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***323** CONSIDERATIONS IN THE ASSESSMENT OF COMPETENT TO PROCEED [FNd1] IN JUVENILE COURT [FNdd1]

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I. Introduction

Although the first juvenile court was established a little over 100 years ago, [FN1] the ability of youth to participate in legal proceedings typically was not the subject of discussion and consideration until more recently. [FN2] In the past 15 years, however, increasing attention has been paid to juveniles' adjudicative competence. Researchers have begun to study the competence-related abilities of youth, state legislatures have revised the sections of their juvenile codes devoted to adjudicative competence, and legal commentators and appellate courts have debated what is presently and what should be required of juveniles in this context.

The flurry of attention that juveniles' adjudicative competence received has resulted in swift changes in legal practice. Defense attorneys who appear in juvenile court regularly request that their clients' ability to understand and participate in the legal process be assessed, whereas such evaluations rarely, if ever, occurred just 15 years ago. Juveniles adjudicated incompetent to proceed routinely have their cases stayed and are ordered to participate in treatment and rehabilitation focused on the emotional or behavioral disturbances considered to underlie their limited understanding and appreciation of the legal process with the intent of them eventually returning to court, being adjudicated competent to proceed, and having their cases resumed. [FN3] Discussed below are legal and clinical issues of primary importance to attorneys and judges in cases when a juvenile's competence to proceed is at issue, assessment techniques that should be *324 employed by mental health professionals, and strategies for attorneys and judges when considering the reports and opinions of examining mental health professionals.

II. A Brief History of the Juvenile Court

It has only been in the last century that special courts designed to respond to juveniles who engage in what would otherwise be classified as criminal behavior have existed. [FN4] Through the end of the 19th century, juveniles accused of criminal acts were subject to criminal proceedings and sanctions. [FN5] In 1899, however, the first juvenile court was established in Illinois, [FN6] after which similar courts were quickly established around the country (and world). [FN7] Because their goal was primarily rehabilitation rather than punishment, juvenile courts looked very different from the criminal courts from which they emerged. [FN8] Since the

proceedings were not criminal, youth were not subjected to trials to determine their guilt or innocence, but rather participated in hearings in which they might be adjudicated delinquent. [FN9] Youth who were adjudicated delinquent and in need of services were not sentenced, but rather received a “disposition” that was crafted by the court with the intention of rehabilitating them. [FN10] Because of the courts' rehabilitative focus, psychologists, social workers, and other mental health professionals presumed to have expertise regarding youth, their development, their problems, and appropriate treatments, played a significant role in juvenile proceedings. [FN11] Finally, and perhaps most importantly, children appearing in juvenile court were often not provided many of the legal protections of their adult counterparts (e.g., the right to remain silent, notice, representation by an attorney, an adversarial hearing, and confrontation of accusers). [FN12] Indeed, for the first 50 or 60 years of the juvenile courts' existence, an informal legal process characterized by the heavy involvement and input of mental health professionals was the norm. [FN13]

The first significant reform in the institution occurred in the 1960's when critics questioned the juvenile courts' intent and the larger juvenile justice system in which it was embedded. [FN14] Observations that youth in juvenile court *325 were not provided the same legal protections as adults in criminal court, but were subjected to dispositions that were similarly punitive, caught the judiciary's attention. [FN15] In a succession of cases beginning in 1966, the United States Supreme Court noted the increasingly punitive nature of, and diminished emphasis on rehabilitation in, the juvenile justice system. [FN16] Further, the Court voiced its concern about the lack of procedural protections afforded youth appearing in juvenile court, [FN17] and ruled that juveniles appearing in delinquency proceedings were entitled to almost all the protections afforded their adult counterparts who were subject to criminal proceedings. [FN18] Just how far the juvenile court and juvenile justice system moved from benevolent institutions that acted in the best interests of their charges to punitive ones that were sanction-focused is revealed in two Supreme Court cases. In *Kent v. United States* the Court observed that the juvenile justice system provided minors with “the worst of both worlds”, offering neither the legal protections afforded adults who were subject to criminal proceedings, nor the genuine efforts at rehabilitation that were promised. [FN19] In *In re Gault*, the Court, in its holding, analogized the juvenile court to a “kangaroo court” that was arbitrary, ineffective and unjust. [FN20] Subsequent to this line of holdings, juvenile courts became more formal in their procedures, adopted many of the “trappings” of criminal court, and made clear that juveniles' are entitled to a number of basic rights (including the right to avoid self incrimination, notice, legal representation, a trial or hearing, and confrontation). [FN21] Some contend, however, that despite these cases and the related changes in legal process, the juvenile court system continues to inadequately protect the legal rights of minors, [FN22] and recent surveys of juvenile court practices throughout the United States provide considerable support for this notion. [FN23]

Although juveniles were provided many of the same constitutional protections afforded adults subsequent to the Supreme Court's holdings in *Gault*, [FN24] *Kent*, [FN25] and *In re Winship*, [FN26] rarely was attention paid to the issue of *326 juveniles' capacity to either understand, or participate in their cases, or to exercise the rights to which they were entitled. [FN27] Juveniles' cases were still considered to be taking place in a setting in which the goal was to provide treatment and rehabilitation. [FN28] Worst case scenarios involved commitment to secure residential programs for a limited period of time that typically did not extend beyond when the youth reached the age of maturity. [FN29] Defense attorneys were reluctant to challenge or delay the legal process by questioning their clients' ability to understand and participate in the proceedings. [FN30] However, when still another dramatic change in the juvenile justice system occurred in the 1990's, attorneys, courts, and legislatures began to pay increasing attention to juveniles' adjudicative competence. [FN31]

The juvenile justice system experienced its second significant reform beginning in the early 1990's when, in

response to the public's increasing concern about juvenile crime (particularly violent crime), the majority of states made substantive changes to their juvenile justice systems. [FN32] The primary objective and outcome of states reforming their juvenile justice system was to allow for more significant sanctions for juvenile offenders by explicitly identifying punishment and incapacitation as the mission of their juvenile courts, expanding the courts' jurisdiction over youth adjudicated delinquent, and increasing the ease with which minors with histories of serious or repeat offenses could be transferred to criminal court (where they were subject to adult sanctions). [FN33] According to some commentators, it was in response to this second set of reforms that the defense bar began to force the issue of the ability of youth to understand and participate in legal proceedings in juvenile court. [FN34]

*327 III. Competence to Proceed

A. Common Law Underpinnings and Rationale

The requirement that a criminal defendant be able to assist in his or her defense and participate in the legal process can be traced to at least the 17th century, when courts refused to proceed against defendants considered to be incompetent as a result of a mental disorder or mental defect. [FN35] This requirement is considered to promote the dignity of the legal process, the accuracy of legal judgments, and the accused's autonomy. [FN36] More specifically, prosecuting defendants who are incapable of understanding and participating in the legal process and assisting in their defense is inconsistent with conceptions about fundamental fairness of the legal process; the defendants' and the legal system's investment in accurate judicial outcomes (insofar as incapacitated defendants may be less able to provide information helpful to their defense and challenge the state's allegations); and the law's requirement that defendants, with the assistance of counsel, must ultimately make (rational) decisions about important case matters. [FN37]

B. Competence to Proceed in Criminal Court

Consistent with the common-law, the Constitution requires that defendants be competent to participate in the criminal justice process. [FN38] In *Dusky v. United States*, the Supreme Court ruled that a defendant must have "...sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...[and have a] rational as well as factual understanding of the proceedings against him." [FN39] The Court's decision in *Dusky* identified only what was minimally required of defendants in order to proceed with prosecution, yet most states have adopted some variant of the *Dusky* language and approach. [FN40] While some of the Court's language in *Dusky* is vague and invites interpretation or speculation, there appears to be a general consensus regarding the standard and what it requires of defendants. [FN41] Although the *Dusky* standard does not identify any predicate conditions that must be present and responsible for any *328 observed deficits in competence-related abilities (e.g., mental illness, mental retardation, or normal "limitations" associated with youth), many state statutes devoted to criminal proceedings associate competence-related deficits that result from mental impairments of some type (i.e., mental illness or mental retardation). [FN42] The *Dusky* Court's reference to "sufficient" ability and a "reasonable" degree of understanding suggests that the defendant's capacities need not be unimpaired, whereas language referencing the defendant's "present" ability indicates that the focus is on competence-related capacities as they exist at the time of the evaluation and in the immediate future. [FN43] The Court's reference to both a "factual" and "rational" understanding of the proceedings suggests that simple

knowledge of facts and factors relevant to the proceedings may not be enough. [FN44] The defendant may also need to be able to appreciate and consider the proceedings and case facts, as well as make legally relevant decisions in a rational way that is not significantly impaired by mental disorder.

C. Competence to Proceed in Juvenile Court

As noted above, through a series of cases decided in the 1960's the Supreme Court made clear that youth appearing in juvenile court are entitled to almost all the legal protections enjoyed by their adult counterparts who appear in criminal court, including the rights to notice, counsel, a hearing or trial, confrontation, and avoid self-incrimination. [FN45] The Court, however, has never addressed whether the Constitution requires that youth be competent to participate in proceedings that occur in juvenile court. It seems reasonable to predict that the Court would rule that the Constitution requires this prerequisite on the grounds that the important procedural rights that were enunciated in *Gault*, *Kent*, and *Winship* would mean little if the youth could not exercise them. Yet, since the Court has distinguished juvenile proceedings from criminal proceedings in at least some ways, [FN46] it can also be argued that a juvenile need not be able to understand and participate in the legal process provided that there is someone by the youth's side (e.g., counsel) who can exercise important rights on his or her behalf. This latter argument is, at the very least, strained insofar as many of the rights outlined in *Gault*, *Kent*, and *Winship* require some capacity on the youth's part in order for them to have a real impact. That is, there are many circumstances in which it is important that youth be capable of exercising these rights in order for them to have any real meaning (e.g., to confront accusers, provide defense counsel with potentially exculpatory information, and make important case decisions).

*329 Thirty-four states and the District of Columbia specifically address the issue of competence in juvenile proceedings, and most of these states have simply imported from their criminal codes the Dusky-like criteria employed in the jurisdiction's adult proceedings. [FN47] Courts differ, however, with respect to ruling how the test enunciated in *Dusky* should be applied in juvenile proceedings. Some courts hold that the capacity required of a respondent in a juvenile proceeding is identical to that demanded of an adult in a criminal proceeding, [FN48] whereas others hold that the *Dusky* standard may be conceptualized and applied differently in juvenile proceedings. For example, in *Ohio v. Settles* the court, in considering the state's competence standard for minors, held that “juveniles are assessed by juvenile rather than adult norms”, [FN49] and in *In re Causey* the court held that even non-impaired juveniles may not demonstrate the same abilities as adults with respect to rationally understanding the proceedings or working with their attorneys. [FN50] Finally, at least one court has determined that juveniles need not be competent to participate in delinquency proceedings, based on the presumption that the juvenile court and juvenile justice system are focused on rehabilitation rather than punishment. [FN51]

Given the developmental differences between adults and juveniles, adoption of competence standards and criteria used with adults, while relatively easy, has proven problematic. For example, some states do not require that findings of incompetence must be due to mental illness or mental retardation. [FN52] As a result, juveniles whose inability to understand and participate in legal proceedings flows from normal cognitive “limitations” related to incomplete and ongoing development (sometimes referred to as “developmental incompetence” or “developmental immaturity”) cannot be adjudicated incompetent to proceed, despite their clearly documented lack of understanding and appreciation. [FN53] According to Grisso, a small number of states specifically identify “developmental immaturity” as a basis for incompetence, while others recognize it as a basis for a finding of incompetence without specific statutory recognition. [FN54] Grisso and Quinlan reported that

approximately two-thirds of the evaluators who responded to their national survey of juvenile court clinics indicated that they sometimes recommended to the court that youth they *330 evaluated be adjudicated incompetent to proceed based on developmental limitations, and one-fifth identified this as the most common basis for recommendations of adjudication as incompetent to proceed. [FN55] Thus, although all defendants, including minors appearing in juvenile court, are presumed competent to proceed, in most jurisdictions courts are apparently willing to recognize that capacity to understand and participate in the proceedings can be affected by factors beyond mental illness and mental retardation.

IV. Developmental Psychology and Adolescent Decision Making in Legal Contexts

The constantly changing physical, cognitive, social and emotional capacities of children and adolescents distinguishes them from adults in important ways, many of which are relevant to their understanding of and participation in the legal process. The law often regards a youth's level of maturity as a benchmark for decisions about his or her offense and culpability. For example, in *Kent* the Supreme Court referenced that the criteria judges employed in deciding whether the juvenile courts' jurisdiction would be waived included “the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.” [FN56]

For years following *Kent*, the notion of maturity continued to hold prominence and was referenced in psychological reports and judicial decisions, but it lacked much consensual meaning. [FN57] Historically, conclusions about the maturity and capacities of juveniles appearing in court were often based on obvious characteristics such as age or physical development, or behaviors such as the nature and severity of the delinquent acts they are accused of committing. [FN58] These factors, however, are not reliable indicators of true psychosocial capacity and maturity. [FN59] There is considerable variability in the age and rate at which emotional and cognitive capacities that affect juveniles' ability to understand and participate in the legal process develop; development does not occur in a predictable linear fashion, and development does not occur equally in all spheres. [FN60] In the past decade, however, investigators have begun to research and operationalize the construct of psychosocial maturity which Steinberg and Cauffman define as “the complexity and sophistication of the process of *331 individual decision-making as it is affected by a range of cognitive, emotional, and social factors.” [FN61]

Steinberg and Cauffman identified four capacities that are particularly important to understanding youths' legally relevant decision making: responsibility, time perspective, social perspective, and temperance. [FN62] Responsibility refers to the juvenile's ability to be self-reliant and independent, act autonomously, and not be inappropriately influenced by external pressures (including peer opinion when making important decisions). [FN63] Time perspective references the youth's capacity to appreciate and consider both short-term and long-term consequences incident to important decisions and behaviors. [FN64] Interpersonal perspective describes the youth's ability to understand and appreciate the perspectives, feelings, and views of others. [FN65] Temperance refers to the youth's emotional and behavioral controls and his or her ability to manage emotions, impulses, and behavior. [FN66] All of these factors should be considered with respect to how they affect the juvenile's legal decisions.

A. Competence-Related Abilities of Juveniles

Coinciding with the legal system's increasing attention to the adjudicative competence of juveniles in the

past decade, psychologists and other researchers have begun to investigate juveniles' competence-related abilities. Researchers have studied juveniles' competency-related abilities and the manner and extent to which they may be affected by juveniles' reasoning skills, [FN67] cognitive development, [FN68] and psychiatric disturbance. [FN69] These studies have incorporated a range of samples, including youth from within and outside the juvenile justice system, [FN70] youth referred for competence evaluations, [FN71] and youth adjudicated *332 incompetent to proceed. [FN72] Collective findings indicate that a majority of juveniles under the age of 15, as well as 15 and 16-year-olds with compromised intellectual abilities, show significant limitations in their ability to understand and participate in the legal process, while 16 to 17-year-old juveniles typically have capacities that are more comparable to those of adults. [FN73]

The most comprehensive study examining the competence related abilities of juveniles (which was conducted with funding from the John and Catherine T. MacArthur Foundation) [FN74] is worthy of detailed review given its scope. Grisso and his colleagues conducted a multi-site study of adjudicative competence on a sample of over 1,300 males and females between the ages of 11 and 24. [FN75] Approximately half the subjects were youth and young adults detained in jail or juvenile detention facilities, whereas the remaining half were community-dwelling youth and young adults similar in age, gender, ethnicity, and socioeconomic status to their detained counterparts. [FN76] All subjects were administered a standardized battery of tests designed to assess their abilities regarding competence to stand trial, strategies of legal decision making, and emotional, behavioral and cognitive functioning. [FN77] The MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA), a normed measure designed to assess adult defendants' capacity to understand and participate in the criminal justice process, was used to assess the subjects' understanding of and ability to participate in the legal process. [FN78] The MacCAT-CA, which uses a hypothetical battery case, assesses an examinee's understanding (i.e., knowledge of procedures and courtroom personnel), reasoning (i.e., ability to recognize information relevant to a defense, process information, and make important case decisions), and appreciation (i.e., the degree to which the examinee's case decision-making is affected by mental disorder) of legal proceedings. [FN79]

As assessed by the MacCAT-CA, competence-related abilities did not vary by gender, ethnicity, socioeconomic status, prior experience with the legal system, or psychopathology-intelligence and age was the only significant predictor of competence-related abilities in this sample. [FN80] Juveniles of below-average intelligence were more likely to show significant impairment than *333 juveniles with average or above average intelligence, and consistent with prior research, a greater proportion of youth in the juvenile justice sample were of below-average intelligence than those in the community dwelling sample. [FN81]

As noted above, there was also a relationship between age and competence-related abilities, with older subjects demonstrating more complete understanding, reasoning, and appreciation abilities as assessed by the MacCAT-CA. [FN82] Youth ages 11 to 13 demonstrated a greater number of limited competence-related abilities (i.e., understanding of legal matters and ability to make legally relevant decisions) than did 14 to 15 year-olds, who demonstrated a greater number of limited abilities than 16 to 17 year-olds, whose abilities were similar to those of the young adults ages 18 to 24. [FN83] Whereas 30% of the 11 to 13 year-olds demonstrated significant competence-related limitations as assessed by the MacCAT-CA, only 19% of the 14 to 15 year-olds, and 12% of the 16 to 17 year-olds and young adults demonstrated such limitations. [FN84]

Significant age differences were also apparent when it came to consideration for plea-bargaining, which is an especially important issue given the large number of juveniles who waive their right to a hearing and enter a plea. [FN85] When presented with a hypothetical case, half of the 18 to 24 year-olds indicated that they would

enter a guilty plea and waive their right to a trial, whereas 75% of the 11 to 13 year-olds, 65% of 14 to 15 year-olds, and 60% of the 16 to 17 year-olds indicated they would take such a course of action. [FN86] The young adults considered all outcomes, including entering a guilty plea and getting a sentence of two years or going to trial and being adjudicated guilty (six years) or not guilty (zero years). [FN87] In contrast, youth in the study (who were more likely to enter a guilty plea as a function of their decreasing age) paid little attention to the outcome associated with acquittal (zero years) and focused in on the comparison of two years (resulting from a plea bargain) and six years (resulting from a conviction/delinquency adjudication) in their decision making. [FN88] Finally, similar age-related differences were also observed when it came to the subjects' abilities to identify the seriousness of negative consequences of various *334 decisions, the likelihood of such outcomes, and the long-term consequences of such negative outcomes. [FN89]

V. Competence to Proceed Evaluations in Juvenile Courts

A. Current Practices

Although juveniles' competence to proceed in the delinquency process has only received significant attention in the past 15 years, a number of recent investigations provide some insight into the assessment practices of mental health professionals. Ryba and her colleagues surveyed 80 psychologists with considerable experience evaluating youth in the juvenile justice system (the group reported an average of 16 years of experience conducting these evaluations). [FN90] Clinical constructs and factors that this group of psychologists identified as important to consider when conducting a competence evaluation included the youth's cognitive functioning, social skills, decision-making capacities, developmental abilities, behavioral controls, and moral reasoning capacity. [FN91] Seventy percent of the sample agreed that core elements of these examinations included assessment and description of the juvenile's current emotional, cognitive, and behavioral functioning, understanding and appreciation of the charges, possible penalties and the legal process, ability to work with counsel, and developmental functioning as it affected competence-related issues. [FN92]

Christy, Douglas, Otto, and Petrla reviewed over 1,300 competence evaluations completed on 674 different Florida youths who were evaluated by two or more mental health professionals, adjudicated incompetent to proceed in juvenile court, and ordered to undergo competence-related treatment or rehabilitation. [FN93] Psychologists and psychiatrists completed the large majority of evaluations, and the median number of pages per report (perhaps a gross measure of comprehensiveness) was four. [FN94] All examiners attempted interviews of the youth and the most frequently employed tests were measures of intelligence. [FN95] This latter finding is partly a function of the sample which, as indicated above, included only reports for juveniles who had been adjudicated incompetent to *335 proceed, as well as the fact that juveniles who are adjudicated incompetent to proceed (as compared to their adult counterparts) are more likely to meet diagnostic criteria for mental retardation. [FN96] Unfortunately, in few reports was there reference to third party data and collateral data, which is considered integral to competent forensic evaluation. [FN97] In only 40% of the reports did the examiner indicate that mental health records had been reviewed, and in a little over half (54%) of the reports was reference made to an interview of a family member or other person (e.g., guardian or foster parent) knowledgeable about the youth who was the subject of the examination. [FN98] The investigators also reported that the examiners' descriptions of the youths' clinical functioning was less than complete, and most reports did not adequately describe how any emotional or behavioral impairments that were observed affected the juveniles' competence-related abilities. [FN99] In contrast, over 85% of the reports included some discussion of a number

of competence-related abilities, including the examinees' understanding and appreciation of the charges, allegations, possible penalties, the legal process and their rights, as well as their ability to work with their attorneys, testify, and participate in and understand the legal proceedings. [FN100] Although most of the reports included opinions or recommendations regarding the juveniles' competence to proceed (96%) and "restorability" (84%), only 62% identified the clinical condition that was considered to be the underlying cause of the competence-related limitations. [FN101]

B. Recommendations for Evaluating the Competence-Related Abilities of Youth

There are no published standards or practice guidelines for juvenile competence to facilitate juvenile evaluations, and principles for assessing juveniles' competence-related abilities have largely been borrowed from adult competence literature. [FN102] Although a thorough discussion of the clinical-forensic competence evaluation process is beyond the scope of this chapter, a concise overview of the evaluation process and what it should entail is offered below. The interested reader is directed to other resources for additional discussion of what the evaluation process should entail. [FN103]

***336** When assessing a juvenile's competence to proceed, the mental health professional's task, at the most basic level, is to:

- (1) assess and describe the juvenile's understanding of and ability to participate in the legal process (including any limitations),
- (2) assess and describe the juvenile's current emotional, behavioral, or cognitive functioning as they may affect any competence related limitations, and,
- (3) in cases in which a finding of incompetence is likely or possible, identify whether the emotional, behavioral, or cognitive impairments responsible for the impaired capacity may be remedied, and offer specific recommendations for intervention/treatment when indicated.

All of the above is to be considered, of course, in light of the juvenile's emotional, behavioral, and cognitive development. This requires that the examiner understand the juvenile justice system, child and adolescent development, and child and adolescent psychopathology. The examiner also must have a clear understanding of:

- (1) the charges, allegations, and possible sanctions the juvenile faces,
- (2) the juvenile's appreciation of the charges, allegations, and possible sanctions,
- (3) the juvenile's appreciation of his or her rights,
- (4) the juvenile's ability to participate in and understand the legal process, and
- (5) the juvenile's ability to work with his or her attorney and provide information of relevance.

As noted above, assessment of a youth's current emotional, behavioral, cognitive, and developmental functioning is an integral part of the competence evaluation, and mental health professionals may administer tests which assist in assessment of relevant constructs (e.g., measures of mood, anxiety, attention, intelligence, memory, and academic ability). These test results, however, provide little, if any, information regarding a juvenile's competence-related abilities.

There are no psychological "tests" that have been developed for use with juveniles whose competence to proceed is at issue. Although a number of assessment tools have been developed for use with adults whose competence is ***337** called into question, [FN104] the use of such tools with juveniles is discouraged because of the many developmental differences between adolescents and adults, and the absence of adequate data regarding juveniles' normative performance on these assessment tools. [FN105] There are, however, two recently

published assessment instruments that show some promise. These instruments are not “tests” that provide scores, but rather are “structured professional judgment” tools, the purpose of which is to ensure a comprehensive and reliable evaluation of the examinee's competence-related abilities.

Grisso's Juvenile Adjudicative Competence Interview (JACI) structures the professional's clinical examination around those factors most relevant to understanding and participating in the legal process and directs the examiner's attention to developmental factors that can affect a juvenile's understanding, appreciation, and decision-making in legal contexts. [FN106] The JACI guides the examiner's assessment in 12 primary areas, including the youth's:

- (1) understanding and appreciation of the charges and allegations,
 - (2) understanding and appreciation of the purpose of the delinquency hearing,
 - (3) understanding and appreciation of possible pleas,
 - (4) understanding and appreciation of possible penalties,
 - (5) understanding and appreciation of the prosecutor's role,
 - (6) understanding and appreciation of the defense attorney's role,
 - (7) understanding and appreciation of the juvenile probation officer's role,
 - (8) understanding and appreciation of the judge's role,
 - (9) ability to work with and assist counsel,
 - (10) understanding and appreciation of the plea agreement process,
 - (11) decision making and reasoning abilities (as affected by developmental factors such as autonomy, risk perception, time perspective, and abstract thinking) relevant to deciding *338 whether to retain counsel, assist counsel, and make plea decisions, and
 - (12) ability to participate in and understand the legal proceedings, including the capacity to testify.
- [FN107]

The Fitness Interview Test-Revised (FIT-R), like the JACI, is not a test, but rather is a semi-structured interview which guides the examiner's clinical assessment of the youth's competence related abilities. [FN108] Although the FIT-R was developed for use with adults, preliminary research indicates its utility with juveniles as well. [FN109] The FIT-R focuses on 16 separate areas or capacities, including the juvenile's:

- (1) understanding and appreciation of the arrest process,
- (2) understanding and appreciation of the charges and allegations,
- (3) understanding of the roles of key participants (i.e., defense counsel, prosecutor, judge, witnesses),
- (4) understanding and appreciation of the legal process,
- (5) understanding and appreciation of possible pleas,
- (6) understanding of court procedure,
- (7) understanding and appreciation of possible sanctions,
- (8) understanding and appreciation of legal defenses,
- (9) understanding and appreciation of likely outcomes,

- (10) capacity to communicate relevant information to counsel,
- (11) capacity to work with and relate to counsel,
- (12) capacity to plan a legal strategy,
- (13) capacity to engage in one's defense,
- (14) capacity to challenge prosecution witnesses,
- ***339** (15) capacity to testify relevantly, and
- (16) capacity to manage courtroom behavior. [\[FN110\]](#)

Based on these inquiries, the examiner forms judgments about the examinee's capacities in three primary areas: his or her understanding of the legal proceedings; understanding of possible outcomes; and ability to work with counsel. [\[FN111\]](#) Unlike the JACI, the FIT-R was not developed specifically for use with youth, and as a result, does not include any components designed to insure that the examiner considers developmental factors as they may impact the juvenile's competence-related abilities. [\[FN112\]](#)

C. Review and Critical Assessment of Competence Evaluations

Mental health professionals who evaluate youth appearing in juvenile court must appreciate that their role is to provide the court (i.e., judge and attorneys) with information about the youth they would not otherwise have so as to bring about more informed and accurate decisions. Accordingly, judges and attorneys are best conceptualized as consumers of these forensic evaluations.

With some exceptions, little has been written to guide attorneys in their review of juvenile forensic evaluations. [\[FN113\]](#) Provided below is some practical guidance designed to make attorneys and judges more knowledgeable consumers of competence evaluations of youth appearing in juvenile court.

Most importantly, attorneys and judges can bring about better evaluations by ensuring that the evaluator who is retained is appropriately qualified and credentialed. As noted above, integral to evaluating the competence-related abilities of juveniles is an understanding of the juvenile justice system, child and adolescent development, and child and adolescent psychopathology. When seeking a qualified examiner, it is helpful to contact colleagues for referrals, ask potential examiners to provide copies of previously completed evaluations (with appropriate privacy protections considered), and query potential examiners about competence-related issues (including the jurisdiction's juvenile justice system and competence laws and rules). Attorneys and judges are cautioned against the fallacy of some common sense inferences, including that expertise results simply from conducting large numbers of competence evaluations (courts have ***340** been known to consistently appoint poorly qualified professionals); that knowledge about children and adolescents, without knowledge about the juvenile justice system and juvenile competence to proceed, is adequate (such examiners may produce evaluations that do not begin to approach the competence issue before the court); and that knowledge about the juvenile justice system and juvenile competence to proceed, without knowledge about child adolescent development and psychopathology, is adequate (such examiners may draw highly inaccurate conclusions about the youth they examine).

Moreover, it is also helpful for the attorney or court to provide the retained examiner with any background or collateral information that may be relevant to understanding the youth and his or her competence-related abilities. Documents that are clearly relevant and are ideally provided to the examiner prior to the evaluation include: case specific information such as arrest reports, witness statements, and charging documents, as well as personal information about the juvenile, including school records, juvenile justice history, medical and mental health records, and the names of and contact information for persons knowledgeable about the youth, the youth's history, and development. Attorneys should be wary of mental health professionals who are willing to conduct the evaluation and offer opinions regarding the youth's competence-related abilities solely based on a clinical interview of the youth and without important collateral information.

Whether the prosecutor or defense counsel is entitled to observe the competence evaluation varies according to the jurisdiction. Observation of the evaluation can provide the attorney with important information about the examination process, the examiner, and the youth's abilities that the prosecutor or counsel might not otherwise have access to. Observing the examination is to be distinguished from interfering with the evaluation. Before an evaluation that is to be observed begins, the attorney and examiner should agree to its scope, ground rules, and resolve any points of contention. For example, there may be some aspects of the examination, such as administration of psychological testing, that the examiner might not want recorded or observed given concerns regarding test reliability, validity, and security. Audio or video recording, as an alternative to direct observation, may be just as helpful to the interested attorney, because audio or video recording can be perceived as less "intrusive" than a third party's presence, and takes less of the attorney's time. Further, because using a court reporter to record the evaluation is more costly and may be perceived by the examinee and examiner as more intrusive, it is recommended as a last resort.

The evaluation and associated report will be much more useful if the attorneys and judge review it before the examiner's court appearance and testimony. A cursory review can reveal some basic but very important information about the evaluation, including when and where it took place, the length of the evaluation, important sources of information that were and were not accessed, and the specific assessment techniques that were and were not employed. Knowing the basis for any opinions offered by the examiner allows ***341** the attorney and court to consider how much weight or credence should be accorded to them. A more thorough review of the report should reveal a summary of relevant background information (i.e., family social, educational, medical, mental health, and juvenile justice histories); a detailed description of the youth's emotional, behavioral and cognitive functioning; an assessment of the youth's response style or approach to the evaluation (e.g., whether the youth exaggerated, fabricated, denied, or minimized problems); a detailed description of the youth's competence-related abilities and limitations; and opinions regarding restorability and associated treatment recommendations (if indicated).

Important to consider when reviewing the report is whether the examiner made significant distinctions between the juveniles' knowledge, willingness, and capacity. Lack of knowledge does not necessarily indicate a lack of ability. Moreover, recommending a finding of incompetence based simply on insufficient knowledge is inconsistent with the Supreme Court's conceptualization of competence that it enunciated in *Dusky* [FN114] and makes little sense with respect to disposition since treatment or habilitation cannot remedy knowledge deficits. Conversely, presence of knowledge alone does not necessarily indicate capacity. Some youth can offer a rote, mechanistic, or memorized account of the legal process, one's rights, or case circumstances without any real understanding or appreciation. Assessing for knowledge or lack thereof is considerably easier than probing deeper to assess the examinee's appreciation of these issues. [FN115] It is also important to distinguish the juvenile's unwillingness to participate in the legal process or work with defense counsel from a lack of ability or

capacity. Although this distinction may sometimes be difficult to discern, particularly when considered in light of the continual debate in psychology and law regarding issues of free will and determinism, examiners should be sensitive to this issue.

In cases where a finding of incapacity is suggested, the examiner should identify the suspected cause (e.g., emotional or behavioral impairment, cognitive impairment, or normal developmental maturity issues related to age) with an eye towards identifying disposition and interventions designed to treat or habilitate the cause or condition. If incapacity is considered to result from normal developmental maturity issues associated with age, then treatment or habilitation recommendations make little sense. If, however, the impairment that is responsible for the juvenile's competence related limitations can be impacted with treatment or rehabilitation, then recommendations for intervention should be made.

*342 VI. Summary

The ability of youth to understand and participate in legal proceedings has received considerable attention from legal and mental health professionals alike over the course of the past fifteen years as a result of the juvenile court and juvenile justice system adopting a more punitive focus and de-emphasizing rehabilitation. The large majority of states require that youth be competent to proceed when appearing in juvenile court, but adoption of the competence standards that have historically been employed with adults in criminal proceedings is problematic given the significant differences between juveniles and adults with respect to their reasoning and decision making abilities.

In order to ensure that youth are able to enjoy important rights to which they are entitled when appearing in juvenile court, it is imperative that they be able to understand and participate in the proceedings. Mental health professionals called on to help attorneys and judges understand juveniles' competence-related abilities are obligated to describe juveniles' capacities as they are affected by their developmental abilities, and attorneys and judges must consider mental health professionals' work and opinions carefully. The dignity and accuracy of the legal process requires no less.

[FNd1]. Although many readers may be more familiar with the term “competence to stand trial”, the term “competence to proceed” is used throughout this paper to reflect the requirement that juveniles must be competent to participate throughout the delinquency process.

[FNdd1]. This paper is based on a presentation delivered at the 2006 Juvenile Law Symposium sponsored by Salmon P. Chase College of Law.

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[FN2]. Richard Bonnie & Thomas Grisso, Adjudicative Competence and Youthful Offenders, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 73, 84 (Thomas Grisso & Robert Schwartz eds., 2000).

[FN3]. *Id.* at 74.

[FN4]. *Id.* at 82.

[FN5]. Bonnie & Grisso, *supra* note 2, at 79-82.

[FN6]. Tanenhaus, *supra* note 1, at 17.

[FN7]. Franklin E. Zimring, *The Punitive Necessity of Waiver*, in *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 207, 207 (Jeffrey Fagan & Franklin E. Zimring, eds. 2000).

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[FN9]. *Id.*

[FN10]. *Id.*

[FN11]. Thomas Grisso, *Forensic Evaluation in Delinquency Cases*, in 11 *Handbook of Psychology: Forensic Psychology* 315, 315-16 (Alan Goldstein ed., 2003).

[FN12]. *Id.* at 316.

[FN13]. *Id.*

[FN14]. *Id.* at 317.

[FN15]. *Id.*

[FN16]. *In re Gault*, 387 U.S. 1, 28 (1967); See Bonnie & Grisso, *supra* note 2, at 94.

[FN17]. *Kent v. United States*, 383 U.S. 541, 556 (1966).

[FN18]. Bonnie & Grisso, *supra* note 2, at 94.

[FN19]. *Kent*, 383 U.S. at 556.

[FN20]. *Gault*, 387 U.S. at 28.

[FN21]. Gary Melton, John Pettila, Norman Poythress, & Christopher Slobogin, *Psychological Evaluations For the Courts: A Handbook For Mental Health Professionals and Lawyers* 419-420 (2nd ed. 1997); Grisso, *supra* note 11, at 317.

[FN22]. Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 *Crime & Just.* 197 (1993); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 *Minn. L. Rev.* 141 (1984).

[FN23]. See National Juvenile Defender Center, available at <http://www.njdc.info/assessments.php> (last viewed Mar. 2, 2007) to review recent assessments of the adequacy of juveniles' representation and access to counsel in Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington.

[FN24]. [Gault](#), 387 U.S. at 1-2.

[FN25]. [Kent](#), 383 U.S. at 541.

[FN26]. [In re Winship](#), 397 U.S. 358, 377-78 (1970) (holding that “proof beyond a reasonable doubt” is the standard of proof required when a juvenile is charged with a crime).

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[FN28]. *Id.*

[FN29]. Bonnie & Grisso, *supra* note 2, at 95.

[FN30]. Grisso, *supra* note 11, at 317-18.

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[FN39]. [Dusky v. United States](#), 362 U.S. 402, 402 (1960).

[FN40]. Melton et al., *supra* note 21, at 123.

[FN41]. See Stafford, *supra* note 35, at 360-61; Melton et al., *supra* note 21, at 122-23.

[FN42]. Bonnie & Grisso, *supra* note 2, at 79.

[FN43]. See [Dusky](#), 362 U.S. at 402.

[FN44]. Id.

[FN45]. Melton et al., supra note 21.

[FN46]. See [McKiever v. Pennsylvania](#), 403 U.S. 528, 545 (1976) (holding that juveniles do not enjoy a constitutional right to jury trials when appearing in juvenile court).

[FN47]. Richard Redding and Lynda Frost, [Adjudicative Competence in the Modern Juvenile Court](#), 9 Va. J. Soc. Pol'y & L. 353, 374 (2001); See also Bonnie & Grisso, supra note 2, at 86.

[FN48]. In the Matter of the [Welfare of D.D.N.](#), 582 N.W.2d 278, 281 (Minn. Ct. App. 1998)(noting, “the level of competence required to permit a child's participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult.”).

[FN49]. Ohio v. Settles, No. 13-97-50, Ohio App. 3d. LEXIS 4973, at *8 (Ohio App. 3d. Sept. 30, 1998).

[FN50]. [In re Causey](#), 363 So.2d 472, 476 (La. 1978).

[FN51]. [G.J.I. v. State](#), 778 P.2d 485, 487 (Okla. Crim. App. 1989).

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[FN55]. Thomas Grisso & Janet Quinlan, A NATIONAL SURVEY OF JUVENILE COURT CLINICAL SERVICES (2005).

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[FN57]. Grisso, supra note 11, at 318.

[FN58]. Tanenhaus, supra note 1, at 32.

[FN59]. Grisso, supra note 32, at 27-29; Laurence Steinberg & Robert Schwartz, Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice 9, 19-28 (Thomas Grisso & Robert Schwartz eds., 2000); Randy Otto & Randy Borum, Evaluation of Youth in the Juvenile Justice System, in Handbook of Forensic Psychology 873, 875-77 (William O'Donahue and Eric. Levensky eds., 2004).

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[FN73]. Cooper, *supra* note 68, at 177; see also Grisso et al., *supra* note 70, at 356.

[FN74]. Grisso et al. *supra* note 70, at 362.

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[FN77]. *Id.* at 341-56.

[FN78]. Norman Poythress et al., *MANUAL FOR THE MACARTHUR COMPETENCE ASSESSMENT TOOL-CRIMINAL ADJUDICATION* (1999).

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[FN83]. *Id.* at 356.

[FN84]. *Id.* Similar findings were reported by Ficke, Hart, and Deardorff, who administered measures of intellectual, emotional and behavioral functioning along with the MacCAT-CA to a sample of 247 incarcerated youths between the ages of 9 and 18. There was a significant relationship between age and competence-related abilities as assessed by the MacCAT-CA. See Susan Ficke, Karen Hart, & Paul Deardorff, *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)*. Paper presented at the Annual Meeting of the Southeastern Psychological Association, Nashville, TN (2005).

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[FN88]. *Id.*

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[FN90]. Nancy Ryba, Virginia Cooper & Patricia Zapf, *Juvenile Competence to Stand Trial Evaluations: A Survey of Current Practices and Test Usage Among Psychologists*, 34 *Prof. Psychology: Res. & Prac.* 499, 500-01 (2003).

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[FN98]. Christy et al., *supra* note 93, at 383.

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[FN101]. *Id.* at 385-86.

[FN102]. Otto & Borum. *supra* note 59, at 888.

[FN103]. Grisso, *supra* note 32; Thomas Grisso, *CLINICAL EVALUATIONS OF JUVENILES' COMPETENCE TO PROCEED: A GUIDE FOR LEGAL PROFESSIONALS* (2005).

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[FN105]. Otto & Borum, *supra* note 59, at 889; Grisso, *supra* note 32, at 28-29.

[FN106]. Grisso, *supra* note 54, at 73-79; see also Appendix C for *Juvenile Adjudicative Competence Interview (JACI)*. *Id.* at 155-67.

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