences than sixteen- to seventeen-year-olds; fourteen- to fifteen-year-olds and young adults were not significantly different from any other group.²⁹³

The MacArthur Study found that age and IQ were significantly related to MacCAT-CA scores, while prior experience in the justice system was unrelated and mental health problems were "largely" unrelated.²⁹⁴ Age remained a significant predictor of all subscale scores when IQ was controlled, but there were marginally significant interactions between IQ and age for both Understanding and Appreciation scores.²⁹⁵

The MacArthur group created *significantly impaired*, *mildly impaired*, and *not or minimally impaired* classifications as suggested by the MacCAT-CA performances:

The cut-off score for "clinically significant impairment" was set at the score equaling 1.5 standard deviations below the mean of the "presumed competent" samples in the original norming study. Performance above 1.0 standard deviation below the mean for those samples [was] considered to represent "minimal or no

²⁸⁹ *Id.* at 352-53.

²⁹⁰ *Id.* at 352 fig.9.

²⁹¹ *See id.* at 353.

²⁹² *Id.* at 353-54.

²⁹³ *See id.* at 354.

²⁹⁴ *Id.* at 346-47.

²⁹⁵ *See id.* at 348.

impairment.["] Scores between those two cut-offs were labeled "mild impairment."²⁹⁶

Based on this assumption the MacArthur group identified 30% of the eleven- to thirteen-year-olds, 19% of the fourteen- to fifteen-year-olds, and 12% of the sixteen- to seventeen-year-olds and adults as "significantly impaired" due to scores on the Understanding and Reasoning subscales.²⁹⁷ Overall, adults performed slightly worse than the sixteen- to seventeen-year-olds.²⁹⁸ The study found no variation in gender, ethnicity, SES, and geography, but lower IQ scores were correlated with worse performances on the MacCAT-CA.²⁹⁹

In the end, age was related to risk recognition and long-term consequence identification, in addition to performance on the MacCAT-CA.³⁰⁰ The MacArthur group admitted that they did not find large numbers of actual incompetent to stand trial adolescents since even "[a] score in the 'clinically significant impairment' range does not represent 'incompetence to stand trial.'"³⁰¹ This admission was necessary because the MacCAT-CA "assesses capacities that are relevant for the competence question, but not legal competence itself."³⁰²

Although the MacArthur group admitted that the study results had to be carefully interpreted, they emphasized that their study found that eleven- to thirteen-year-olds were "more than three times" (actually 2.5 times—30% vs. 12%) "as likely as young adults to be 'seriously impaired' on the evaluation of competence-relevant abilities," while those fourteen to fifteen years old "were twice" (actually 1.6 times—19% vs. 12%) "as likely as young adults to be 'seriously impaired.'"³⁰³ Success rates of 70% and 81%, respectively, for the eleven- to thirteen-year-olds and fourteen- to fifteen-year-olds were not sufficient to let them escape a suggestion from the MacArthur Study authors that they were presumptively incompetent: "Our results indicate that juveniles aged fifteen and younger are significantly more likely than older adolescents and young adults to be impaired in ways

²⁹⁶ MacArthur Research Network, *supra* note 187, at 21.

²⁹⁷ See Grisso et al., *supra* note 276, at 344, 356.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 344, 347-48.

³⁰⁰ *Id.* at 344, 353-55.

³⁰¹ MacArthur Research Network, *supra* note 187, at 21.

³⁰² Grisso et al., *supra* note 276, at 357.

³⁰³ MACARTHUR RESEARCH NETWORK, THE MACARTHUR JUVENILE COMPETENCE STUDY: SUMMARY 2 (2002), available at http://www.adjj.org/downloads/58competence_study_summary.pdf.

that compromise their ability to serve as competent defendants in a criminal proceeding."³⁰⁴

While technically accurate, this reporting style is very misleading. Imagine the report that would have been written by the MacArthur group had 90% of the eleven- to thirteen-year-olds, 95% of the fourteen- to fifteen-year-olds, and 99% of the sixteen- to seventeen-year-olds and adults passed the MacCAT-CA. All of these imagined defendants would have performed better than those in the MacArthur Study (and probably close to actual numbers). The DPs would report, however, that among the imagined defendants, eleven- to thirteen-year-olds were *ten times* as likely, while fourteen- to fifteen-year-olds were *five times* as likely as sixteen- to seventeen-year-olds and adults to be incompetent to stand trial.

Warren, Aaron, Ryan, Chauhan, and Duval studied 120 males between the ages of ten and seventeen who had been hospitalized for psychiatric treatment.³⁰⁵ They measured IQ via the K-BIT, and examined the severity of psychiatric symptoms (hallucinations, conceptual disorganization, depression, anxiety, motor retardation, emotional withdrawal, hostility, and uncooperativeness), and serious emotional or mental disorders among youths (anger, thought disorder, somatic complaints, drug/alcohol use, suicidal ideation, and depression).³⁰⁶ Ten (or 8%) of the participating sample had an IQ score below 60.³⁰⁷

Warren and her colleagues divided the youths into two groups: ages ten to thirteen (n = 40) and fourteen to seventeen (n = 80).³⁰⁸ The younger group had significantly higher scores on the Verbal (99.54) and Matrices (99.15) subtests of the K-BIT than the older youths (91.07 and 90.40, respectively).³⁰⁹ The older group also significantly differed in displaying more symptomatology than the younger one on the depression subscale of one psychiatric test as well as the alcohol/drugs, suicide, trauma, and total score of the MAYSI.³¹⁰

Perhaps the *better equipped* status of the younger juveniles explains why Warren and her colleagues found no significant differences between the younger and older groups on all the MacCAT-CA measures. IQ was found to have the strongest relationship to Understanding, Reasoning, and

³⁰⁴ Grisso et al., *supra* note 276, at 356.

³⁰⁵ Janet I. Warren et al., *Correlates of Adjudicative Competence Among Psychiatrically Impaired Juveniles*, 31 J. AM. ACAD. PSYCHIATRY & L. 299, 301 (2003).

³⁰⁶ *Id.* at 302.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 303 tbl.1.

³⁰⁹ *Id.*

³¹⁰ *See id.* at 303. The MAYSI is the Massachusetts Youth Screening Instrument.

Appreciation.³¹¹ The study concluded: "These findings suggest that some youths as young as ten years demonstrate a level of performance on the MacCAT-CA that is comparable in some ways to that of competent adults."³¹²

Viljoen's dissertation examined the interrogative and adjudicative competence of 152 detained defendants between the ages of eleven and seventeen (73 females; 79 males) awaiting trial. They were divided into three groups: ages eleven to thirteen ($n = 50$); fourteen to fifteen ($n = 51$); and sixteen to seventeen ($n = 51$).³¹³ Viljoen was interested in adolescents' predictions of how they would plead, accept a plea bargain, communicate with counsel, react if they disagreed with counsel, and appeal guilty verdicts. The sample was mostly white (60%), black (26.3%), or Hispanic (7.9%), with some representation of Native Indians (3.95%) and Asians (1.3%); most of the participants (63.2%) were classified as being at the two lowest SES levels (IV and V), the average age was 14.52, and the mean IQ score was a relatively low 82.57.³¹⁴

The researcher examined general intelligence and five broad cognitive clusters, including "comprehension-knowledge or verbal abilities (a measure of acquired knowledge), fluid reasoning (the ability to recognize patterns and make logical inferences), long-term retrieval (the ability to store and retrieve information), attention (the ability to attend to relevant information), and executive processing (the ability to plan and control behavior)."³¹⁵ She also measured psychopathology, including "depression-anxiety (. . . depressed mood and feelings of inferiority), psychomotor excitation (. . . hyperactivity and distractibility), and behavior problems (. . . hostility and manipulativeness)."³¹⁶

To gauge adjudicative competence, Viljoen used the Fitness Interview Test, Revised Edition (FIT-R), which is a semi-structured, clinical interview consisting of sixteen items divided into three sections: Understanding (knowledge of current charges, roles of key participants, etc.); Appreciation (understanding possible penalties, legal defenses, etc.);

³¹¹ See *id.* at 304 tbl.2.

³¹² *Id.* at 306.

³¹³ See Jodi L. Viljoen, *Police Interrogation and Criminal Adjudication of Child and Adolescent Defendants: Legal Abilities, Decisions, and Standards* 39-40, 71 tbl.1 (Apr. 2004) (unpublished Ph.D. dissertation, Simon Fraser University) (on file with Simon Fraser University).

³¹⁴ See Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253, 256 (2005). This article was one of two publications of Viljoen's dissertation.

³¹⁵ *Id.* at 256-57.

³¹⁶ *Id.* at 257.

and Communication (communicating facts, planning and engaging in the defense, challenging witnesses, and so on).³¹⁷ Viljoen also included several situational variables such as whether the defendant had confessed, had a private attorney, or had prior arrests, and also considered the perception of the evidence against the accused, and the number of weeks spent in custody.³¹⁸

Viljoen examined five cognitive clusters: verbal, retrieval, fluid reasoning, attention, and executive ability.³¹⁹ She discovered significant correlations between age and three of the five cognitive clusters (all but retrieval and fluid reasoning) as well as in general intellectual ability (GIA).³²⁰ The two youngest groups scored significantly lower than the sixteen- to seventeen-year-olds in GIA and attention; the youngest group scored significantly lower than the sixteen- to seventeen-year-olds on verbal and executive abilities.³²¹ The data show that the detained population in this study was well below average in the development of cognitive abilities.³²²

Age was also correlated with performance on the three subscales of the FIT-R. The youngest group scored significantly lower on all subscales than the two older groups.³²³ The fourteen- to fifteen-year-olds scored significantly lower on Understanding than the sixteen- to seventeen-year-olds, but not significantly lower on the Appreciation and Communication subscales.³²⁴

Viljoen found significant associations between age and GIA, as well as between GIA and legal abilities. Not surprisingly, "the association between age and legal . . . capacities decreased when GIA, in addition to age, was entered in the regression equations."³²⁵ Somewhat puzzling is that GIA was inversely associated with Understanding.³²⁶ Viljoen discovered that

³¹⁷ See *id.* at 258; see also RONALD ROESCH ET AL., FIT-R: FITNESS INTERVIEW TEST-REVISED (2006).

³¹⁸ Viljoen et al., *supra* note 314, at 256, 259.

³¹⁹ See Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 LAW & HUM. BEHAV. 723, 731 (2005). This article was the second publication of Viljoen's dissertation.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 732.

³²⁴ *Id.* Also scoring lower on the FIT-R were those who "showed evidence of attention deficits or hyperactivity, came from below average socioeconomic classes, and had spent limited time with their attorneys." See Viljoen, *supra* note 313, at 165.

³²⁵ Viljoen & Roesch, *supra* note 319, at 732.

³²⁶ See Viljoen et al., *supra* note 314, at 55.

previous arrests were associated with higher scores on understanding adjudicative proceedings, and that contact with attorneys (meeting with an attorney and time spent with one) was a strong predictor of legal capacities relevant to adjudication.³²⁷ Viljoen did not find an association between psychological symptoms (for example, depression, anxiety, or behavior problems) and adjudicative competency; ADHD was associated with ability to communicate with counsel. Females scored significantly lower than males on understanding adjudicative proceedings.³²⁸ SES was also related to legal abilities, even after intellectual deficits were controlled.³²⁹

Age was not related to the decision to plead.³³⁰ Most other variables were also not significantly related to cognitive abilities, the three areas of psychopathology, and most of the situational variables.³³¹ Of the latter, only perceived stronger evidence against the accused was linked with a decision to plead guilty for those in the fifteen-to-seventeen age group, and not for the eleven to fourteen age group.³³² Although none of the six clusters of cognitive abilities was associated with a plea decision or uncertainty in pleading, those with higher FIT-R scores in all subscales were significantly more likely to decide to plead one way or another as opposed to not being sure how to plead, which had much lower FIT-R scores.³³³

Viljoen found no age differences in the decision to accept a plea bargain, but males were significantly more likely than females to reject one, as were those with lower cognitive ability scores.³³⁴ Viljoen failed to mention that those who rejected the plea bargain also had lower cognitive ability scores (in all but general intelligence) than the group unsure about the plea bargain. But they also had FIT-R (or legal ability) scores that were higher than the unsure group, and were not significantly lower than the group accepting the plea bargain.³³⁵ While psychopathology was not related to the plea bargain decision, those with more prior arrests and who had spent more weeks in custody were significantly more likely to accept or reject a plea bargain than to be unsure about it. Stronger evidence against

³²⁷ See Viljoen & Roesch, *supra* note 319, at 732.

³²⁸ See *id.* at 738.

³²⁹ See Viljoen, *supra* note 313, at 60.

³³⁰ See Viljoen et al., *supra* note 314, at 264.

³³¹ See *id.*

³³² See *id.* at 265-66.

³³³ See Viljoen et al., *supra* note 314, at 264.

³³⁴ See *id.* at 266.

³³⁵ See *id.* at 267.

was linked to accepting a plea bargain, but only for fifteen- to seventeen-year-olds.³³⁶

Age was not related to the decision to disclose to the attorney, but gender and race were. Males and blacks/ethnic minorities were significantly more likely to say *no* or *unsure* to whether they would fully disclose to counsel.³³⁷ Among the situational variables, only the stronger perceived evidence (for older adolescents) was associated with a decision to disclose.³³⁸ Those inclined to disclose had significantly higher Appreciation and Communication scores on the FIT-R, but not significantly higher Understanding scores; they also had higher cognitive scores in four of the six areas, but not in Reasoning and Attention.³³⁹

The first time that age was correlated with a legal decision occurred when defendants were asked about what they would do if they had a disagreement with their attorneys.³⁴⁰ Defendants who responded they would go along with what the lawyer wanted or stated they believed they could get in trouble for disagreeing were identified as “compliant.” These individuals and those who were unsure what they would do were significantly more likely to be younger and from lower SES than youths who gave “assertive” responses (meaning they would talk to or instruct a lawyer). The compliant defendants were also significantly more likely to score higher on the psychomotor excitation index and to score lower on the FIT-R subscales and on most of the cognitive abilities areas—all but Reasoning and Executive Processing—than the assertive types.³⁴¹ The unsure defendants also were significantly lower on the FIT-R subscales and on most of the cognitive abilities areas (all but Reasoning) than assertive defendants, but there were no significant differences between these two types in the psychopathology variables.³⁴² The most interesting aspect of the data, ignored by Viljoen, is that the compliant defendants had the highest average prior arrest profile; perhaps they had learned that “taking on” the defense attorney in juvenile court was to no avail.³⁴³

Finally, defendants who would not seek an appeal or who were unsure about it were younger and scored significantly lower on the FIT-R subscales.³⁴⁴ There were no significant differences in any of the other

³³⁶ See *id.* at 265-66.

³³⁷ *Id.* at 267 tbl.5.

³³⁸ *Id.*

³³⁹ *Id.* at 267.

³⁴⁰ *Id.* at 268.

³⁴¹ *Id.* at 269.

³⁴² See *id.* at 268-69.

³⁴³ See *id.* at 269.

³⁴⁴ *Id.* at 270.

demographic variables, in any of the situational variables, in any of the cognitive abilities areas, and in any of the psychopathology contexts.³⁴⁵

Viljoen created categories of impairment based on her FIT-R data. She determined that scores of two or more standard deviations below adult means or "norms" on one or more scales of the FIT-R meant the juveniles in her study were impaired, or incompetent to stand trial.³⁴⁶ Viljoen found 85.5% of the eleven- to fourteen-year-olds and 53.9% of the fifteen- to seventeen-year-olds to be impaired.³⁴⁷ She then re-estimated the impaired population using so-called adolescent norms.³⁴⁸ This figure was achieved by establishing a cut-off score at two standard deviations below the mean scores attained by the juvenile study sample on the FIT-R.³⁴⁹ The percentage of youths considered impaired decreased markedly (16.2% of eleven- to fourteen-year-olds; 2.8% of those aged fifteen to seventeen) under the adolescent norms formula.³⁵⁰ Finally, Viljoen created a third, "proposed" standard based on a recommendation that youths prosecuted within the juvenile system need only a "basic understanding of the purpose of the proceedings" as well as an ability to "communicate rationally with counsel."³⁵¹ How this "standard" differs from the *Dusky* requirements is unclear and unexplained. Viljoen declared that sample youths who fell three or more standard deviations below adult means on Understanding and Communication were impaired.³⁵² This "proposed standard" produced a rate of impairment (73.3% of eleven- to fourteen-year-olds; 40.8% of fifteen- to seventeen-year-olds) that fell between the other two standards.³⁵³

Viljoen acknowledges the arbitrary nature of the determination of impairment and that "[i]t is likely that the rates of incompetency are substantially lower than the rates of impairment found here."³⁵⁴ Although age yielded different responses to some of the legal decisions facing the sample, poor legal abilities—that is, low FIT-R scores—factored into more problematic or controversial responses, such as rejecting a plea bargain and an opportunity to appeal the case, and not disclosing information to or failing to discuss disagreements with an attorney. Most disturbing is that

³⁴⁵ See *id.*

³⁴⁶ See Viljoen, *supra* note 313, at 95.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 96-97, 113.

³⁴⁹ *Id.* at 95-96.

³⁵⁰ *Id.* at 96-97, 113.

³⁵¹ These criteria were borrowed from Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL*, *supra* note 111, at 73.

³⁵² Viljoen, *supra* note 313, at 96-97, 113.

³⁵³ See *id.*

³⁵⁴ *Id.* at 106.

males and ethnic minorities said they were less likely to trust defense attorneys and to disclose information to them.³⁵⁵

Poythress, Lexcen, Grisso, and Steinberg compared two male, detained groups of sixteen- and seventeen-year-olds with a male, jailed adult offender sample. One of the juvenile groups had been transferred to adult court by prosecutors, while the second had been prosecuted in juvenile court. The transferred youths (n=105) was a secondary sample associated with the MacArthur Study, while the youths from juvenile court (n=118) and the adult defendants (n=165) were two comparison samples drawn from the original MacArthur Study.³⁵⁶ The researchers used the Understanding and Reasoning subscales from the MacCAT-CA; they also employed a so-called RRI, which refers to "recogniz[ing] relevant information."³⁵⁷ Specifically, the RRI involves the defendant's ability "to distinguish information that is more, or less, relevant to constructing a legal defense and [to] be able to explain why that information has potential legal relevance."³⁵⁸

The transferred youths outperformed the adults on all three measures related to the MacCAT-CA (Understanding, Reasoning, and RRI), and were significantly better on Understanding; those prosecuted in juvenile court outperformed the adults on two of the measures (Understanding and RRI), while they tied on the third (Reasoning).³⁵⁹ The study also utilized the MacArthur Judgment Evaluation (MacJEN). There were no significant differences among the three groups concerning consultation with a public defender, but the youths prosecuted in juvenile court were less likely to recommend full disclosure to a private attorney compared to the other two groups.³⁶⁰ Although those prosecuted in juvenile court displayed nearly equal or superior Understanding and Reasoning (and RRI) as the other two groups, they were most likely to be reluctant to fully disclose to private attorneys.³⁶¹ This suggests that age does not explain hesitancy in confiding in these defense attorneys. Lastly, as to psychosocial factors, the MacJEN revealed no significant group differences in risk recognition, risk impact, and future orientation; adults were significantly higher than the juvenile court group on risk likelihood, while transferred youths were slightly higher

³⁵⁵ See Viljoen et al., *supra* note 314, at 266-68, 271.

³⁵⁶ See Norman G. Poythress et al., *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 LAW & HUM. BEHAV. 75, 76-79 (2006).

³⁵⁷ *Id.* at 85-86.

³⁵⁸ *Id.* at 80.

³⁵⁹ See *id.* at 85.

³⁶⁰ See *id.* at 86-87.

³⁶¹ *Id.* at 87 tbl.3.

than juvenile court youths in this category.³⁶² Transferred youths were also significantly higher than the juvenile court group and the adults in their mean score on resistance to peer influence.³⁶³ The researchers concluded:

This examination of 16–17-year old defendants transferred to criminal court by direct file found few differences between them and 18–24-year old criminal defendants in competence-related abilities and developmental characteristics with potential significance for decision making in the legal process. Where differences existed, they suggested somewhat better performance for the Direct File sample than for the Adult Defendant sample. The results of this study, therefore, provide no basis for concern that direct-file mechanisms in the transfer to criminal court of 16–17-year old male adolescents, who, as a result of immaturity, have impaired competence-related abilities relative to those of adults.³⁶⁴

Ficke, Hart, and Deardorff studied 247 detained youths who were mostly minorities (66% black, 31% white) and males (81%), between the ages of nine and eighteen.³⁶⁵ They divided the youths into four age groups: nine to twelve (n = 26); thirteen to fourteen (n = 74); fifteen to sixteen (n = 100); and seventeen to eighteen (n = 47).³⁶⁶ Ficke and her colleagues constructed an estimated intelligence score, measured academic achievement skills (reading, spelling, and math), and assessed psychiatric symptoms.³⁶⁷

The oldest group differed significantly from the others in three major variables; the seventeen- to eighteen-year-olds had a higher estimated IQ, better math and reading skills, and more charges (or juvenile court history).³⁶⁸ The three younger groups did not differ among themselves in the IQ or math and reading skills. The youngest group had significantly higher scores on the psychiatric tests than the other groups, indicating a greater likelihood of displaying problematic behavior (hostility, lack of cooperation, and being manipulative) and motor excitation (hyperactivity and distractibility).³⁶⁹

Ficke and her colleagues employed the MacCAT-CA to gauge competency to stand trial. Although they found no differences between boys and girls, the data revealed “a small but significant relationship between age and estimated IQ Age also correlated significantly with

³⁶² *Id.* at 88 tbl.4.

³⁶³ *See id.* at 87.

³⁶⁴ *Id.* at 88.

³⁶⁵ *See* Susan LaVelle Ficke, Kathleen J. Hart & Paul A. Deardorff, *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA)*, 34 J. AM. ACAD. PSYCHIATRY & L. 360, 363 (2006).

³⁶⁶ *Id.* at 363–64.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 364.

³⁶⁹ *See id.*

achievement skills and number of charges.”³⁷⁰ Estimated IQ correlated significantly with both academic skills and the three subscale scores of the MacCAT-CA.³⁷¹ Age also was significantly related to the MacCAT-CA scores, but the correlation was weaker than the IQ, math, and reading skills.³⁷² While the nine- to twelve-year-old group scored significantly lower than all other age groups on all three scales, there were no significant differences between the remaining age groups on any of the scales.³⁷³ Neither prior juvenile court history nor developmental maladjustment—such as depression, withdrawal, disorientation, anxiety, hallucinations, and delusions—was related to the MacCAT-CA scores.³⁷⁴

The researchers then used MacCAT-CA scores to estimate the percentage of “clinically significant” impaired youth. In the Understanding subscale, the nine- to twelve-year-old group had a much higher rate (almost 62%) than the thirteen-to-fourteen-, fifteen-to-sixteen-, and seventeen-to-eighteen-year-old groups (between 14% and 22%).³⁷⁵ The same held in the Reasoning subscale where the nine- to twelve-year-old group had a much higher rate (50%) than the thirteen-to-fourteen-, fifteen-to-sixteen-, and seventeen-to-eighteen year-old groups (14% to 22%).³⁷⁶ Ficke and the other researchers acknowledged that their results were worse than other studies and said that this could be due to the low IQ (mean = 76.17) of their sample (especially for the nine- to twelve-year-olds), which was much lower than other studies (for example, the MacArthur study mean IQ was 86).³⁷⁷ They also admitted the limits of the MacCAT-CA’s ability to determine competency to stand trial and that the relatively high numbers of incompetent to stand trial juveniles are inflated.³⁷⁸

D. THE CASE, SUCH AS IT IS: A SUMMARY OF THE JAI RESEARCH

Thus far, the DPs’ research has not supported their claim that juveniles are incompetent to stand trial in criminal court. Examination of arguably the most salient and significant variable in this inquiry, scores on various competency tests, has produced divided results. Age has been found *related* and *not related* to these scores. The relationship between age and various factors has also produced conflicting results. Thus, factors such as

³⁷⁰ *Id.* at 365-66.

³⁷¹ *Id.* at 366 tbl.2.

³⁷² *Id.* at 366, 367 tbl.3.

³⁷³ *See id.* at 367.

³⁷⁴ *See id.* at 366, 370.

³⁷⁵ *Id.* at 368.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 372.

³⁷⁸ *See id.* at 367-69, 372.

peer attachment or influence, accepting a plea bargain, risk perception, risk appraisal, risk recognition, risk preference, and future orientation or temporal perspective *have* and *have not* been associated with age. Otherwise, age has been found related—but not significantly—to understanding the defense attorney's role, and to responsibility and consideration of others, but not in a linear fashion and with no adverse effects on performance in the MacCAT-CA. Age was associated with not agreeing with counsel and with not seeking an appeal.

The list of variables with which age has been found to be *not associated* includes emotional distress, decisional temperance (including sensation seeking, impulse control, and suppression of aggression), perspective, trust in one's lawyer or in people in authority, disclosure to counsel, decision to plead, and parent attachment.

The relationship between a number of variables and performance on various competency tests has also yielded mixed results. Studies have divided in finding a correlation between competency scores and previous juvenile court history, and gender, race, or socioeconomic status. Although competency scores have not been correlated with depression, anxiety or thinking disturbance, mental health problems, or mental health services history, they have been correlated with previous severe mental health diagnosis or treatment and mental retardation.

Years of education have not been related to competency scores, but education level has, as have high school grades and remedial or special education. By far, the most consistent and significant, and logically expected, variable found to be related to competency scores is IQ score. Other, more esoteric factors found to be related to competency scores range from poor performance on motor coordination, to a history of disrupted family structure, to mother or sibling history of criminal conduct, to the number and length of contacts with the defense attorney. Most of the JAI research has continuously delivered the message that the vast majority of juveniles are competent to stand trial. Many are even equal to adults in competency performance measures, from very young ages such as eleven to thirteen years old and especially by fourteen and fifteen years of age. Furthermore, sixteen- and seventeen-year-olds have consistently outperformed the adults on the MacCAT-CA.

IV. THE OBSTACLE: SEVERAL PROBLEMS SURROUNDING THE CLAIM THAT JUVENILES ARE INCOMPETENT TO STAND TRIAL

The DPs have relied upon several interrelated and faulty premises in developing the claim that juveniles are incompetent to stand trial in criminal court.

A. DPS' FAULTY PREMISES ABOUT JUVENILES' COMPETENCY TO STAND TRIAL

1. That Competency to Stand Trial Is Relative or That There Are Degrees of Competence

Choosing to identify the defendant who is legally capable of being tried as competent to stand trial may have been an unfortunate description to adopt. It can easily lead to misinterpretation, as competence is a relative term. However, "competent to stand trial" is a legal standard imposing a threshold. The Supreme Court put any notion of relativity to rest long ago:

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, . . . the Due Process Clause does not impose these additional requirements.³⁷⁹

In retrospect, it might have been wiser to label the defendant "certified" or "eligible" to stand trial. Defendants would not likely be considered more or less certified or eligible to stand trial. Some defendants are more competent than others in performing certain tasks, such as remembering the incident or communicating with counsel. To that extent, some defendants are "better" or more effective than others; defendants have not been created equal in abilities. Once defendants have passed the necessary—that is, *Dusky*—threshold they are competent to stand trial; none is "more competent to stand trial" than others. Similarly, defendants must waive rights voluntarily with an understanding of the consequences of the waiver. While some defendants feel less pressure, are more intelligent, and possess a better understanding of the implications behind a waiver than others, surrender of rights by the better equipped is not "more valid" than when made by the lesser equipped.

A parallel situation can be seen in licensed automobile drivers. Some drivers are better than others at performing certain driving-related tasks, and there are some incompetent drivers, but that does not mean that some are "more licensed to drive" than others. Once all drivers pass the necessary minimum threshold, they occupy the same legal status as a licensed driver. There would have been much confusion if authorized drivers were identified as competent to drive instead of licensed to do so.

Casting competency to stand trial as a relative or continuous entity is central to the DPS' assertion that juveniles are incompetent to stand trial in criminal court. It is incorrect and a misrepresentation of the legal concept.

³⁷⁹ *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

In the end, defendants have a right to equal justice, but, contrary to the DPs' suggestions, there is no right to be as equally capable as others in performing as an accused at trial.

2. That Juveniles on Average Are Less Competent to Stand Trial Than Adults Means That All Juveniles Are Incompetent to Stand Trial

The DPs, again relying upon relativity to construct another flawed premise, argue that by sometimes registering lower scores than adults in some competency tests, juveniles revealed themselves to be less competent to stand trial as a group:

The scores that were earned by juveniles on the MacCAT-CA were not equal to those of adults which indicates that juveniles do not adequately understand all of the issues that are involved in competence to stand trial.³⁸⁰

Similarly, after acknowledging that adults have deficiencies, Professor Grisso asserts:

The question for policy and judicial decisions about juvenile competence, therefore, is not whether they have deficits in these areas, but whether their deficits are sufficiently great to render them *less capable* of participating in their defense than is the average adult defendant. Do adolescents' capacities relevant for trial competence differ on average from those of adults?³⁸¹

The juvenile-as-*lesser something-than-an-adult* argument prevailed recently in *Roper v Simmons*.³⁸² In *Roper*, the Court held that the lesser culpability of a juvenile murderer as compared to an adult murderer exempted juvenile murderers from the death penalty as a categorical rule.³⁸³ Three critical differences exist between juvenile culpability and juvenile competency, however, which make an extension of the *Roper* logic to competency to stand trial inappropriate. First, unlike competency, culpability has long been recognized as relative, such that aggravating and mitigating circumstances, such as youth, should affect sentencing.³⁸⁴ Inasmuch as there needs to be proportionality between culpability and punishment (and offense), especially in capital cases, it is hardly astonishing that the Supreme Court would find that juveniles are generally less culpable than adults and less deserving of the ultimate punishment.³⁸⁵ The lesser culpability of juveniles was the cornerstone of the founding of

³⁸⁰ Burnett, *supra* note 223, at 88.

³⁸¹ Grisso, *supra* note 107, at 29.

³⁸² 543 U.S. 551, 570-71 (2005).

³⁸³ *Id.* at 573-75.

³⁸⁴ See Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (2003).

³⁸⁵ See *id.*

juvenile court.³⁸⁶ Competency to stand trial is not a matter of proportionality, however; it is equally necessary for the prosecution of crime in juvenile *and* criminal court. Moreover, whereas most (if not all) fourteen- and fifteen-year-old murderers could demonstrate lesser culpability vis-à-vis adult murderers (everything being relative in culpability), most (if not all) fourteen- and fifteen-year-old juvenile murderers would be competent (unless the elements of competency are radically redefined).

Second, the major substantive difference is that while lack of maturity and responsibility, susceptibility to peer pressure, and a less developed character (among other things) certainly affect culpability, they do not have relevance to one's being able to comprehend the trial proceedings and to assist counsel. Diminished culpability does not mean diminished competency. It is one thing to be unable to execute a fourteen- and fifteen-year-old murderer where a very substantial prison sentence is still available; it is quite another to not be able to prosecute a fourteen- and fifteen-year-old murderer in criminal court.

Third, the Supreme Court's methodology in establishing a categorical exemption for the juvenile death penalty followed the precedent it had established for the execution of the mentally retarded in *Atkins v Virginia*.³⁸⁷ In both cases the Court relied upon a national trend in state legislation toward prohibiting the death penalty for the two populations. In the competency arena, however, the national trend in legislation and case law is to retain traditional *Dusky* elements in determining competency, to apply *Dusky* to both juvenile and criminal courts, *and* to permit the prosecution of rather young chronic and violent juvenile offenders in criminal court under *Dusky* requirements.

Competency to stand trial is an individual phenomenon and not a categorical or group one. In order to be found incompetent to stand trial, it is not enough that juveniles merely differ or are generally less capable than adults. Individual juveniles must be incapable. There can be little doubt that there is a difference between the two populations generally and that youths overall are less capable than adults in many legal endeavors; more youths overall would likely be found to be incompetent to stand trial when compared to adults. The same can apply within categories of adults with regard to mental ability, educational attainment, gender, class, race, or age. If the DPs' logic carries, broad categories of adults will be incompetent to stand trial vis-à-vis other categories of adults. Higher percentages of men

³⁸⁶ See Daniel P. Mears et al., *Public Opinion and the Foundation of the Juvenile Court*, 45 CRIMINOLOGY 223, 224 (2007).

³⁸⁷ 536 U.S. 304 (2002).

could be less capable of organized thinking and thus incompetent to stand trial as compared women. If the mentally ill or retarded as a group scored lower than the "average adult" on competency tests, *all* those with these mental disabilities would be incompetent to stand trial. Evidently, this finding would be even more necessary if that population scored lower than the "average juvenile." There is no necessary end to comparison groups. Age could prove to be a factor. Twenty-year-olds may not be as competent as fifty-year-olds, while forty-year-olds may be less competent than seventy-year-olds. Assuming a fairly bright group of retirees can be located and tested as a comparison group, as long as their scores were better than younger adults, it might be impossible to prosecute anyone younger than sixty years old.

Another problem with this premise is that juveniles of the same age are not necessarily on the same developmental page. There will be considerable variation in the capabilities of all fifteen-year-olds, some of whom will be more capable than some adults. As Grisso notes, they will differ markedly in their ability—and inclination—to:

- take an active role in decision making and monitoring the trial process;
- consider both short-range and long-range consequences when making decisions;
- respond to assistance offered by parents and attorneys; and
- manage their behavior both inside and outside the courtroom³⁸⁸

Thus, there could be sub-groups of juveniles less competent than other juvenile groups (who, in turn, could be more competent than some groups of adults). Perhaps public school-educated adolescents, overall, would not fare as well as private school students. Or perhaps delinquents would score lower, on average, than non-delinquents on competency tests; if so, then no delinquent would ever be able to stand trial.

A defendant must be personally and individually incompetent to stand trial, not just the member of a group that overall or collectively has more incompetent members than some other group. Competency to stand trial is about thresholds, not about relative abilities or relative standings. That is, *all* defendants who fulfill the *Dusky* requirements are competent to stand trial, regardless of whether one group of these defendants is better equipped than another generally in terms of satisfying the *Dusky* criteria. Otherwise, all juveniles would escape from criminal liability simply because some of them—and not necessarily the ones who are facing trial—fall below the

³⁸⁸ Grisso, *supra* note 125, at 143.

average adult's capability or score. The adults who fall below the average juvenile and adult scores, perhaps significantly, but who are above the *Dusky* threshold are competent to stand trial, so why would juveniles, en masse, be incompetent to stand trial and collectively receive a walk?

Finally, what is most ironic and problematic about this premise is that while juveniles tended to perform less well than adults in *some* aspects of *some* of the tests in *some* of the research studies, overwhelming majorities of *all* youths scored above the threshold acknowledged as competent by the DPs. Thus, vast majorities of all study participants were competent to stand trial even though adolescents may have been less clearly above the threshold than adults in general. An analogy could be drawn to research comparing delinquents' and non-delinquents' school performance. If a study found delinquents (with an average grade of 75) were overall less academically accomplished than non-delinquents (with an average grade of 85), delinquents, as a class, could be labeled failures despite their average passing grade, and even though an overwhelming majority could have graduated.

3. That Some or Most Juveniles of a Certain Age Are Actually Incompetent to Stand Trial Means All Juveniles of That Age Are Incompetent to Stand Trial

The DPs rely again on the group idea in suggesting that simply because some or perhaps most youths of a particular age—for example, eleven to thirteen years old—would be found incompetent to stand trial, that amounts to a determination that all youths of that age should be considered incompetent. Ironically, the vast majority (70%) of adolescents of this age were competent to stand trial, according to the MacArthur Study.³⁸⁹ This did not prevent the authors of that study from concluding, however, that no juveniles of that age group should be transferred to criminal court due to being incompetent to stand trial in that forum, even though only 30% were “significantly impaired.”³⁹⁰

According to this logic, if 30% or perhaps less of the mentally ill or retarded population were to be found incompetent to stand trial, that would mean *no individual* with this designation could be prosecuted for any crimes. But even mentally disabled defendants with significant difficulties in comprehension and communication must individually be found incompetent to stand trial.

³⁸⁹ See Grisso et al., *supra* note 276, at 344.

³⁹⁰ See *id.*

4. That Competency to Stand Trial Is About Maturity of Judgment and Perfect Defendants

Historically, competency to stand trial has focused upon the defendant's cognitive capacities. Research has demonstrated that juveniles, particularly those fourteen and fifteen years of age and older, have cognitive capacities that rival adults when it comes to making decisions about and consenting to medical procedures.³⁹¹ Moreover, adolescents aged fifteen and older are no more likely than adults to suffer from what is called the "personal fable" (the belief that one's behavior is not governed by the same rules of nature that apply to everyone else), and are no less likely than adults to employ rational algorithms in decision-making.³⁹²

Because the cognitive focus has failed to demonstrate that large numbers of juveniles are incompetent to stand trial, the DPs have broadened and shifted the inquiry to maturity of judgment.³⁹³ There are no limits to what maturity of judgment can include: self-reliance or healthy autonomy, the ability to understand the complexity of a situation and to place it in a broader context, temperance or the ability to limit impulsivity, the ability to resist peer pressure, an appropriate attitude toward and perception of risk, or a balance of short-term and long-term perspectives.³⁹⁴ Moreover, juveniles' judgment can be slightly less developed or immature as compared to adults in any of these areas, and they can qualify as incompetent to stand trial. One DP, who has boldly asserted that "juveniles do not have the requisite competency to stand trial in criminal court,"³⁹⁵ described a juvenile defendant (who killed two and wounded thirteen at Santana High School in Santee, California):

Williams made a subjectively rational decision, yet had he exercised the requisite responsibility, autonomy, perspective and temperance, he would have demonstrated a more reasonable, mature sense of judgment. Therefore, adolescent choice to

³⁹¹ See, e.g., Ambuel & Rappaport, *supra* note 123; Ronald W. Belter & Thomas Grisso, *Children's Recognition of Rights Violations in Counseling*, 15 PROF. PSYCHOL. RES. & PRAC. 899 (1984); Grisso & Vierling, *supra* note 124; Lewis, *supra* note 123; Weithorn & Campbell, *supra* note 123.

³⁹² See Elizabeth Cauffman, Jennifer Woolard & N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPAC L. REV. 403, 407 (1999).

³⁹³ See *id.* at 407-10.

³⁹⁴ See, e.g., Cauffman & Steinberg, *supra* note 95; Scott, Reppucci & Woolard, *supra* note 99; Taylor-Thompson, *supra* note 103.

³⁹⁵ Tamara Wong, Comment, *Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity to Stand Trial*, 6 U.C. DAVIS J. JUV. L. & POL'Y 163, 165 (2002).

participate in criminal activity reflects immaturity of judgment despite the display of a seemingly cognitive decision-making processes.³⁹⁶

According to this perspective, juvenile criminality must be regarded as irresponsible, immature behavior for which youths are entitled to immunity from criminal prosecution.

Juvenile incompetency to stand trial can also stem from lack of empathy and an inability to take another's perspective³⁹⁷ or an inability to tolerate the stress of trial or to behave appropriately in court,³⁹⁸ including having "some capacity to tolerate shame, humiliation, loss of respect, disapproval, and guilt."³⁹⁹ Moreover, defendants must be motivated to self-defense (for example, questioning the permissibility of guilty pleas), and must be able to appraise the likely outcome of the proceedings.⁴⁰⁰ It is also not enough that juveniles simply appreciate the prospect of conviction and punishment, they must be able to gauge whether the judge will treat them more or less fairly than other defendants charged with the same crime. Other factors include a youth's suggestibility, parental influence, and the defense attorney's personality characteristics.⁴⁰¹ In effect, the DPs want an idealized defendant, a veritable Philosopher King, in order to be competent to stand trial. More than just adult-like maturity, juveniles must also possess wisdom and emotional stability.⁴⁰² Thus, juveniles would have to be both competent and extremely effective in order to stand trial in criminal court.

³⁹⁶ *Id.* at 175-76 (citations omitted).

³⁹⁷ See Grisso, *supra* note 125.

³⁹⁸ See, e.g., THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1988); GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2d ed. 1997); RICHARD E. REDDING, *ADJUDICATIVE COMPETENCE IN JUVENILES: LEGAL AND CLINICAL ISSUES* (2000) (on file with author).

³⁹⁹ Lois B. Oberlander, Naomi E. Goldstein & Caleb N. Ho, *Preadolescent Adjudicative Competence: Methodological Considerations and Recommendations for Practice Standards*, 19 BEHAV. SCI. & L. 545, 558 (2001).

⁴⁰⁰ See GRISSO, *supra* note 398; MELTON ET AL., *supra* note 398.

⁴⁰¹ See Jennifer Woolard, *Understanding Violence from a Developmental Perspective*, (Univ. of Fla. Ctr. for Studies in Criminology & Law, Position Paper, 2001) (on file with author).

⁴⁰² Bonnie and Grisso express concern that juveniles might not appreciate the impact of their appearance and demeanor on fact-finders, and that this might place them at a disadvantage vis-à-vis adults. See Bonnie & Grisso, *supra* note 351, at 89. Meanwhile, Zapf and Roesch explain that a defendant's being angry, anxious, or agitated could interfere with an ability to talk to a lawyer or to testify in court. See Patricia A. Zapf & Ronald Roesch, *An Investigation of the Construct of Competence: A Comparison of the FIT, the MacCAT-CA, and the MacCAT-T*, 29 LAW. & HUM. BEHAV. 229, 247 (2005).

As late as 2000, the DPs acknowledged that there was a meaningful distinction between adjudicative competence (which was also recognized then as binary or non-relative) and effectiveness of participation. Grisso explained:

Adjudicative competence directs us to examine the degree to which defendants are at risk of having deficits that seriously jeopardize their defense in ways that have constitutional implications, and the decision regarding this question is *binary*: the individual either is or is not competent to proceed to trial. In contrast, *effectiveness of participation* focuses on a continuum of lesser to greater capacities for contributing to one's defense, and it provides a foundation for seeking ways to maximize defendants' effectiveness.⁴⁰³

Similarly, Woolard and Reppucci declared:

Effective participation goes beyond the consideration of constitutionally required capacities to include those capacities that might affect the nature and quality of a defendant's participation but *do not cross the threshold of incompetence to stand trial*⁴⁰⁴

Finally, Schmidt, Reppucci, and Woolard spent considerable energy distinguishing competency from effectiveness by explaining that there is:

[A]n interesting distinction between the concept of *adjudicative competence* as it is legally defined and the notion of *effective participation* as a defendant. Whereas the legal definition of adjudicative competence establishes a minimum standard of required capacities for a defendant's case to go forward, effective participation encompasses abilities beyond those that are constitutionally required that may influence the quality and nature of a defendant's participation in the trial process without crossing the threshold for legal competence In particular, youths who have the cognitive capacities required to meet the formal legal criteria for competence to stand trial under the *Dusky* standard may nevertheless possess certain developmental characteristics that impair their effective participation as trial defendants⁴⁰⁵

Despite these acknowledgments, the DPs have merged effectiveness with competence. Today under the DPs' approach, juveniles need to display both traits to be competent to stand trial.

For example, any waiver of rights by a juvenile stems from incompetency unless it occurs through seasoned reasoning, and is also compatible with DPs' expectations:

[W]hen making a decision about waiver of important rights, defendants are free to place a primary value on their immediate gratification at the expense of their future welfare, or to opt to please their friends rather than act in their best interests, as long

⁴⁰³ Grisso, *supra* note 125, at 141 (emphasis added).

⁴⁰⁴ Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, in *YOUTH ON TRIAL*, *supra* note 111, at 173, 177 (emphasis added).

⁴⁰⁵ Schmidt, Reppucci & Woolard, *supra* note 260, at 176-77 (citations omitted).

as they adequately understand and grasp the consequences of their choices. But if adolescents place a relatively higher value on immediate gratification than do adults as a consequence of their developmental immaturity, they may make different legal choices than they themselves would make in their adult years.⁴⁰⁶

The DPs have created the perfect criterion for keeping juvenile defendants from ever being found competent to stand trial in the maturity of judgment theory. First, the maturity requirement is immeasurable. Adolescents mature at different rates and times, and can even experience periods of regression. In short, they are all over the "maturity map."⁴⁰⁷ Not only are youths ever shifting within the maturity spectrum, but the inventors of the maturity of judgment theory admit that the maturity elements are variable as well and are dependent upon context:

Although we are attempting to formulate a general model of maturity of judgment that can be applied across a variety of situations, we recognize that whether an individual actually demonstrates responsibility, temperance, or perspective when faced with a particular decision likely depends on the nature of the situation and the social context of the decision. The same adolescent may in some situations behave responsibly, while in others, irresponsibly; show temperance under certain conditions but impulsively under others; and demonstrate perspective in some circumstances but short-sightedness in others. We believe therefore that responsibility, temperance, and perspective are best considered as *dispositions* to behave in a given way *under particular conditions*, rather than as fixed abilities or competencies that are displayed independently of context.⁴⁰⁸

Moreover, there is no agreement as to what constitutes maturity or how maturity is best measured.⁴⁰⁹ Thus, gauging maturity is a very subjective analysis that will vary considerably among evaluators. Using such a requirement as the basis for a competency determination would create serious equal protection problems in that the determination of competency would depend upon the particular examiner involved.

⁴⁰⁶ Grisso et al., *supra* note 276, at 335. Years ago, Professor Bonnie noted that a defendant's motives for various actions are irrelevant and that a defendant's reasons for waiving a right have relevance only if they involve coercive threats. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 573 (1993). His theory is important to the DPs because he expanded the focus of what is required to be competent to stand trial by creating the concept of adjudicative competence.

⁴⁰⁷ See Laurence Steinberg & Elizabeth Cauffman, *Adolescents as Adults in Court: A Developmental Perspective on the Transfer of Juveniles to Criminal Court*, 15 SOC. POL'Y REP., Issue 4, at 3, 4-5 (2001); Steinberg & Schwartz, *supra* note 111, at 24.

⁴⁰⁸ Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 252 (1996).

⁴⁰⁹ See Eileen P. Ryan & Daniel C. Murrie, *Competence to Stand Trial and Young Children: Is the Presumption of Competence Valid?*, 5 J. FORENSIC PSYCHOL. PRAC. 89 (2005).

Adding to the measurability problem, reliance upon the maturity criterion places the judge completely at the mercy of the examiner. Competency analysis has already been severely criticized due to judges' overreliance upon the examiner's opinion.⁴¹⁰ Arguably, that overreliance is indefensible and unnecessary as judges themselves are qualified to estimate a defendant's ability in order to satisfy *Dusky*—that is, to assess basic comprehension and communication abilities.⁴¹¹ Basing competency on maturity will compound the overreliance since judges will not personally be able to gauge maturity status.

More important, the requirement that juveniles have to be as mature as adults is unattainable for juveniles. Being found incompetent to stand trial is guaranteed as juveniles cannot have as developed or as matured a sense of judgment as do adults. DPs easily assert that no juveniles under the age of eighteen think now the same way they would if they were much older.⁴¹² Since the only truly or fully competent defendant is the fully matured defendant, no one would be able to be prosecuted before he or she fully matured.

DPs posit that juveniles must have a *stable identity*.⁴¹³ Youths at the beginning or middle stages of identity development can make choices that differ from what they would have chosen after their identity was more stabilized. Even when juveniles have cognitive abilities that rival those of adults, DPs can argue that these youths will not be able to apply those abilities as well as adults when they are in new, ambiguous, or stressful situations. This is because the cognitive abilities are less well-developed

⁴¹⁰ See, e.g., Bruce A. Arrigo & Mark C. Bardwell, *Law, Psychology, and Competency to Stand Trial: Problems with and Implications for High-Profile Cases*, 11 CRIM. JUST. POL'Y REV. 16 (2000); Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions About Competency*, 28 LAW & PSYCHOL. REV. 108 (2004); Keith R. Cruise & Richard Rogers, *An Analysis of Competency to Stand Trial: An Integration of Case Law and Clinical Knowledge*, 16 BEHAV. SCI. & L. 35 (1998); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competency to Stand Trial*, 47 J. CLINICAL PSYCHIATRY 29 (1986).

⁴¹¹ Grant H. Morris, Ansar M. Haroun & David Naimark, *Assessing Competency Competently: Toward a Rational Standard for Competency-To-Stand-Trial Assessments*, 32 J. AM. ACAD. PSYCHIATRY & L. 231, 243 (2004).

⁴¹² See, e.g., Lyle, *supra* note 249, at 15; Schmidt, Reppucci & Woolard, *supra* note 260, at 179. For example, Bonnie and Grisso claim: "This tendency could lead them to make choices in the adjudicative process . . . that do not reflect the values that they would bring to bear on the judgment a few short years later when they become adults." Bonnie & Grisso, *supra* note 351, at 88. Similarly, Grisso wonders, "[W]hat if the individual's choices reflected preferences based on a temporary set of values sure to change in a short time?" Grisso, *supra* note 125, at 160.

⁴¹³ See Grisso, *supra* note 107, at 32.

due to their recent acquisition.⁴¹⁴ For example, the DPs offer an illustration that purports to demonstrate incompetence in a juvenile defendant. The theoretical case involves a sixteen-year-old charged with felony murder and facing a twenty-five-year minimum sentence. He refused a plea bargain offer of a seventeen-year sentence despite the presence of strong evidence indicating guilt. This decision illustrates the youth's incompetency, according to DP logic:

Discussion with the examinee indicated that his decision making regarding the plea agreement and his insistence to go forward with a trial was significantly affected by his consideration of the 17-year sentence in light of his own age, and he specifically stated that the sentence was for a period of time longer than he had lived. Thus, although this 16-year old 'knew' that he faced a minimum of 25 years in prison if he was convicted, and he understood that a conviction was highly likely, his decision making was affected by his age and appreciation of time and was likely quite different than the decision making and appreciation of a 32-year-old male who might find himself in the same predicament.⁴¹⁵

How and why the thinking of a thirty-two-year-old became the essence of competency is not explained by the authors. The DPs admit that few adults are perfect defendants.⁴¹⁶ The thinking of the sixteen-year-old may or may not have been different than that of a thirty-two-year-old. It certainly would not be strange to find many thirty-two-year-olds making the same decision to go to trial. Moreover, a "different" decision does not equate to an incompetent decision. Conviction and a twenty-five-year minimum sentence were highly likely, but not guaranteed. A clearly thinking sixteen-year-old could have thought that an eight-year reduction was not a sufficient discount for his guilty plea. Rejection of this offer surely does not automatically constitute an absence of logic, let alone render the defendant incompetent to stand trial.

An analogy to the mentally ill or retarded population is appropriate. Clearly the mere presence of mental illness or retardation does not amount to incompetency to stand trial.⁴¹⁷ Grisso explained that "[t]he issue is whether, and how, the mental disorder actually affects the defendant's abilities to perform those functions that are required for the defendant's trial participation. Not all defendants with mental disorders, even those that

⁴¹⁴ See *id.*

⁴¹⁵ Otto & Goldstein, *supra* note 105, at 182-83.

⁴¹⁶ See Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 817 (2005).

⁴¹⁷ Bruce A. Arrigo, *Justice and the Deconstruction of Psychological Jurisprudence: The Case of Competence to Stand Trial*, 7 THEORETICAL CRIMINOLOGY 55, 58 (2003).

involve psychotic delusions, necessarily experience symptoms that interfere with their trial participation.”⁴¹⁸

Calling for youth or immaturity alone to be the basis for incompetency to stand trial would be like allowing mental illness or retardation alone to qualify as incompetent. A better case can be made for mental illness or retardation automatically to be grounds for incompetency, since these individuals are likely to have impaired thinking capabilities, and not simply underdeveloped or developing capabilities. Compared to the general population, those with mental disorders could have:

- less clarity in their thinking and analysis abilities;
- less ability to appraise the likely outcome of the proceedings;
- less overall understanding of the proceedings;
- less ability to empathize with others;
- less ability to tolerate the stress of trial;
- less ability to behave properly in court;
- less memory about events;
- less ability to think long-term;
- less ability to defer gratification;
- less ability to relate to defense counsel;
- less inclination to disclose information to counsel;
- less ability to discuss strategy with counsel;
- more susceptibility to the suggestions and urgings of others;
- more impaired communication skills;
- more paranoia and distrust of counsel and judges; and
- more problems in experiencing psychotic delusions.

5. That Competency to Stand Trial Requires Belief in the Ideals of the Adversary Process

Not only must juvenile defendants be ideal or perfect, they also must readily accept an idealized conception of adversariness. For example, cynical or distrustful attitudes toward defense counsel are described as “misunderstandings and distortions of the attorney-client relationship.”⁴¹⁹ These misunderstandings and distortions then become the foundation of a incompetency determination. Under the DPs’ approach, to be found competent to stand trial, juveniles must accept the following:

⁴¹⁸ THOMAS GRISSO, *FORENSIC EVALUATION OF JUVENILES* 84-85 (1998).

⁴¹⁹ Schmidt, Reppucci & Woolard, *supra* note 260, at 181.

(1) There is a true adversarial nature in juvenile court (that is, prosecutors and defense attorneys battle in pursuit of justice rather than compromise in pursuit of convenience);⁴²⁰

(2) All information provided the defense attorney remains confidential (counsel will not repeat anything the defendant says to the parents, the judge, opposing counsel, etc.);⁴²¹

(3) Defense attorneys are true advocates (counsel will do all they can to beat the case);⁴²²

(4) Defendants must be truthful with their defense attorneys and tell all (it is wrong to think that counsel will be less of an advocate if the defendant's guilt has been acknowledged by the defendant);⁴²³

(5) Lack of confidence or trust in defense counsel or the system, or failure to develop a meaningful relationship with counsel is unwise and uncalled for (counsel and the system will not mistreat accused offenders).⁴²⁴

Grisso explained that youths must have meaningful collaboration with defense counsel "because of the attorney's advocacy role and the promise of confidentiality."⁴²⁵ However, the Supreme Court has explicitly rejected Grisso's advocacy of meaningful relationships between defendant and counsel in *Morris v. Slappy*.⁴²⁶

Research in juvenile court has reported defense attorneys who consider the parents to be their clients (so much for confidentiality),⁴²⁷ and who actually seek adjudications in order to ensure that the youth receives treatment (so much for legal advocacy).⁴²⁸ Juveniles with previous court experience may already be aware that telling the defense attorney

⁴²⁰ See *id.* at 177; Schnyder, *supra* note 164, at 36.

⁴²¹ See Michele Peterson-Baladi & Rona Abramovitch, *Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?*, 34 CAN. J. CRIMINOLOGY 139 (1992); Schmidt, Reppucci & Woolard, *supra* note 260, at 177; see also, e.g., REDDING, *supra* note 398, at 6 ("Young adolescents often incorrectly believe that their attorney will reveal confidential information to the judge or police.").

⁴²² See Thomas Grisso, Michael O. Miller & Bruce Sales, *Competency to Stand Trial in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1, 12 (1987); Schmidt, Reppucci & Woolard, *supra* note 260, at 177; Lyle, *supra* note 249, at 49-52.

⁴²³ See Redlich, Silverman & Steiner, *supra* note 267, at 405; Schmidt, Reppucci & Woolard, *supra* note 260, at 178.

⁴²⁴ See Schmidt, Reppucci & Woolard, *supra* note 260, at 180; Schnyder, *supra* note 164, at 75.

⁴²⁵ Grisso, *supra* note 107, at 31.

⁴²⁶ 461 U.S. 1 (1983).

⁴²⁷ See Joseph B. Sanborn, Jr., *How Parents Can Affect the Processing of Delinquents in Juvenile Court*, 7 CRIM. JUST. POL'Y REV. 1, 11 (1995).

⁴²⁸ See Joseph B. Sanborn, Jr., *Remnants of Parens Patriae in the Adjudicatory Hearing: Is a Fair Trial Possible in Juvenile Court?*, 40 CRIME & DELINQUENCY 599, 605-06 tbl.3 (1994).

everything means the attorney cannot allow the defendant to take the stand and lie about the incident. In addition, defense attorneys could more eagerly pursue a plea bargain in lieu of a trial when their clients have acknowledged guilt. Yet the DPs regard juveniles who fail to endorse ideals as incompetent to stand trial. Ironically, the vast majority of the youths who have been examined by the DPs as research subjects likely learned their views as a result of being prosecuted in juvenile court. They very likely have never been to criminal court. Any youth who rejects one or all of the preceding propositions on juvenile court adversariness after having experienced juvenile court should most likely be regarded as particularly perceptive rather than as cynical, distrustful, or incompetent.

6. That Competency to Stand Trial Requires That Defendants Share DPs' Values and Perspectives

According to the DPs, juveniles also must adopt the DPs' views of the defendants' situations. "Wrong" answers to tactical choices or "inappropriate" reactions qualify to render one incompetent to stand trial. The previously discussed theoretical case of the sixteen-year-old who rejected the seventeen-year sentence offer is a good example. The DP's failure to agree with the defendant's choice, regardless of his motives, suffices for an incompetency finding.

The DPs describe the need for defendants to understand the gravity of potential consequences of a criminal conviction in order to be competent.⁴²⁹ The critical question becomes, then, gravity according to whom? Competency demands a defendant's awareness that a conviction will potentially result in a ten-year prison sentence. But the DPs demand more; they want defendants to share their opinions on the gravity of the consequences. Thus, whereas that ten-year sentence could surely impress a DP accustomed to the good life, the failure of that same sentence to equally impress a juvenile offender supposedly constitutes incompetency. Repeat offenders' experiences with a juvenile justice system known for humane and possibly beneficial, rehabilitation-oriented dispositions (some youths end up in a facility that is an improvement over where they have lived) could also render them unimpressed with threatened sanctions for criminal behavior. The point is that neither juveniles nor adults need to have the same reactions to punishment as the DPs in order to be competent to stand trial.

⁴²⁹ See, e.g., GRISIO, *supra* note 398.

7. That Competency to Stand Trial Matters Less in Juvenile Court Than in Criminal Court

Underlying the DP's approach to this subject is a belief that competency to stand trial in juvenile court is not critical or at least not as critical as it is in adult court. Considering the potential length of juvenile court sentences and the ability to factor juvenile court adjudications into criminal court sentencing, this reasoning is fundamentally wrong. It does tend to support a theory, however, that the DP's research and policy pursuits have been more concerned with ensuring that juvenile defendants do not see criminal court rather than ensuring that only truly competent juvenile defendants stand trial in either system. As one defense attorney in the DP camp offered: "If a finding of incompetence could secure the minor's adjudication in juvenile court, a lawyer should think twice about engaging in efforts to enhance her client's trial competence in adult court."⁴³⁰

B. METHODOLOGICAL PROBLEMS IN THE DP'S STUDY OF JUVENILES' COMPETENCY TO STAND TRIAL

1. Competency to Stand Trial Research Tests Do Not Actually Measure Competency

Neither the earlier measures—the Competency Screening Test, The GCCT and the FIT-R—nor the MacCAT-CA constitute a valid assessment of competency to stand trial. While research can tell us what to look for in terms of a defendant's deficiencies and what can be done to improve competence, it cannot tell us if any group of juveniles is competent.⁴³¹ The research tests yield high rates of false positives,⁴³² which probably explains why they are not typically employed by evaluators who actually determine a defendant's competency.⁴³³ The Competency Screening Test and the

⁴³⁰ Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL*, *supra* note 111, at 243, 252 (2000).

⁴³¹ See Ficke, Hart & Deardorff, *supra* note 365; Woolard & Reppucci, *supra* note 404.

⁴³² See, e.g., MELTON ET AL., *supra* note 398; Robert A. Nicholson, Stephen R. Briggs & Helen C. Robertson, *Instruments for Assessing Competency to Stand Trial: How Do They Work?*, 19 PROF. PSYCHOL. RES. & PRACT. 383 (1988); Richard Rogers, Karen L. Ustad & Kenneth Sewell, *Dimensions of Incompetency: A Factor Analytic Study of the Georgia Court Competency Test*, 14 BEHAV. SCI. & L. 323 (1996); Karen L. Ustad et al., *Restoration of Competency to Stand Trial: Assessment with the Georgia Court Competency Test and the Competency Screening Test*, 20 LAW & HUM. BEHAV. 131 (1996).

⁴³³ See, e.g., Jennifer L. Skeem et al., *Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUM. BEHAV. 519 (1998).

GCCT are especially problematic.⁴³⁴ They measure current knowledge of court procedure rather than an ability to comprehend proceedings and to assist counsel.⁴³⁵ The Competency Screening Test demands an idealized perception of the legal system, and has validity problems, particularly in discriminating against defendants who doubt judicial fairness or disagree with attorney advice.⁴³⁶

The test contains twenty-two statements that the subject completes.⁴³⁷ The scoring for at least nineteen of these statements is subjective and arbitrary, if not capricious. For example, the person who responds to "The lawyer told Bill . . ." with "to plead guilty" receives a full two points, while the one who answers "he is guilty" receives only one point. Points are reduced because the defendant seems to regard the lawyer as judgmental.⁴³⁸ Similarly, saying that the defendant "pleaded not guilty" merited two points, while a defendant "denied it" warranted only one point. The appropriate response to a formal accusation is to plead not guilty, which accounts for the point reduction.⁴³⁹ Ironically, most juvenile courts do not employ guilty plea terminology, but rather refer to admitting to or denying the charges.

The FIT-R operates more like a final exam in a legal course than an analysis of the defendant's ability to understand what is occurring in court. The Understanding section of the test includes everything from the charges to the roles of the individuals to the court process. The Appreciation section demands that a defendant identify available legal defenses and the likely outcome of the proceeding. The Communication with Counsel section examines the defendant's ability to relate to lawyers and to plan legal strategy, both of which are beyond the scope of competency to stand trial.⁴⁴⁰

The FIT-R outcome also relies upon the defendant's motive in accepting a plea bargain offer from the prosecutor. Apparently, the only "sound" motive for which one is considered to be competent to stand trial is

⁴³⁴ Problems attending the GCCT-Juvenile Version were thoroughly examined during the discussion of Cooper's dissertation and will not be repeated here. See Cooper, *supra* note 147; *supra* notes 150-58 and accompanying text.

⁴³⁵ See GRISSO, *supra* note 398; Burnett, *supra* note 223.

⁴³⁶ See Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 LAW & HUM. BEHAV. 141, 158 (1997).

⁴³⁷ See LAB. OF CMTY. PSYCHIATRY, HARVARD MED. SCH., COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 74 (1972) (Nat'l Inst. of Mental Health, Crime and Delinquency Issues: A Monograph Series (1972)).

⁴³⁸ *Id.* at 76.

⁴³⁹ *Id.* at 77-78.

⁴⁴⁰ See Roesch et al., *supra* note 317.

the weight of the evidence against the accused.⁴⁴¹ This is not the only legitimate reason to forgo trial, especially for defendants in juvenile court who could have learned in previous visits that the lack of a case is not an obstacle to adjudication. Defendants who want to plea bargain due to a need for closure or from moral guilt, embarrassment, fatigue, resignation, or perhaps even a fear of receiving a harsher disposition for going to trial are not incompetent to stand trial by virtue of these motivations. Wanting to "get it over with" may or may not be legally wise, but it is not equivalent to being incompetent.

The same argument applies to defendants' anticipating whether they will appeal, should the prosecutor make a serious error. A response of *no* on the FIT-R is scored negatively and could contribute to a finding of incompetent to stand trial. The *no* response does not render one incompetent, however, even if the response is legally unwise. Youths might think that they would have to return to detention should they pursue an appeal, and might prefer to just have the matter behind them. The defendant may already know the likely disposition, and prefer not to risk losing it via reopening the case. Perhaps the youth has been committed to a facility that has an open bed now, one that would be lost pending an appeal. Even more likely, some youths could have been told by their defense attorneys that there is no real benefit to appeal since any appellate decision would likely occur *after* the disposition has terminated, and most appeals are unsuccessful anyway.

The MacCAT-CA has its own problems and cannot be considered an accurate measure of competency to stand trial. Even the developers of the MacCAT-CA acknowledge that it cannot be the sole basis for a competency assessment and that it is not intended as a test of competency.⁴⁴² Similar to other research-oriented tests, it measures knowledge rather than capacity to understand rights and the process as *explained* to the youth. It also forces the youth to focus on someone else's case via a vignette.

The vignettes themselves are problematic, too. One asks: if "Fred" pleads guilty, can he still try to prove his innocence? A *yes* is considered incorrect and receives no points. The MacCAT-CA tries to tap into the respondent's awareness that a guilty plea dispenses with a trial. The question is badly formed, especially for juvenile court. A *yes* response could actually be correct. The participant might think that testimony may be offered *after* one admits guilt, and that the judge would accept the explanation and find not guilty. Unlike criminal court, juvenile courts often require both involvement in the behavior *and* a need for treatment in order

⁴⁴¹ See Viljoen et al., *supra* note 314, at 264-65.

⁴⁴² See Otto et al., *supra* note 214.

to be adjudicated. Defense counsel may believe it wise to admit guilt and hope that the judge will listen to the explanation and reduce or throw out the charges.⁴⁴³

Another question asks if it is more important for "Fred" to tell his attorney that he was drinking beer before the fight in which he assaulted someone or to explain that he was out to dinner with a girlfriend. Incorrectly picking the dinner story nets zero points. Adults might think having been to dinner shows they weren't looking for a fight, while drinking could make them look worse. Demanding the juvenile pick beer drinking to receive points requires admitting one offense to mitigate a second. Moreover, the juvenile could think that a revealed substance abuse problem could exacerbate the ultimate disposition and that drinking beer before a fight does not mitigate culpability.

The focus of the test is problematic as well. A defendant's understanding of the trial process should not involve receiving points for offering "plausible" reasons for choosing between a bench and a jury trial. Many youths may have experienced or may have been told by defense attorneys that juvenile court judges will adjudicate regardless of the strength of evidence. Perhaps this would help explain why defendants with previous juvenile court experience perform "poorly" on these competency to stand trial tests.

2. Examining a Defendant's Miranda Comprehension Does Not Determine Competency to Stand Trial

A number of studies that have focused on juvenile competency to stand trial have included and relied upon an analysis of youth's comprehension of *Miranda* issues. Although the examination of youths' *Miranda* comprehension is worthwhile, the results are not an indication of competency. What juveniles think they would or should do during police interrogation does not address their ability to remember the incident, to communicate with counsel, or to understand trial. Juveniles could be *Miranda* illiterates, and yet be quite competent to stand trial.⁴⁴⁴

⁴⁴³ Joseph B. Sanborn, Jr., *Plea Negotiation in Juvenile Court* 108-09 (Dec. 14, 1984) (unpublished Ph.D. dissertation, State University of New York at Albany) (on file with author).

⁴⁴⁴ Redlich, Silverman & Steiner, *supra* note 267, at 394.

3. *Examining Only Delinquents, Especially Only Those Detained, Does Not Yield a Representative Juvenile Competency to Stand Trial Score*

Ironically, the DPs who portray delinquency as a trait that is common among all youths⁴⁴⁵ also disproportionately measure competency to stand trial among detained delinquents. Juvenile offenders are subject to criminal prosecution whether or not they have a previous criminal history or have been detained. To derive a representative sample of the *typical* juvenile defendant eligible for criminal prosecution, research should address all juveniles, or at least all of those arrested during a certain period of time. Instead, the DPs have drawn juvenile samples exclusively or disproportionately from detention,⁴⁴⁶ long term facilities,⁴⁴⁷ psychiatric inpatient facilities,⁴⁴⁸ or from treatment centers used for competency evaluations.⁴⁴⁹ If the research that examines delinquency theory were this selectively focused, the approach would be criticized, and the results considered invalid and unreliable.

In many jurisdictions, fewer than 20% of younger juveniles (that is, those fifteen years of age and younger) will experience detention.⁴⁵⁰ Unlike jail, detention is known as a holding ground for offenders with problems.⁴⁵¹ Not surprising, the MacArthur Study found that detained youths scored significantly higher than community youths on numerous measures, such as Alcohol/Drug Use, Angry/Irritable, Depressed/Anxious, Somatic Complaints, Suicide Ideation, and Thought Disturbance.⁴⁵² The mean estimated IQ score of Ficke and co-researchers' all-detained group was 76.17, and that of Burnett's detained "offender group" was 84.16 (the

⁴⁴⁵ See, e.g., Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL, *supra* note 111, at 291, 300; Scott & Grisso, *supra* note 112, at 154-56; Taylor-Thompson, *supra* note 103, at 156.

⁴⁴⁶ See, e.g., Ficke, Hart & Deardorff, *supra* note 365; Grisso et al., *supra* note 276; Boyd, *supra* note 213; Burnett, *supra* note 223; Krause, *supra* note 185; Viljoen, *supra* note 313; Woolard, *supra* note 106.

⁴⁴⁷ See, e.g., Cooper, *supra* note 147; Schnyder, *supra* note 164.

⁴⁴⁸ See, e.g., Warren et al., *supra* note 305; Lexcen, *supra* note 237.

⁴⁴⁹ See, e.g., Cowden & McKee, *supra* note 136; McKee & Shea, *supra* note 143; McKee, *supra* note 141.

⁴⁵⁰ See JOSEPH B. SANBORN, JR. & ANTHONY W. SALERNO, *THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS* (2005); see also HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2006 National Report*, at 170. Even for sixteen- and seventeen-year-olds the rate of detention is less than 25%. See *id.*

⁴⁵¹ See, e.g., Karen M. Abram et al., *Comorbid Psychiatric Disorders in Youth in Juvenile Detention*, 60 ARCHIVES GEN. PSYCHIATRY 1097, 1098 (2003); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1134-37 (2002).

⁴⁵² MacArthur Research Network, *supra* note 187, at 12.

"comparison group" mean was 101.6).⁴⁵³ Similarly, the intellectual functioning of Viljoen's all-detained sample was "substantially below expected developmental levels. For example, the reasoning abilities of defendants aged 16 to 17 did not even reach the average performance of 10-year olds in community samples."⁴⁵⁴ Consequently, the test scores of the samples in the DPs' research on competency to stand trial cannot be said to reflect the competency of juvenile defendants in general.

4. The Lack of a Standard Measure of Adults' Competency to Stand Trial Compromises Research

The lack of a representative juvenile competency score is exacerbated by the absence of an adult standard score. Very different results have occurred due to the use of three different adult sets of MacCAT-CA scores: the normative study that first tested the MacCAT-CA (the Otto 1 standard),⁴⁵⁵ another version of the Otto normative data used by Boyd in her dissertation (the Otto 2 standard),⁴⁵⁶ and the MacArthur Study standard.⁴⁵⁷

Table 2
Adult Mean MacCAT-CA Mean Scores

	U	R	A
Otto 1	12.5	13.27	11.44
Otto 2	12.17	12.73	11.23
MacArthur	12.13	12.57	10.77

V. THE ULTIMATE PROBLEMS IN THE DPs' STUDY OF JUVENILE COMPETENCY TO STAND TRIAL

A. THE LACK OF A JUVENILE COMPETENCY PROBLEM

Starting from the worst case scenario of the critical MacArthur Study, only 30% of the youngest adolescents (eleven- to thirteen-year-olds) and only 19% of the fourteen- and fifteen-year-old group "failed" the MacCAT-CA in displaying supposed significant impairment. Those 30% and 19% figures themselves are inflated, as acknowledged by the MacArthur

⁴⁵³ See Ficke, Hart & Deardorff, *supra* note 365, at 368; Burnett, *supra* note 223, at 58-60.

⁴⁵⁴ Viljoen, *supra* note 313, at 56.

⁴⁵⁵ See Otto et al., *supra* note 214, at 440.

⁴⁵⁶ See Boyd, *supra* note 213, at 61.

⁴⁵⁷ See Grisso et al., *supra* note 276, at 343.

researchers.⁴⁵⁸ Forensic evaluators would find a much lower percentage of early- and mid-adolescent defendants incompetent to stand trial than did the MacArthur Study and other DP research. The numbers of incompetent juvenile defendants would certainly decrease once the focus of competency evaluations is restricted to legitimate, cognitive *Dusky*-oriented abilities. The MacArthur Study acknowledged that much of what they found was not about competency to stand trial:

The study indicates that psychosocial immaturity may affect a young person's decisions, attitudes, and behavior in the role of defendant *in ways that do not directly implicate competence to stand trial*, but that may be quite important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context.⁴⁵⁹

In addition, 99% or more youths transferred to criminal court tend to be fourteen years of age or older at the time of the offense, at least in the most transfer-prone state, Florida. In that state between 2001 and 2006, only thirty-one youths age thirteen or younger (six of whom were twelve or younger) were transferred to criminal court.⁴⁶⁰

There is no widespread problem regarding incompetency to stand trial among juvenile defendants facing trial in criminal court. Considering the minimal cognitive abilities required to be competent to stand trial, this is hardly surprising. It is also hardly surprising in light of the abundant research that has documented competent juvenile decision-making abilities in other, more demanding contexts. For example, juveniles who are fourteen years of age have been found capable of making informed and competent decisions concerning consent to medical and mental health treatment.⁴⁶¹ Similarly, girls between the ages of fourteen and seventeen

⁴⁵⁸ See Steinberg et al., *supra* note 112, at 11.

⁴⁵⁹ Grisso et al., *supra* note 276, at 361 (emphasis added); Steinberg et al., *supra* note 112, at 13. Bonnie, who created the two-dimensional formula for competency to stand trial, said the lack of competency in the decisional competence category—the only category in which juveniles display weaknesses—is not a bar to conducting trial. See Bonnie, *supra* note 406, at 555.

⁴⁶⁰ See FLA. DEP'T OF JUVENILE JUSTICE, 2005-2006 DELINQUENCY PROFILE (2007), available at http://www.djj.state.fl.us/Research/Delinquency_Profile/0506_Profile.html.

⁴⁶¹ See, e.g., Ambuel & Rappaport, *supra* note 123; Belter & Grisso, *supra* note 391; Stephen Bates Billick, *Developmental Competency*, 14 BULL. AM. ACAD. PSYCHIATRY L. 301 (1986); Nancy Kaser-Boyd et al., *Children's Understanding of Risks and Benefits of Psychotherapy*, 15 J. CLINICAL CHILD PSYCHOL. 165 (1986); Nancy Kaser-Boyd, Howard S. Adelman & Linda Taylor, *Minors' Ability to Identify Risks and Benefits of Therapy*, 16 PROF. PSYCHOL.: RES. & PRAC. 411 (1985); Patricia A. King, *Treatment and Minors: Issues Not Involving Lifesaving Treatment*, 23 J. FAM. L. 241 (1984); Lewis, *supra* note 123; Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99 (1983); Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L.

who were considering abortions appeared similar to adults in both cognitive competency and volition.⁴⁶²

The findings of the research in these other decision-making areas have been so consistent in establishing juvenile competency that some psychologists are willing to assert that when it comes to "the capacity to understand and reason logically, there is no qualitative or quantitative difference between minors in mid-adolescence, i.e., about fourteen to fifteen years of age, and adults."⁴⁶³ Similarly, "Regardless of the standard of capacity used, research shows that by the age of about fourteen or fifteen, most children will demonstrate full adult competence"⁴⁶⁴

The American Psychological Association was so convinced of the reasoning abilities of adolescents that on a number of occasions it submitted briefs to the U.S. Supreme Court that boldly asserted:

[There is a] growing body of methodologically sound and generally accepted psychological research which concludes that minors fourteen years of age and older generally possess the ability to understand treatment alternatives and their attendant risks and benefits, as well as the demonstrated capacity for rational decisionmaking to a degree that is not measurably different from that of adults.⁴⁶⁵

Developmental psychologists have built a rich body of research examining adolescents' capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence. The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral

REV. 695 (1993); Weithorn & Campbell, *supra* note 123. Some research has made this finding at the age of fifteen. See, e.g., Grisso & Vierling, *supra* note 124; Mann et al., *supra* note 124.

⁴⁶² See Ambuel & Rappaport, *supra* note 123.

⁴⁶³ Brief for American Psychological Ass'n as Amicus Curiae Supporting Appellees at 18, *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (No. 85-673). In the footnote accompanying this sentence, the authors continue: "Moreover, progressively increasing numbers of younger adolescents demonstrate such capacities as they proceed through the developmental transition typical of ages 11-14 [sic]." *Id.*

⁴⁶⁴ Redding, *supra* note 461, at 726.

⁴⁶⁵ Brief for American Psychological Ass'n as Amicus Curiae Supporting Appellees at 4, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495) (citations omitted).

dilemmas, understanding social rules and laws, reasoning about interpersonal relationships and interpersonal problems, and reasoning about custody preferences during parental divorce. By middle adolescence most young people develop an adult-like identity and understanding of self. Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy. Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.⁴⁶⁶

More intriguing is research that has discovered significant decision-making capacity among even younger youths:

A sizeable and convincing body of empirical research has accumulated over the last decade suggesting that children have much more competence than has been recognized by the legal community. The general picture which emerges is that children are capable of quite a lot, if you just let them participate in the decisionmaking process.

Adolescents, and frequently even younger children, are capable of adult-like understanding and decisionmaking. For instance, children as young as about twelve appear to have a factual understanding and appreciation for the risks and benefits of psychotherapy. Discussing unpleasant or uncomfortable issues, discomfort with the therapist, violations of confidentiality, and poor treatment effectiveness are identified as risks; having someone to talk with, learning things, and solving problems are seen as benefits. Even nine-year-olds appear to understand many basic aspects of treatment, including differences between various diagnoses and prognoses, and treatment risks and benefits. Twelve-year-olds are able to define accurately many legal concepts. Significantly, children as young as six can be astute in perceiving procedural injustice⁴⁶⁷

B. THE DPS' PROPOSED SOLUTION IS WORSE THAN THE PROBLEM

1. *The DP's solution*

Evidencing that their concern is with the prosecution of juvenile defendants in criminal court rather than the prosecution of incompetent juvenile defendants per se, the DPs ultimately recommend that juvenile defendants found incompetent to stand trial in criminal court should be returned to juvenile court for trial.⁴⁶⁸ These so-called "default dispositions" are necessary so as to avoid an "institutional crisis" that would result if

⁴⁶⁶ Brief for American Psychological Ass'n et al. as Amicus Curiae Supporting Petitioners/Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-805, 88-1125, 88-1309), available at 1989 WL 1127529, at *18-20 (citations and footnotes omitted).

⁴⁶⁷ Redding, *supra* note 461, at 708 (citations omitted).

⁴⁶⁸ See Scott & Grisso, *supra* note 416, at 826-27.

“large numbers” of incompetent juvenile defendants could not be prosecuted anywhere or at all.⁴⁶⁹

The DPs advocate the adoption of a new standard for competency to stand trial in juvenile court:

[Y]ouths who are incompetent under the *Dusky* standard can be subject to a relaxed competence standard in juvenile court without violating constitutional norms so long as the dispositions to which they are subject are different in purpose and punitiveness from criminal sentences.⁴⁷⁰

Simply put, if juvenile court punishes *less* or just *differently* than adult court, defendants prosecuted there can be *less competent* than their counterparts in adult court.

The DPs also hold that competency to stand trial itself is relative, subject to gradations: “As a purely conceptual matter, the adoption of dual standards is quite feasible because competence, unlike many procedural protections is largely a continuous rather than a binary construct.”⁴⁷¹ The DPs warn that failure to adopt their “relaxed” competency standard in juvenile court will lead to “serious disruption” in the prosecution of delinquency cases because forcing a “uniform competence standard” (i.e., *Dusky*) upon juvenile court will produce “a flood of petitions for competence evaluations and hearings, resulting in a major diversion of financial and human resources to a process that most would agree should have *limited importance* in this legal setting.”⁴⁷²

This proposition is puzzling. Statutes and case law have applied *Dusky* to juvenile courts for years.⁴⁷³ Yet, there has been barely a trickle (let alone a flood) of appellate case law in this area and no widespread reports of disruption in juvenile court. By far, however, the most puzzling aspect of the DPs’ proposal is their description of the “tailored juvenile court standard.”⁴⁷⁴ “Under the competence criteria that [the DPs] endorse, a youth facing a delinquency proceeding must have a basic understanding of the charges and proceeding and of her position as defendant in that proceeding, and the capacity to communicate with her attorney.”⁴⁷⁵ Of course, this “relaxed,” “tailored” standard is indistinguishable from that established by *Dusky*.

⁴⁶⁹ See *id.* at 827.

⁴⁷⁰ *Id.* at 827-28.

⁴⁷¹ *Id.* at 834.

⁴⁷² *Id.* at 835-36 (emphasis added).

⁴⁷³ See *supra* Parts III-IV.

⁴⁷⁴ See Scott & Grisso, *supra* note 416, at 836.

⁴⁷⁵ *Id.* at 838 (footnote omitted).

The DPs explain that the juvenile court standard means the youth could have a “lesser ability to foresee remote consequences” of a conviction and still be competent.⁴⁷⁶ But a greater or lesser ability to foresee remote consequences not only defies measurement, it also is not related to or required by competency criteria. The DPs also assert that youths would “need not understand how advocacy is translated into practice in a way that would be required of an adult,”⁴⁷⁷ whatever that means; but this, too, is not measurable and is not related to or required for competency to stand trial. Finally, the DPs contend that youths “need not have the ability to weigh the value of defense strategies, or to advise counsel accordingly,”⁴⁷⁸ which also is not a part of competency to stand trial and thus also not required of adult defendants. The DPs have not created a “relaxed” standard of competency for juvenile court. Instead, the DPs are attempting to rewrite constitutional law to guarantee no juveniles are prosecuted in adult court.

2. *The DPs' Proposal Fails on Its Merits*

There are at least three flaws with the DPs' proposal. The first has already been considered, namely, that competency to stand trial is *not* a continuous construct. Either defendants can comprehend the nature of the proceedings and assist in their defense or they cannot; if they cannot perform these minimal tasks, they should not be prosecuted in any court. Their greater or lesser abilities to foresee the future, appreciate the nature of defense advocacy, or gauge the worth of defense tactics are not part of competency to stand trial.

The second is that competency to stand trial is not related to the extent of the possible punishment. Instead, it is related to the type or nature of the proceeding. While it is true that some constitutional rights, such as counsel and jury trial, are linked to the potential sentence, other rights, such as the protection against self-incrimination and the requirement of proof beyond a reasonable doubt, are triggered by the mere presence of a criminal proceeding, regardless of the severity of the outcome. Competency to stand trial belongs with the latter grouping of rights. By the DPs' own admission, competency to stand trial is required to preserve the dignity and integrity of the proceedings; it is unseemly to prosecute a defendant who is incompetent to stand trial.⁴⁷⁹ None of this matters any longer to the DPs as long as the proceedings take place in juvenile court.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ See, e.g., Bonnie, *supra* note 406, at 543, 551; Scott & Grisso, *supra* note 416, at 800, 809.

All criminal defendants must be competent. This applies even to defendants prosecuted in trial courts of limited jurisdiction, which not only operate with very serious limits on possible sanctions imposed there but also operate with much *less* sentencing power than juvenile courts (in terms of length of sentence). The Supreme Court has equated the adjudicatory hearing with a criminal prosecution. It did so in *In re Gault*⁴⁸⁰ when granting juveniles the right to counsel and the protection against self-incrimination; in *In re Winship*⁴⁸¹ when requiring proof beyond a reasonable doubt to convict in juvenile court; and in *Breed v. Jones*⁴⁸² when prohibiting sequential prosecution for the same offense in juvenile and criminal courts due to this constituting double jeopardy—that is, being subject to two criminal prosecutions. Grisso even admitted a few years ago that *Winship* represents “a decision that rests squarely on the premise that the cost of an erroneous finding of delinquency is equivalent to the cost of an erroneous criminal conviction.”⁴⁸³

Thus, the DPs’ proposal must fail when they assert that the adoption of a relaxed juvenile court standard “depends on whether delinquency proceedings differ substantially from criminal proceedings . . .”⁴⁸⁴ This matter has already been resolved conclusively by the Supreme Court.

The argument citing the “shorter duration” of juvenile court sanctions compared to adult court sentences also fails. First, most convicts in criminal court are headed to probationary sentences; they are nevertheless required to be competent to stand trial.⁴⁸⁵ Second, many youths adjudicated in juvenile courts are headed to placements.⁴⁸⁶ For some of these youths there will be longer terms of incarceration than for some adults headed to jail or prison. Third, juveniles targeted for prosecution in criminal court, especially the younger ones, tend to be the most serious or chronic

⁴⁸⁰ 387 U.S. 1 (1967).

⁴⁸¹ 397 U.S. 358 (1970).

⁴⁸² 421 U.S. 519 (1975).

⁴⁸³ Bonnie & Grisso, *supra* note 351, at 94.

⁴⁸⁴ Scott & Grisso, *supra* note 416, at 836.

⁴⁸⁵ In 2006, there were 4,237,023 adults on probation. That figure was much higher than the combined numbers in jail (766,010), prison (1,492,973), and parole (798,202). See Sourcebook of Criminal Justice Statistics Online, Adults on Probation, in Jail, or Prison, and on Parole, Table 6.1 (2006), <http://www.albany.edu/sourcebook/pdf/t612006.pdf>. In 2004, even 28% of felony convictions ended with probationary sentences. See MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 3 (2007).

⁴⁸⁶ Yearly, the national estimates of adjudicated juveniles sentenced to placement are in the 22%-25% range. See C. Puzzanchera & W. Kang, Juvenile Court Statistics Databook (2008), <http://www.ojjdp.ncjrs.gov/ojstatbb/jcsdb/asp/process.asp>. There are no estimates for the length of sentences given to or served by juvenile inmates.

offenders.⁴⁸⁷ Forcing these youths to be prosecuted in juvenile court will almost definitely result in that system pursuing the institutionalization of many, and perhaps most, of these offenders for significant duration. Consequently, the need for these defendants to be competent to stand trial in juvenile court will be just as great as in criminal court.

The third flaw involves the reality that juvenile court adjudications can be factored into subsequent criminal court sentencing. In some jurisdictions, an adjudication is given an impact equal to a criminal conviction.⁴⁸⁸ It is unconscionable that a youth who is purportedly incompetent to stand trial for current criminal court purposes could experience an adjudication in juvenile court, which is then allowed to enhance a later sentence in adult court.

3. *The DPs' Solution Is Inappropriate*

The DPs' solution is inappropriate as well. The DPs found a minority of selectively identified adolescents to be arguably incompetent to stand trial. From this they suggest that no youths below a certain age should be eligible for prosecution in adult court.⁴⁸⁹ The masses of competent and possibly mature juvenile defendants among this age group are in effect receiving immunity from criminal prosecution due to the tendencies of a small minority of their population. Defendants must individually qualify for designations as incompetent to stand trial. Grisso acknowledged as much when addressing consent to treatment.

[B]y age 14 or 15, most minors have probably attained a level of cognitive functioning (formal operational thinking) that is equivalent to cognitive maturity; therefore minors at this age should be regarded as competent to give informed consent, unless individually they fail to meet standards that are employed to determine the incompetence of sane adults.⁴⁹⁰

⁴⁸⁷ Statutes permitting transfer to adult court tend to raise the severity of offense and record requirements as the age of the accused decreases. See SANBORN & SALERNO, *supra* note 450, at app. G-H.

⁴⁸⁸ See Joseph B. Sanborn Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 209-10 (1998).

⁴⁸⁹ The MacArthur group had suggested no one younger than fourteen years old should be prosecuted in criminal court. See Grisso et al., *supra* note 276, at 358. Since that study, observations have surfaced such that any state prosecuting anyone younger than fifteen or even sixteen years of age could be risking wholesale prosecution of incompetent defendants. See, e.g., Feld, *supra* note 384, at 525; Grisso & Steinberg, *supra* note 93, at 625. The next step to be anticipated from the DPs is their requesting an appellate court to extend a *Roper*-like categorical exemption to the prosecution of anyone younger than a certain age in criminal court due to their finding widespread incompetency among these youths in their studies.

⁴⁹⁰ Belter & Grisso, *supra* note 391, at 900.

There would also be an equal protection problem such that immature juveniles and adults bound for criminal court would not be immune from criminal prosecution due simply to being older than an arbitrary age cut-off. Assuming *immaturity* is the real culprit, the DPs' solution goes too far in letting *mature* competent juveniles escape adult court merely because of their age and does not go far enough due to its abandoning *immature* older adolescents and young adults subjected to trial in adult court.

4. The DPs' Solution Is Unnecessary

The DPs' solution of barring the criminal prosecution of juveniles is unnecessary. Some DPs admit this. For example, Grisso initially conceded that for many incompetent juveniles' "judges might simply 'continue' the case (postpone the trial) until the juvenile has achieved greater maturity."⁴⁹¹ In addition, "clinical intervention might compensate for the difficulties produced by immaturity."⁴⁹² Grisso offered that defendants in juvenile court could be held up to one year for restoration of competency.⁴⁹³ Five years later, however, Grisso declared, without explanation, that postponement in criminal court is "both politically inconceivable and constitutionally problematic."⁴⁹⁴ Postponement for months is possible when adult defendants are initially found incompetent to stand trial, however, so the Constitution is not a problem. In *Jackson v. Indiana*, the Supreme Court held that delay for a "reasonable period of time" is constitutionally permissible.⁴⁹⁵ Moreover, prosecution in the adult system is fraught with considerable delay that would allow for both natural maturing and clinical intervention, if necessary. If the problem is deficient understanding, even the MacArthur Study group acknowledged that youths could "be tried as adults after a period of instruction about the matters they do not comprehend."⁴⁹⁶ This begs the question as to why immature juveniles cannot similarly be instructed as to risk perception, future time perspective, pressure from peers, etc. Some DP researchers have conceded that some juveniles would need merely to have misconceptions clarified or to consult more thoroughly with defense counsel.⁴⁹⁷

⁴⁹¹ GRISSE, *supra* note 418, at 96.

⁴⁹² *Id.* at 120.

⁴⁹³ *Id.* at 89.

⁴⁹⁴ Grisso et al., *supra* note 276, at 360 (footnote omitted).

⁴⁹⁵ See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In *Jackson*, the pretrial delay involved years.

⁴⁹⁶ *Id.* at 361.

⁴⁹⁷ Schnyder, *supra* note 164, at 86; Viljoen, *supra* note 313, at 63.

VI. THE CONCLUSION: MYTHS DISPELLED AND LESSONS LEARNED CONCERNING JUVENILES' COMPETENCE TO STAND TRIAL

A. MYTHS DISPELLED

1. Massive Numbers of Juvenile Defendants Are Incompetent to Stand Trial

Contrary to the assertions of the DPs, the vast majority of juvenile defendants are competent to stand trial. Even focusing the research disproportionately on the most troubled (that is, detained) segment of juvenile offenders could not alter these results. The majority of DP research has found most juveniles, even at the tender age of eleven years, know and comprehend enough to satisfy what competency to stand trial requires. This should hardly be surprising, considering the very low threshold for competency to stand trial. The DPs' message that, as a group, even fourteen- and fifteen-year-olds are incompetent to stand trial lacks credibility. It is inconceivable that the four-year high school today is populated by youths among whom one-half are incompetent to stand trial.

2. Competency to Stand Trial Is Relative, Group-Determined, and Associated with Punishment

Contrary to the assertions of the DPs, competency to stand trial is not an adjustable concept. It is simply wrong to measure and compare overall results of a group of juveniles versus a group of adults, and then to suggest that "lower scores" for the one group means that all in that group are "less" competent than the other and actually are incompetent across the board. If the focus of this inquiry were race or gender instead of age, there would be confusion and outrage accompanying the publication of this kind of study. Competency to stand trial is a personal, individual matter, just as the insanity defense is. A particular defendant either is or is not competent to stand trial, and the general tendencies of this defendant's group characteristics are irrelevant. Also irrelevant is whether more juveniles are incompetent compared to adults. Finally, the sentence is irrelevant as well. Before the state can convict or adjudicate any defendant, it is essential that the accused experiencing that prosecution is legitimately and fully competent to stand trial.

B. LESSONS LEARNED

1. Ideology and Not a Constitutional Right Is Driving Research Regarding Competency to Stand Trial

It is abundantly clear that the DPs' main concern is to prevent the criminal prosecution of juvenile offenders, rather than to ensure the prosecution of only competent defendants. If competency to stand trial were the real concern, DPs should welcome prosecution in criminal court. The very things that purportedly offend the DPs, such as lesser advocacy by defense counsel and violation of confidentiality between counsel and defendant, are trademarks of juvenile court. First, the DPs denigrate juvenile defendants (and accuse them of being incompetent) for their believing, perhaps after directly experiencing, that, among other things, defense attorneys will not work diligently for their acquittal. Then, the DPs insist that the solution for this alleged incompetency is holding trial in juvenile court where juvenile defendants are likely to (re)encounter that very same lack of vigorous representation. And, the DPs are willing to reduce the supposed competencies associated with competency to stand trial so as to allow this prosecution to occur in juvenile court. Actually, taking the DPs' logic to its natural extreme, if juvenile court is to become the haven for juvenile defendants who are theoretically incompetent to stand trial, then competent juveniles should be prosecuted in criminal court, particularly all sixteen- and seventeen-year-olds who regularly outperform adults on the competency tests employed in DP research.

Rather than proscribing the prosecution of all juvenile offenders below a certain age in criminal court, the implications of the DPs' research lead to educating juvenile defendants and to cleaning up a number of items in juvenile court, including the nature of defense representation. Instead of militating to enhance the due process attending the prosecution of juvenile offenders in both juvenile and criminal courts, the DPs propose to promote injustice in juvenile court by prosecuting incompetent defendants there. This arrangement creates havoc by creating nebulous boundaries between the two courts based on subjective, ambiguous, artificial, and malleable determinations of competency to stand trial.

2. Juveniles Need Classroom Instruction on Their Rights

Disclosed throughout the research into custodial interrogation and competency to stand trial has been a significant unawareness of the rights juveniles enjoy. Juveniles need instruction to better comprehend their rights. Surely this material is as important to many students as the operation of state and federal governments. This material should be

included in their studies by middle school. The curriculum may not compare well with the actual experiences of some who have been processed by the juvenile court, which could make for interesting classroom discussions. At least students will be informed of the ways in which juvenile courts are supposed to operate. Truants and dropouts, who arguably need this instruction the most, may not receive it. But then it will be students depriving themselves instead of schools not providing valuable lessons. This may be what is needed to encourage some to return to school or to not leave in the first place.

3. Juvenile Defendants Require Extra Attention from Defense Counsel

Whether a criminal charge against a youth is prosecuted in juvenile or criminal court, the youth deserves and requires special guidance and instruction. Perhaps, as some research has found, all that might be needed is for defense counsel to spend some extra time with juvenile clients. It might also be productive to have special certification for all defense attorneys who want to work in juvenile court or with juvenile clients in criminal court. Minimally, defense attorneys should ensure that juvenile defendants are aware of their rights at all stages of the process, and all court personnel should verify that youths who waive rights do so intelligently and voluntarily. To be sure, juvenile defendants may still be vulnerable to peer influence or unrealistic estimates of the value of plea bargaining versus trial, but as long as the youth knows what is occurring and the rights, if any, which are being surrendered, then the youth has made a competent, if not wise, decision. Neither society nor the Constitution should expect more.

In terms of policy, there are many very valid reasons why the vast majority of juvenile offenders should not be prosecuted in criminal court. The desire to ensure that all defendants are competent to stand trial, however, is not one of them.

